

Innovative procurement processes and their use in social and healthcare sector

Timo Kivistö^{ab},

Daniela Grudinschi^c, Jukka Hallikas^d, Sanna Sintonen^e

Timo Kivisto Consulting Ltd^a

Ylistörmä 5 E

FIN-02210 Espoo

timo.kivisto@kivistoconsulting.fi

Lappeenranta University of Technology, Department of Business Administration^{b, c, d, e}

PO BOX 20

FIN-53851 Lappeenranta

Abstract

In innovative public procurement can be innovative objects where the purchasing object itself is innovative. Those can be procured by general or innovative procurement procedure. The other dimension is where the method of public procurement is innovative. We examine in this paper innovative procurement processes including organizing innovative procurement, procurement strategies and sourcing process.. The processes are identified from literature research and practical cases both from the public sector and private sector, including procurement of existing products or services and those to developed. They can be innovations made within the organization, which could be procured from outside service providers as a service or as consultancy where the service is performed by the organization itself. The innovative processes are assessed towards a large innovation case base in social and healthcare sector from Finland, Sweden and UK. An analysis will show which kind of procurement processes are needed for the case base and which innovative procurement processes still could be used in public procurement. Due to public pressures to increase the effectiveness and end-customer value creation in public organizations and services, it is essential to pay attention on developing new innovations and innovativeness in the public procurement. However, there is only limited number of research conducted on innovation practices and types in the public procurement.

Previous research

Innovation in purchasing and supply management

Innovative purchases and innovation in the purchasing management has achieved a lot of both managerial and academic attention in the recent years. Especially, the public sector interest towards more differentiation and demand based approaches in comparison to competition through price has provided attention in the policy making and practical management of purchases (Edler and Georghiou 2007). It has been recognized that in various purchasing categories innovativeness may provide better performance outcome for the public organizations than reduced purchasing price. In this section we briefly outline the forms of innovativeness in the purchasing and supply management.

There are various types of innovations that can be used to identify the purchasing objectives in the innovation process. Innovation in the supply chain involves changes in product, process, or service that either reduce cost or improve efficiency, thereby increasing customer satisfaction (Roy, et al, 2004). Innovations can be classified into incremental and discontinuous ones. According to Phillips et al. (2006), close supplier relationships are supposed to favor incremental innovation, while new and temporary relationships should favor discontinuous innovation. It is also possible to classify innovations based on their role value chain into product and process innovations. Product innovations which may be physical products or services have a direct connection to the customer. Process innovations, on the other hand, are often dedicated to improve the effectiveness of the supportive actions in the supply chain. This distinction is not always very clear since many services may be seen as both products and processes. Innovation is not just important in the supply chains of physical products but also processes and services have an essential role in the innovation management.

In order to identify the nature of innovation in the purchasing and supply, we have made an investigation on existing research conducted in this field. The main findings of the review have been presented in the Table 1. The purpose of the review has been to identify the sources of innovativeness in the purchasing.

Table 1. The sources of innovation in purchasing and supply.

Sources of Innovativeness in purchasing and supply	Sources
Supply chain and purchase process development	McGinnis and Vallopra, 1999; Croom, 2001
E-commerce and ICT applications in supply chain	Croom, S., 2001, Min and Galle, 1999, Monczka et al. 2010
Early supplier involvement and supplier innovativeness in product and service development	Wynstra et al 1999, Zsidisin and Smith, 2005, Schiele 2006, Schiele 2010, Monczka et al. 2010
Creating an innovation seeking demand and a market	Edler and Luke Georghiou, 2007
Sustainability in product development	Green and Morton, 1998
Integration of supply management in the innovation strategy and R&D roadmap	Schiele 2010, Monczka et al. 2010
Tradeoff business analysis between price and innovation	Monczka et al. 2010
Innovation workshops with key suppliers	Monczka et al. 2010

In the first category, supply chain and purchase process development has been recognized as an important source of innovation. Here, the purchase process re-engineering and automation of supply chain processes may have an essential impact on structure and effectiveness on purchasing (Croom, 2001). According to McGinnis and Vallopra (1999). Production and operations process development/improvement is a significant contributor to competitive advantage and purchasing is more likely to play a major role in process development/improvement when the importance of process as a source of competitive advantage is considered to be high. Leaner and faster processes may result in cost savings and increased customer satisfaction due to lesser manual work, faster delivery speed, and reduced failure rate.

Strongly related to the process development, the E-commerce and ICT applications in supply chain plays an important source of innovativeness in purchasing (Croom, S., 2001, Min and Galle, 1999, Monczka et al. 2010). Incremental innovation focus merely on the reduction of administrative costs by automating the manual processes (Croom, 2001). More sophisticated approaches cover the the ability to use the Internet to seek new suppliers (Croom 2001) usage of e-system approached to acquiring supplier innovation ideas (Monczka et al. 2010). It has been recognized that suppliers can serve as important source of innovation by bringing new ideas, concepts and reducing the development time of services and products significantly (Min and Galle, 1999).

Perhaps the most popular research stream in the purchasing innovation management is related to Early supplier involvement and supplier innovativeness in product and service development. This ESI approach addresses the collaborate with suppliers in developing or implementing certain Innovations (Wynstra et al 1999). In other words, it seeks to get innovations out from the suppliers by developing clear collaborative processes for the early involvement of suppliers. Advantages of such an early involvement include *reduces product development cycle time, improvements in the product quality, enhancements in the utilization of supplier expertise, improvements in the management of costs, and decreasing the supply risks* (Zsidisin and Smith, 2005). a new task for purchasing arises, as firms need to understand which suppliers actually do have high potential contributing to the innovativeness of the firm and which do not (Schiele 2006).

There are also important categories on purchasing innovation, which may be for purchasing organizations looking for innovations. Edler **and** Georghiou (2007) have addressed the use of public demand as an engine for innovation public demand, and more into the focus of innovation policy making. They argue that traditional supply-side innovation policies are insufficient to meet the challenges posed in promoting competitiveness. Thus there is a need for creating an innovation seeking demand and a market. Edler **and** Georghiou (2007) identified several application areas: e-Health, Pharmaceuticals, Energy, Environment, Transport and Logistics, Security, and Digital Content as possible sectors for innovation. The recent trend of sustainability in product development should also be taken into account when considering the ability to use market mechanisms to persuade suppliers to innovate or increase environmental performance (Green and Morton, 1998).

The recent research by Monczka et al. (2010) identifies additional areas of innovation in purchasing and supply management. They address the importance of the Integration of supply management in the innovation strategy and R&D roadmap. According to Schiele (2013) technology roadmaps can be used to bridge NPD strategies and sourcing strategies by including the supply network design as a step in roadmap formulation and including purchasing

professionals in its formulation. Monczka et al. (2010) also identifies the significance of making tradeoff business analysis between price and innovation, and organizing innovation workshops with key suppliers.

The current research has focused mainly on the how suppliers' enhance the innovation of purchasing organization and how suppliers are connected early in the development processes of the firm. However, more research is needed also on the factors of innovativeness of purchasing organization itself and classification of purchasing-related innovation types.

Theoretical background

The definition of innovation by OECD

Based on the innovation management literature, there are several types of innovation types that can be used for different purposes (Tidd et al, 2005). The OECD Oslo Manual for measuring innovation defines four types of innovation: product innovation, process innovation, marketing innovation and organizational innovation.

A product innovation means a good or service that is new or significantly improved. This includes significant improvements in technical specifications, components and materials, software in the product, user friendliness or other functional characteristics.

A process innovation means a new or significantly improved production or delivery method. This includes significant changes in techniques, equipment and/or software.

A marketing innovation means a new marketing method involving significant changes in product design or packaging, product placement, product promotion or pricing.

An organizational innovation means a new organizational method in business practices, workplace organization or external relations.

The definition of innovation in purchasing context

An innovation is an invention commercialized on the market by entrepreneurs (Schumpeter 1939). In purchasing context this means that the purchasing object is an innovation, and it is new to the purchasing organization.

In case on marketing innovation we can recognize pricing, and in procurement terms in which way the procurement unit is asking the prices.

The customers of public procurement

In public procurement there are several types of customers. The end-user is using the service, but pays usually nothing or a small percentage of the cost. The relatives of the end-user are an important customer group especially if the end-user has a limited capability of deciding for himself (eg. children, mentally ill, handicapped, elderly with dementia, patient in coma). The relatives can be responsible for paying the end-customer payment of the service. The end users usually have commercial customer service values. The landscape of customers was also recognized by Yeow and Edler (2012).

The third type of customer is the paying customer, normally the public entity, which pays the majority of the cost. The management typically has customer service and economic values. Within the paying customer there are internal customers, like the management, unit chefs and employees. They have commercial customer service values. These customers are called congeneric customers by Hommen-Rolfstam (2009).

Public entities are governed by politicians who may have political values. The political values can be economic – usually redirected to less cost reductions elsewhere, financing better political objects or less taxes. There are rational political values as environmental, social politic values and local economic development values. In addition there can be party or individual political values.

An indirect customer is the employer of the end-user. By the Finnish legislation the employer pays the employee the salary or wages during the day of getting ill and 9 following working days. After that the employer gets compensation from the Finnish social security agency, which is the second indirect customer, financed by the Finnish taxpayers.

A direct customer can in certain cases be only the end user with 100% self-financing responsibility. In these kind of procurement cases the public entity qualifies one or several suppliers for the end users. These are used eg. for supportive services as cleaning. These are called extrinsic customers by Hommen-Rolfstam (2009).

Different aspects of innovative procurement

Product novelty can be either novelty products or services ready to use. Yeow and Edler (2012) call these off-the-shelf products. Hommen and Edler (2009) call these late phases of evolution. The second type is innovative products or services to be developed in a reasonable time. The third type is technology roadmap sourcing meaning development activities during the lifecycle of the product. These earlier phases are called early or middle phases of evolution by Hommen-Edler (2009)

The innovative product can either be demand originated or created by technology push. These are not necessarily opposite approaches, because technology push starts with opportunity analysis or market research. Technology push can create radical improvements whereas customer demand usually has incremental improvements as results (Brem et al).

There are different scopes of the requirements definition. In services the wording can be resources, process, end product or value (Axelsson, Wynstra) In products innovative approaches can be expressed in criteria eg value for a certain purpose (pedagogical). There is also a third type of innovative procurement used by innovation funds or procurement programs: performance-based acquisition (Federal Acquisition Central). This type is quite near to buying value. Usually the accepted projects are assessed by a jury.

The innovative procurement can by Hommen, Edler (2009) be either for direct (intrinsic), congeneric need (shared by buyer and other organisations) or catalytic (extrinsic needs, pertaining to other actors than buyer organisations). These catalytic needs are mentioned in innovation policy.

Procurement processes for innovative public procurement

Deducting from literature and we need to define the required purchasing processes as follows.

1. Defining the scope of the purchasing object

In defining the scope we can use make-or-buy analysis for the ongoing services. The question is typically whether outsourcing is more economic or offers more quality for the same price. The outcome of the analysis can also be insourcing the services.

A subquestion to this is make-or-buy analysis for development of operation and change management. Do we buy them as a part of ongoing services or separately.

The second aspect of the scope is strategic decision of ownership of premises. Within purchasing definition this falls under the definition of make-or-buy decision, but in administrative sciences this is called ownership strategy.

The third aspect is evaluation of congeneric or extrinsic needs. (Hommen, Rolfstam). Can the purchasing object have other users than the buyer organization. In case of social services there can be qualified suppliers for wholly customer paid services.

The fourth aspect is life-cycle cost. This is considered in public-private partnerships or variations of it. The second application is life-cycle cost of people to be cared – in case of early cure there is possibility to avoid longer or more expensive care periods.

The fifth aspect is technology as an opportunity (technology push) or public technology procurement (need pull). In this aspect the public entity is procuring a product or service which is to be developed within a reasonable time. This can require one supplier or a network of suppliers.

2. Defining the customer types

In case of congeneric and extrinsic scope the customer types shall have to be defined.

3. Defining the customers within the customer types

Within the customer types there are different groups as customer with their own values. In social and healthcare there are end-customer, their relatives, the management of the public entity, personnel of the public entity and the politicians.

4. Defining customer values

The first subset of value is general customer service values, in this paper looking in social and healthcare. Andreasson, Winge (2010).



Figure 1: Customer service in social and healthcare

The second subset is measurable service or product specific values, especially in social and healthcare. Examples of these are RAI-measurement of elderly people.

The third subset is widely accepted values such as environmental values or social values. These values have roots in politics eg. environmental politics or social politics.

The fourth subset is savings, especially in procurement terminology. In purchasing the economics is measured by cost reduction, which can be caused by lower unit prices or demand reduction. The indirect economic value is measured by the salary or wages of the employee and the daily payment from the Finnish social security agency.

The fifth subset is other economic values than savings. Innovative procurement can be catalytic sourcing for products and services, which can be bought by extrinsic customers or beyond the scope of the purchasing object.

The sixth subset is political values beyond the widely accepted values. These can include party politics, local politics or individual politics.

5. Reverse marketing for innovations

Reverse marketing for innovation means an active statement for searching innovations and promoting that to suppliers. It can mean specific user driven innovations, value based innovations or technology push innovations. In order to function properly the suggestion shall have to be handled in a reasonable time.

6. Supply market research / search for innovations

According to von Hippel (1988) innovations can be found from customer, competitors or suppliers. Monckza et al (2010) recognizes additionally government research, universities and other sources. Let us look at competitors and suppliers.

Public units typically have no competitors, so the relevant term can be similar kind of domestic or foreign organisations.

Suppliers can be further classified from innovation point of view as follows:

- direct material suppliers
- direct service suppliers
- indirect equipment suppliers
- indirect service suppliers (development and planning)
- machinery investment suppliers
- construction investment planners
- construction investment suppliers (complex product systems)
- 2nd-tier suppliers
- network of suppliers

7. Competition set-up

After we know values and suppliers we must decide from which supplier group the innovations may be asked.

Secondly we must decide the scope of RFP, whether we are sourcing the lifecycle of the customer or just coordinating services, and are there catalytic possibilities

Thirdly is the change or development process within or out of scope.

Defining whole or partial orders will serve goals for multiple SME suppliers versus the economics of scale from large companies.

Fifthly we must separate the large volume bulk products from innovative framework agreements with small monetary volume.

8. Determining the initial purchasing requirements

This means by O'Brian (2012):

- regulatory requirements
- assurance of supply
- quality
 - specification based on previous 4 phases (among other things)
- service
 - general service requirements
- cost / commercial
 - savings goals
 - other economic values
 - commercial terms and conditions
 - incentives for innovation benefits
- innovation
 - capabilities for innovation
 - arrangements for sharing and collaboration

9. Determine quantity for RFP

For RFP the quantity of requested products and services must be collected.

10. Determining supplier requirements

Supplier requirements from public procurement law are compulsory. In addition to those there can be RFP specific qualification metrics, eg. credibility of the company, references.

11. Determining the award criteria

The award criteria can incorporate quality aspects, innovation and other aspects. With the current market court practice the evaluation metrics must be defined in advance, so this part inhibits the innovation potential.

12. Select procedure

For innovative procurement we can use standard procedures, if only the object is innovative. If special procedures are needed, we can use precommercial procurement, negotiation procedure and competitive dialogue.

13. Notice

Legal notice shall be sent to OJEU for procurement over threshold value.

14. Request for proposal

In terms of innovative procurement we can use the standard procedure. The innovative part comes in questions and answers and when using negotiation or competitive dialogue.

15. Proposal evaluation

Proposal evaluation is processed in three phases. First the supplier must be qualified, secondly the proposal must correspond the RFP document requirements. In the third phase the proposal are evaluated with award criteria. This third phase is for innovative procurement the difficult one, because the award criteria shall have to be decided in advance.

About the social and healthcare sector in Finland

The framework can be classified in three categories: healthcare, social and non-social-healthcare. Healthcare is financed by municipalities, partly by the national government subsidies compensating the differences in demographics. Every municipality is a member in a hospital district producing special health care. The primary care is either produced by municipalities themselves or by social-healthcare cooperation organizations.

Besides the public healthcare service there is the private sector. Private healthcare companies provide outpatient services and limited selection of surgeries. The customers get a subsidy from the Finnish social security agency, but the amount to be paid by the customers is the larger share. The private sector has also a large market share in occupational health care service.

Social care includes services for citizens with descended ability. The main categories for publicly financed social care are elderly care, handicapped care, foster care, mental care, care for drug abused. The services are partly produced by municipalities are social-healthcare cooperations, but also procured from outside service organizations.

The non-social-healthcare activities can affect the physical, mental and social welfare. Those activities can be produced by the municipality (eg. schools, sports facilities, libraries), non-public organizations (eg. associations, sporting clubs) or by citizen-to-citizen interaction (eg. neighbours). These matters are not discussed in this paper.

Analysis of the innovation objects

Innovation organisations

Innovations were sought from national innovation bodies: Tekes in Finland and Vinnova from Sweden. They are innovation financing bodies. From Tekes the project catalogue with enterprise projects and research projects was analysed. From Vinnova two idea papers were analysed.

The second case source was the innovation units of healthcare providers: SLL Innovation from Sweden and NHS Innovation from UK. The case material is from NHS SW, where was a collection of service innovations.

These cases represent only very limited amount of innovations made in the social and healthcare sector, but it is meant to be an exploratory research what kind of innovations there are and further used to analyse how to procure this kind of innovations. There could be a larger proportion of materials and equipment in other parts of NHS:

The case base contains 43 cases from Swedish Vinnova material, 53 cases from Finnish Tekes material. From national healthcare organisations 30 cases from British material and 35 cases from Swedish SLL Innovation.

Discussion

About the organizations

The innovation bodies of the healthcare providers were concentrated in spreading and commercializing the inventions made by the personnel. In addition to that they provided services for enterprises for evaluation and certification of their products. Striking was that they did not seek innovations from the market.

Formulation of the potential procurement objects

From the case base we can examine what kind of procurement object we should have in order to achieve the innovations. Therefore we have classified the cases into different procurement categories as follows with the number of cases. The decision between development and services is made upon that where the innovation is, in mostly in services.

Cases by type	All
Development of individual services	3
Development of several services	2
Development of services, technology and premises	2
Coordinating services	21
Services	43
Supporting services	3
Enabling technology	61
Materials	19
Premises	2
Other	11
Together	167

Table 2: Cases by type

Purchasing process compatibility to types of procurement objects

The development objects can be bought by development suppliers either consultants or engineering companies. That affects the choice of which supplier group you are searching the innovation. The same question can be made for coordinating services, services, enabling technology and premises.

The same object groups face the question of make-or-buy decision for development ie. do we buy the changes with an implementation project.

When we investigate the objects in enabling technology and materials, we can recognize that many of these innovative objects are designed for special circumstances or rare kind of patients. When public organizations make RFP:s for

healthcare materials or rehabilitation equipment the focus is in large procurement volume products whereas these innovative products are likely to be small procurement volume products and likely to be out of the RFP. Therefore it could be advisable to introduce RFP for framework agreement of innovative products. The product can be evaluated on innovation values.

For coordinating services we need to choose whether we buy the coordinating services with or without the services to be coordinated. If we choose to buy only the coordinating services it is near the project management contracting in building premises, where the project management company receives a fixed fee for controlling. This method enables smaller risks because the different contracts are smaller and there is more competition. In social and healthcare it means also that the coordinated services can be both from the public entities and from other sources. If we choose to buy all the services from one company there is likely to be more risks calculated or causes inflexibility to services.

In the cases technology push was recognized in SLL cases where they evaluated innovative products for the suppliers on a contract basis. Supplier market research was not mentioned in cases nor in the organization profiles.

The innovative parts of the procurement process are defining the scope, competition set-up and determining the requirements for innovative purposes. In commercial requirements the need for incentive for innovation must be mentioned. In all these procurement innovation phases we need collaboration with potential suppliers.

The public procurement legislation does not mainly affect the innovative public procurement. The requirements and criteria must be non-discriminative and the evaluation of criteria must be based on beforehand known principles.

Conclusion

From the case base we can conclude that there are many mature innovations available, but few are searching them. National innovation bodies and those parties seeking financing from the innovation bodies want to make their own inventions. The second problem lies in that these innovations are small in monetary volume and thus not interesting for commercial players. Framework agreements for innovative products would help the situation.

The second theme which is not addressed in this paper that in social and health care there seldom is a development organization. In Yeow and Edler the Assistant Nursing Director was the development organization which was reinforced with a testing team in later stages of the development. This matter needs additional research about the research and development landscape in public entities.

The third theme raised in this paper was the customers and their values. In public entities there is little research of customer satisfaction detailed in different customer types. In Yeow and Edler it was recognized that in the initial phase they did not know the real needs, which in turn had to be revised in the testing phase.

The legislation itself does not inhibit innovative procurement. The challenge is rather making requirements as end products instead of dictating how to perform processes. Another aspect is searching value from procurement contracts. In terms of savings we should have a supplier-buyer discussion forum about principles for innovative procurement. This would concern code of conduct for proprietary information, incentive structures for idea and realizing benefits.

References:

Ashenbaum, B, 2006, Defining Cost Reduction and Cost Avoidance, Center of Advanced Purchasing Studies,

Andreasson S, Winge M (2010), Innovations for sustainable social and health care, Vinnova report 2010:2

Axelsson, B, Wynstra F (2002): *Buying Business Services*, John Wiley & Sons, Ltd.,

Croom, S. (2001) Restructuring supply chains through information channel innovation, *International Journal of Operations & Production Management*, Vol. 21 No. 4, pp. 504-515.

Brem, A, Voigt, K-I (2009), Integration of market pull and technology push in the corporate front end and innovation management—Insights from the German software industry, *Technovation* 29 (2009) 351–367

Edler, J., Georghiou, L. (2007) Public procurement and innovation—Resurrecting the demand side, *Research Policy*, Vol. 36, pp.949–963.

Federal Acquisition Center ,http://www.acquisition.gov/comp/seven_steps/library/SevenSteps_execversion.pdf

von Hippel, E (1988), The Sources of Innovation, Oxford University Press

Hokey Min, William P. Galle (1999) Electronic commerce usage in business-to-business purchasing, International Journal of Operations & Production Management, Vol. 19 No. 9, 1999, pp. 909-921

Hommen, L, Rolfstam M (2009) Public Procurement and Innovation – Towards a taxonomy, Journal of Public Procurement, Volume 9, Issue 1, 17-56

Hovlin, Arvidsson, Hjorth, Ljung (2011) Tjänsteinnovationer i offentlig sektor, Vinnova Rapport VR 2011:12

Gonzalez-Padron, T. G. Hult, T., Calantone, R. (2008) Exploiting innovative opportunities in global purchasing: An assessment of ethical climate and relationship performance, Industrial Marketing Management, Vol. 37, pp. 69–82.

Green, K., Morton, B., New, S. (1998) Green purchasing and supply policies: do they improve companies' Environmental performance? Supply Chain Management, Vol. 3, Number 2, pp. 89–95.

NHS Innovations SW, <http://www.nisw.co.uk/innovation-showcase/long-term-conditions-case-studies.aspx>, read 14.4.2013

McGinnis, M.A., Vallopra, R. (1999) Purchasing and supplier involvement in process improvement: a source of competitive advantage ,The Journal of Supply Chain Management: Vol. 35, Issue 4, pp. 42–50.

Monczka, R.M., Carter, P.L., Scannel, T.V, Carter, J.R. (2010) Implementing Supplier Innovation: Case Study Findings, CAPS Research Papers.

O'Brian J.(2012), Category Management in Purchasing, Kogan Page, 2nd edition

Phillips, W., Lamming, R., Bessant, J., Noke, H. (2006) Discontinuous innovation and supply relationships: strategic dalliances, R&D Management, Vol. 36, Issue 4, pp. 451–461.

Schiele, H. (2006) How to distinguish innovative suppliers? Identifying innovative suppliers as new task for purchasing, Industrial Marketing Management, Vol. 35, pp. 925–935.

Schiele, H. (2010) Early supplier integration: the dual role of purchasing in new product development, R&D Management, Vol. 40, Issue 2, pp. 138-153.

Schumpeter, J. A. (1939). Business cycles : a theoretical, historical and statistical analysis of the capitalist process. McGraw-Hill, New York.

Sivakumar, R.S., Wilkinson, I.F. (2004) Innovation generation in supply chain relationships: A conceptual model and research propositions, Journal of Academy of Marketing Science, Vol. 32(1), 61-79.

SLL Innovation (2011), Årsberättelse 2010-2011

Tekes, Innovaation sosiaali- ja terveystalvelujärjestelmässä 2008-2015, projektit

Vinnova (2012) Idékatalog, Sociala innovationer för äldre, Vinnova information VI 2012:3

Wynstra, F.", van Weele, A., Axelsson, B. (1999) Purchasing involvement in product development: a framework, European Journal of Purchasing & Supply Management Vol. 5, pp. 129-141.

Yeow J, Edler, J (2012) Innovation Procurement as Projects, Journal of Public Procurement, Volume 12, Issue 4, 472-504

Zsidisin, G, Smith, M. (2005) Managing supply risk with early supplier involvement: A Case Study and Research Propositions, Journal of Supply Chain Management, Vol., 41, Issue 4, pp. 44–57.

THE IMPACT OF RAPIDLY CHANGING TECHNOLOGY IN THE GOVERNMENT SUPPLY CHAIN

Elizabeth Gibson and Darin Matthews*

ABSTRACT. According to the institute for supply management (ISM), technology is changing more rapidly than ever and these changes are shaping the future of procurement and supply chain management, including the public sector. Not only are these technological advancements bringing about changes in society, they are changing the manner in which business is conducted throughout the acquisition procurement cycle. All sectors, including manufacturing, high-tech, automotive, and government, are evaluating their existing business practices to ensure they are fully leveraging current technology. As an example, the supply chain has shifted from suppliers within a local geographic boundary to suppliers throughout the world, made possible by advancing technologies. More recently, technology has enabled public agencies to blend the use of both local and global suppliers. .

This paper, through an evaluation of practices by leading agencies, will examine how technology advancements are changing how governments do business throughout the supply chain. This examination includes the current technology uses in the government supply chain for both the buying agency and the supplier. The challenge for governments at all levels is how to integrate new technology in the procurement process so it can be used to their strategic advantage. Areas of concentration include supplier selection, product research, and electronic bidding. In fact, the authors contend that in all phases of the procurement cycle there is advancing technology that is impacting the role of the public procurement professional. These phases include strategic procurement planning, solicitation development

and supplier selection, and contract administration (Thai, 2004). This paper will examine the potential impact to these distinct phases within all levels government, as well as their potential application to private sector supplier markets. Finally, this paper provides recommendations for areas of focus for public procurement practitioners, including areas for growth and development.

** Elizabeth Gibson, BSEE, MSME, serves on the faculty of Portland Community College and is a PhD student at Portland State University. Her professional experience includes high-tech project management and small business development. Her areas of research include technology management, business process roadmapping, and public procurement. Darin Matthews, FNIGP, CPPO, C.P.M., MAM is on faculty at Portland State University, Oregon, USA where he teaches for the School of Business, Supply and Logistics Management Program. He is a past president of NIGP, the Institute for Public Procurement.*

INTRODUCTION

Public procurement is an advancing profession. Its roots can be traced back to the 1700's when the US Congress enacted legislation to direct the manner in which goods and services were procured by the government (Callender and Matthews, 2000). While many contend that these initial efforts to shape the procurement field were regulatory in nature, they nonetheless paved the way for future practitioners to play a more strategic and active role in the procurement process. To demonstrate the advancement of procurement professionals from reactive to strategic, one must contrast the regulatory actions that have shaped the profession.

During the late 1800's, the focus was on prohibiting unethical conduct through the passage of anti-trust legislations such as the Sherman and the Robison-Patman Acts. These acts were passed with the intention of leveling the playing field and ensuring a competitive environment existed (Buffington and Flynn, 2008). Moving forward to the 1990's and the Federal Acquisition Streamling Act (FASA), the focus was on empowering the public procurement practitioner by expanding their authority and ability to use value based

procurement (Thai, 2003). Therefore, the role of public procurement has clearly shifted from one of a regulatory and reactive nature to one that is of indeed strategic and proactive. According to Rendon and Snider, the expectation for public procurement has shifted from being implementers of public policy to playing a key, strategic role in the early stages of development (2010). Further, the expectations of public procurement professionals have increased in recent years. Operating at a high level of responsibility and quality is expected along with an orientation toward leading private sector practices that increase efficiency (Alkadry and Bhargava, 2005).

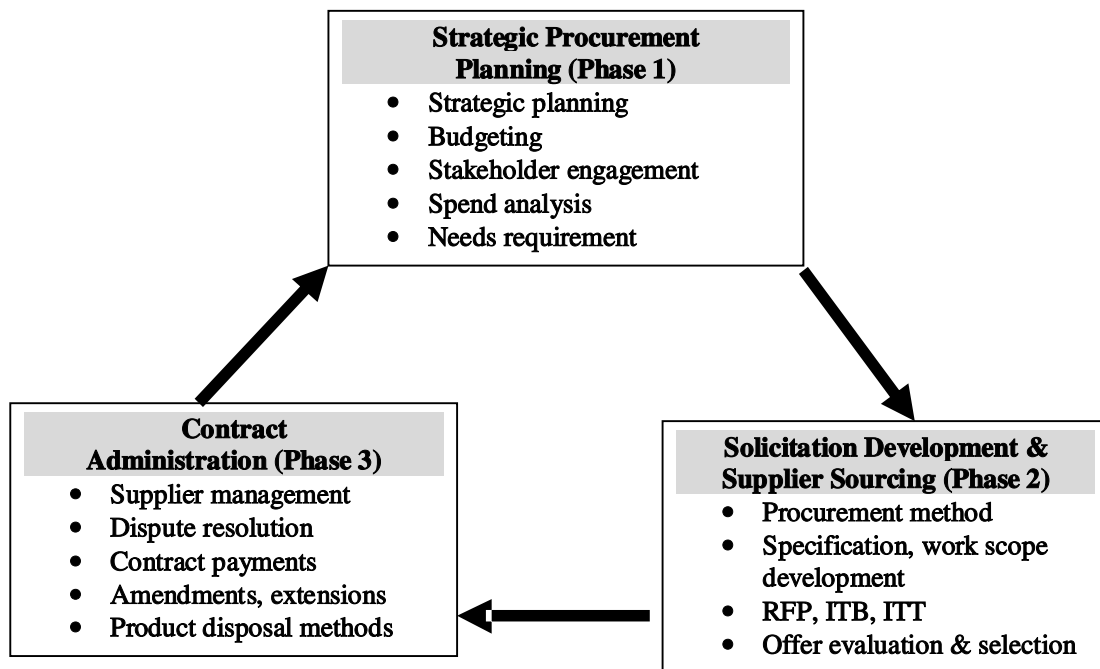
A key part of this evolving, strategic role is the incorporation of leading technologies into all facets of procurement. According to Callender (2003), the use of technology in public procurement will allow its members to better focus on strategic issues. This paper will identify the recognized steps in the procurement cycle and will examine which technologies are being utilized by leading agencies. Further, the authors will consider both the buyer and supplier sides when evaluating the impacts of technology.

THE PROCUREMENT CYCLE EXAMINED

It is no secret that, traditionally, the field of purchasing was considered as merely the act of buying (Calender, 2003). The determination of the need for the particular goods, the level of quality that was necessary, and the timing of the delivery were normally determined by an end user. Only when the time came to actually place the order or contract, was the purchasing agent brought to the table. Therefore, it was not unusual that public procurement practitioners were often the last to know about a purchase. With the development of

procurement as a recognized profession came increased participation and involvement. The following figure depicts the phases of the public procurement cycle, as well as the specific steps involved in each:

FIGURE 1: The Procurement Cycle



Source: Adapted from Introduction to Public Procurement, Thai and Pitzer, 2009, NIGP

The first step of the procurement cycle is engaging in strategic procurement planning. This, of course, requires the procurement professional to be involved in the earliest stages of an acquisition, and generally includes activities such as stakeholder meetings and budget reviews. Being involved from the beginning will provide for a better understanding of program needs and end user objectives by the procurement professional. In recent years, spend analysis has evolved into a key part of the strategic planning process. By fully understanding how much is spent in what commodity areas, agencies can better position

themselves as the move forward with a strategic procurement plan (McCue and Johnson, 2011). In fact, it is through the understanding of agency spending patterns that procurement can identify and deliver efficiencies (White, 2013). The procurement cycle is an iterative process in that it can be repeated and improved upon. Undoubtedly, when a procurement professional completes one acquisition, he or she can be better positioned for the next one. Lessons can be learned and improvements made in order to “fine tune” the public procurement process. Whether a request for proposal (RFP), invitation to bid (ITB), or invitation to tender (ITT) is utilized, the procurement method can be enhanced for future use.

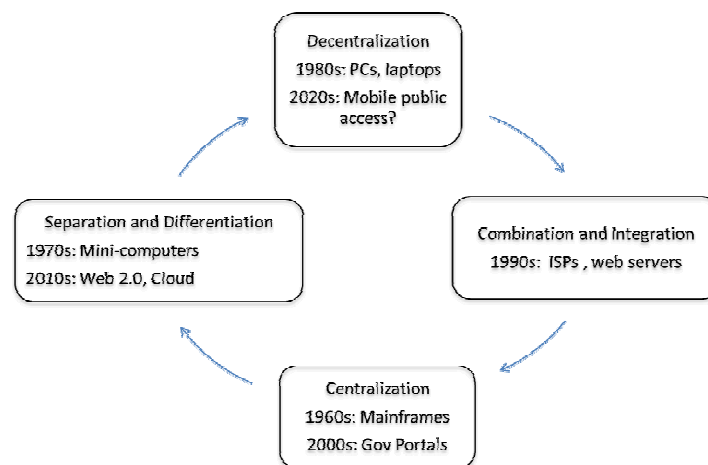
The procurement cycle (or process) can be viewed as a “cradle to grave” approach to acquiring the needed goods and services. Each step represents a key element of public procurement and must be approached with diligence and professionalism. Ideally, the approach taken by the procurement professional would be comprehensive and cross-functional to address the needs of the end user (Thai & Pitzer, 2009). By being aware of, as well as involved in, the entire procurement cycle, procurement can best add value to the acquisition process.

THE TECHNOLOGY CYCLE

Examination of the technology cycle can shed some light on how the public procurement process has evolved over time. Technology forecasting research has determined that we are in the midst of the information technology era with the long wave starting around 1975 to end in about 2025 (Devezas, Linstone, & Santos, 2005). This evolution has led to increased complexity and periodic restructuring in the public supply chain. For example,

agencies have swung between integration and differentiation, centralization and decentralization and localization and globalization. Technology is both a driver and a result of complex interactions and shifts in the public procurement process (Coates et al., 2001). Today, information communication technologies have made it possible to find examples of simultaneous states operating in most agencies. Paradigms began to shift in regards to time and transparency as agencies gained comfort with virtual operational structures and processes. The length of supply chain paths have increased with globalization while time expectations have decreased. Figure 2 shows an example of how technology has helped to drive organizational shifts.

FIGURE 2: The Technology Cycle



Using this cycle, the impact of technology on the evolution of the public procurement process will be explored. Governments began to regulate the use of technology in the public procurement process as Internet technologies gained acceptance. For example, in 2000, the Clinton administration established an integrated online service system that put all online resources offered by the US federal government on a single Web site and the results of a research survey reported that over 87 percent of municipal governments had their own websites (Moon, 2005). As the public procurement process evolved, it has become more

dependent upon technology and more complex. Croom conducted a technology adoption study that identified over thirteen information systems were highly integrated in public procurement processes (Croom & Brandon-Jones, 2005). Moving into the 2010's, Web 2.0 technologies have enabled the public to interact differently with government portals and websites. Use of Wiki's, blogs, and other social networking tools and applications allow citizens to not only read, but also to jointly author content. At the same time the increasing acceptance of mobile devices is driving a shift in public expectations for transparency. These changes emphasize the need for public procurement managers to improve their level of technical proficiency.

Therefore, agencies are not only feeling the pressure to increase efficiency, but they are also being asked to do so under more and more reforms and regulations (Matthews & Calender, 2004). These reforms are demanding that other criteria are considered in the government procurement decision problem besides cost. These can include a higher need for transparency, reforms to drive economic stimulus, cost considerations due to budget constraints, system capabilities that truly meet the business needs of the organization and ensure compliance to policy. Subsequently, not only are regulatory pressures increasing but also mobile device technologies are driving public expectations of increased transparency and access. With the increased administrative reforms driving a need for increased accountability and transparency, future technology acquisitions must be approached from a balanced perspective.

STRATEGIC PROCUREMENT PLANNING

Strategic Procurement Planning is the transformation of a public agency's mission and objectives into procurement activities. These activities are measurable and allow the agency to plan, budget and manage its procurement activities (Thai, 2005). Further, the strategic planning must extend across multiple functional areas of an organization. This requires procurement professionals to collaborate with their counterparts throughout the organization in order to enhance the specification and acquisition of goods and services (Freeman and Cavinato, 1990). As regulation, suppliers and information increases, supply chains are becoming more complex, expensive and prone to disruption. Innovative thinking is required to explore better solutions that meet new regulations and serve the community. In terms of technological innovation, it is the use of hardware devices, software tools and applications to improve the supply of public services and create the demand for sustainability, energy efficiency and regulatory requirements in new ways (Aschhoff & Sofka, 2009).

Benefits of strategic procurement planning are plentiful. According to Frayer and Monczka (1997), some of the most common benefits of strategic procurement planning include the following:

- Attention is focused on the organizational mission and procurement decisions are linked to organizational strategies.
- A framework is created for better communication with suppliers and cross-functional team members.
- Allow procurement resources to be properly assigned according to identified opportunities and risks.
- Identification of opportunities and potential threats for future procurement activities.

Leaders in the procurement field certainly understand the value of early involvement by way of strategic procurement planning. While federal and national governments had historically considered technology as a line item in their budgets, it wasn't until the 1960s that state and local agencies began to consider technology in the public procurement planning phase. Public procurement practitioners do not need to become experts with technology; but they must improve their technological competency to continue to actively influence the strategic planning process. Researchers can help by conducting studies that apply multiple criteria decision making tools under uncertainty. While cost certainly remains a criterion, it must be balanced against other criteria such as performance and transparency. Thus, it is important to invest in the right ERP (enterprise resource planning) and e-tendering systems (McCue & Roman, 2012).

Spend analysis is a leading tool for public and private sector procurement. It can provide tremendous value to the acquisition process by increasing visibility into agency spending and therefore promote the use of superior sourcing decisions (Dwyer, 2010). According to the Aberdeen Group, public sector managers should mirror the practices of their private sector counterparts in this area and better leverage technology in their spend analysis. For example, at United Parcel Service of America visibility extends beyond internal systems and includes partners enabling collaborative decision-making (Butner, 2010). Through the use of automated systems, data can be collected, aggregated, cleansed and analyzed to improve procurement performance. Among other benefits, research shows that organizations using automated spend analysis realize 43 percent shorter cycle times and 17 percent higher savings (Aberdeen Group, 2009).

Automated and standardized reporting is key to the spend analysis process. Public organizations approach this in a variety of ways, such as the use of existing enterprise-wide systems or the use of a third party system that focuses on spend analytics and can be integrated into an existing ERP system. An example of the latter is the State of Michigan, USA, who embarked on an e-procurement initiative in 2013. In order to provide better information and tools for decision making by procurement offices, Michigan selected BuySpeed as its e-procurement provider in rolling out a “Buy4Michigan” initiative. While still early on in the project, results are promising. It is allowing the state agency to drive cost savings while meeting its unique business needs (Government Procurement, 2014).

It should also be noted that there are several advantages to suppliers as a result of strategic sourcing efforts by the government. As procurement professionals analyze the various commodity markets they buy in, they can better understand the supplier side of the equation. This includes supplier capabilities, historical performance of suppliers, and supplier profit margins. Of course, technology is employed in gaining a better understanding of supply markets through the use of both supplier web sites and B2B (business to business) trade bulletin boards (CIPS). The approach that relies on conventional wisdom and benchmarking or best-practices is helpful but no longer sufficient to maintain a competitive edge. Professionals gaining proficiency in technology and forecasting tools can employ predictive analytics to gain competitive advantage and better serve the community. While this task can be complex, sometimes simple forecasts based upon real time transactional data can be more accurate than more complex forecasts based upon historical data. For example, researchers at the Johns Hopkins School of Medicine found they could use data from Google Flu Trends to predict surges in flu-related emergency room visits a week before warnings came from the Centers for Disease Control (McAfee & Brynjolfsson, 2012).

SOLICITATION AND SUPPLIER SELECTION

An area that public procurement has well established itself is the solicitation and supplier selection phase. This is arguable considered the “act of buying” and has historically been an area of focus for procurement practitioners. It includes the solicitation of offers from qualified suppliers for the required good or service, followed by the selection of the most appropriate supplier. The selection decision must be based on the needs of the public agency and also be in accordance with the solicitation document issued. The most common forms of solicitation are the invitation to bid (ITB), request for proposal (RFP), and invitation to tender (ITT). It should be noted that in recent decades, public procurement has employed a variety of methods and approaches other than lowest bid often to support new regulatory requirements.

Regulation is a demand-side driver. In the United States, an economic regulation was driven in part by the Federal Acquisition Streamlining Act of 1994 which promoted alternative methods of procurement and higher thresholds for competition. Ten years later, Europe experienced procurement reforms with directive 2004/18/EC (European Commission, 2004). Approaches to public procurement now include such things as best value selection, design-build, value for money, and competitive dialogues (Thai, 2011). More recently, the European Union enacted procurement reforms that promote the use of most economically advantageous tender (MEAT) in public procurement which considers performance, environmental, and social criteria to arrive at a balanced decision. Included is an emphasis to stimulate the economy through the use of small and medium sized enterprises (SMEs). Several empirical studies provide evidence to support that making tender offers

more transparent and easily accessible to be a good starting point (Edler & Georghiou, 2007). It is important to keep in mind these various techniques when considering the use of technology in the sourcing process. Ultimately the technology tools should drive efficiencies and improvements to an already progressive approach to procurement. The following table outlines the various activities and steps within solicitation and supplier selection.

TABLE 1
Activities and Accountabilities in Solicitation and Selection

Activity	Primary	Secondary
Determination of solicitation method	Procurement	End User, Legal Counsel
Prepare solicitation documents	Procurement	End User, Legal Counsel, Risk Management
Receipt of bids or proposals	Procurement	End User
Tabulation of bids or evaluation of proposals	Procurement	End User
Contract preparation and execution	Procurement	End User, Legal Counsel

Source: McCue C. and Johnson B. (2010). Strategic Procurement Planning in the Public Sector, Herndon, VA: NIGP.

The authors contend that there are three primary areas for technology to impact the sourcing phase of the procurement process: distribution of solicitations, receipt of supplier proposals, and evaluation of offers. While technology has no doubt improved communication with internal stakeholders and the development of standard documents, the leading areas of procurement technology fall within the three aforementioned areas. These functional areas of e-procurement will be further discussed, as well as the technological options for each. Not only do public agencies need to determine whether an e-procurement system is developed internally or externally (make vs. buy), but they also need to decide if one system can address all needs or if multiple systems may be required. Certainly the advantages and disadvantages must be explored and discussed with regard to outsourcing a technology system. Many believe that an external supplier can be best relied upon if the system needed represents an area of core competency for them. Others contend that there are inherent risks to outsourcing IT projects, such as cost overruns and a lack of information hand-off at the completion of the

contract. The following table is used by the US Department of Defense when considering such a decision on a new technology initiative.

TABLE 2
Advantages and Disadvantages of Outsourcing

Advantages	Disadvantages
Allows DoD to focus on core responsibilities	Private contractors provide too little documentation and knowledge transfer
Private industry competition decreases cost	Perceived loss of control of effort
Access to innovation and proven best practices	System maintenance can be costly
Private industry already has needed talent	Many IT efforts have been mismanaged
Usually a lower cost alternative	Poor contracting and management can be a risk

Source: Adapted from Marquis, K (20110, Insourcing and Outsourcing for US DoD IT

Projects: A Model.

E-procurement systems are growing in use throughout the world. Basically, e-procurement systems are used to procure goods or services for the government in exchange for payment. Many definitions exist for e-procurement, but all seem to come down to this common element . The distribution of solicitations has historically been a paper-driven process wherein the government would develop, say an invitation to bid for building maintenance, and then print out dozens of paper copies. Procurement and the requesting department would get a copy, and the rest would be mailed out to known suppliers of the service (the bidder's list). This inefficient and time consuming process was employed extensively in 1990's, frequently in the 2000's, and even sporadically today. However, leading agencies,

particularly medium to large entities, are solely distributing their procurement opportunities electronically. For more than a decade, the City of Portland, Oregon, USA has partnered with E-Bid Systems to post their ITB, RFP and RFQs on a hosted web site (www.portlandoregon.gov/bibs/). City procurement staff has access to the system to upload solicitation documents for projects of all types and sizes. Files are in a PDF format, which is read only to potential bidders. In this case, the state's largest city chose to select a third party system available on the open market, rather than develop their own. The functionality of the electronic bidding system allows interested suppliers to access the City's own web site, navigate to the procurement department's page, and then easily link to the external site to actually access the bid and RFP documents. When viewed through the "make or buy" lense, this would be considered a "buy" scenario.

CONTRACT ADMINISTRATION

Contract administration is a key step in the public procurement process. It involves all activities after the award of a contract, including performance monitoring, reporting, inspection and acceptance, testing, and payments. As a whole, a public procurement system would be considered inefficient if it did not include a method of determining whether or not the contract was properly fulfilled (Thai, 2004). By the 1980's, many agencies routinely considered information and communication technology for contract administration process improvements. PCs and laptops had gained acceptance for improvement into the workflow. Electronic word processing allowed templates to be created for RFPs and other documents driving efficiencies and standardizing processes. With the expansion of Internet Service Providers (ISPs) and web servers, email was not only used for communications but also for documentation of transactions. However, research shows the contract administration phase is often where things can go wrong in a public contract. According to Flynn (2012), common

problems associated with public contracts include failure to deliver, cost overruns, and long delays. Many organizations invested in expensive, enterprise resource planning (ERP) systems only to encounter unexpected problems (Blanchard, 2007). An expensive lesson was learned that public procurement managers could no longer rely solely on technology consultants.

Public organizations need advice and guidance about proceeding with e-procurement technology decisions as they have been asked to stretch their strategic thinking. The private sector has long employed multiple criteria to make these decisions, which “can make the life of the public procurement officer quite difficult” (Vaidya, Sajeew, & Callender, 2006). Therefore, public procurement practitioners are faced with a dilemma. While many are still not familiar with rapidly changing technology and the implications of integrating new technology into their organization, it has become a necessary tool. Some are waiting for the “best” technology system to be identified because they lack the tools to make the decision under so much uncertainty (Davila, Gupta, & Palmer, 2003). Others are waiting for the technology to become sufficiently stable or taking more time to obtain better information (Hardy & Williams, 2008). Thus, it is not a surprise that many managers are skeptical and cost became the major decision criteria for purchase of technology systems. Despite the importance of this decision problem to public supply chain practitioners, researchers disagree about the impact of technology on the supply chain (Mukhopadhyay, Kekre, & Kalathur, 2014). If the three broad goals of contract administration (quality, timeliness, and budget) are truly a priority for public procurement, then there is clearly much work to be done in this area.

A traditional approach to public procurement has been to manage the procurement process itself and then to “hand off” the contract to the end user for management and administration. However, today’s experienced practitioner realizes that the work is truly just beginning at contract award (Matthews, 2002). Proper monitoring of contract performance is imperative to managing risk and ensuring adequate performance by the contractor. This will allow for early detection of potential problems, which can then be corrected with minimal impact to budget and schedule (Davison, 2000). Such an approach is no doubt of benefit to the public agency, but there is also a benefit to the supplier or contractor. If problems can be avoided early on, there is a likelihood that both parties will benefit by avoiding increased costs and strained relationships.

As with other phases of the procurement process, proper use of technology can greatly aid in the administration of public contracts. More and more organizations around the world are utilizing contract administration systems, which can be either an add-on module to an existing ERP system or a commercially available third-party solution. This is another “make or buy” decision by the public entity with many organizations opting for the latter due to the increased functionality (Plimpton, 2008). This can include approval monitoring, standard document management, cost control and tracking, project completion status, change orders, and contract close out. Noted best practices in contract management include the use of electronic systems for storage, access and monitoring as opposed to sifting through paper files. For example, receiving and electronic notification of an upcoming contract renewal can allow the agency to better prepare for renegotiation and potential cost savings (Krappe and Kallayil, 2003). This type of proactive contract administration should also relieve the contractor of having to be the primary source of monitoring. Not having to notify the agency of a pending expiration can allow the contractor to better focus on performance. Additionally,

it is not unheard of for a contract to expire with neither party aware of it, thus leaving the supplier without a contract.

An example of an organization using a third party system provider is The Ohio State University. Due to challenges within their Medical Center that included a lack of contract tracking and document standards, the institution partnered with Ariba to implement a comprehensive contract management system. Spend areas such as technology equipment, linens, public relations and security services were included in the project. Benefits realized in a relatively short time frame included improved visibility between the medical center and the university at large, improved contract tracking, and comprehensive reporting. In addition to the increased efficiencies, the organization realized a significant cost savings opportunity with their linen contractor (Ariba, 2013).

While many quality systems are available for contract management, some agencies find it in their best interest to keep the effort in-house. The Georgia Building Authority (GBA) recently embarked on a project to better track contract administration activities and to enhance staff accountability. The contract administration module (CAM) was developed in-house using a web-enabled database provided through a contract with Intuit-QuickBase. The system had little impact on the agency's resources as it is cloud based. CAM has numerous electronic notifications which notify procurement staff via email of contract activity. The system prompts end users and project managers for status information, such as contract deliverables and schedule milestones. Approvals for contract actions are routed through a work-flow program with each manager monitoring an approval queue for their respective projects. Users receive updates that include attached PDF documents for review and the

ability to provide approvals through their smart phone. Benefits of the GFA contract administration system include improved communication, record keeping and accountability (Government Procurement, 2013).

CONCLUSION

Public procurement managers continue to face the challenges of cost containment, visibility, risk management, and globalization while faced with increasing regulations and customer demands. It is reasonable to expect that technology will continue to impact shifts in costs and other operational aspects at a faster and faster rate. Soon, citizens and suppliers may demand real time access to government documents in the form of bid results, solicitation offerings and other related information. Radio and near frequency identification technologies (RFID) will enable citizens carrying mobile devices to be alerted to real time information changes. Within the next decade, billions of objects will be able to sense, communicate and share information through the Internet of Things (IoT) (Butner, 2010). Government planners striving to optimize services in operations, transportation, health care and utilities will require new sensors and more devices to be purchased and integrated. For example, city planners could optimize public garbage service, goods could be transported with no human intervention, hospitals may shift to remote self-monitoring for patients at home, and consumers may very well manage their individual power consumption through smart grid metering. Management of the convergence of these data sources can promote better coordination between agencies and facilitate quicker responsiveness to emergencies and disasters. For example, a procurement solicitation to respond to a disaster could be handled in real time from a remote location with the right intelligence.

The digital and physical infrastructures will continue to converge with falling prices and rising use of sensor technologies. Use of this technology will drive paradigm shifts in order quantities as suppliers gain the flexibility to purchase piece parts from various

manufacturers in sequential, individual, automated ordering systems that improve their efficiency. Public procurement will have to keep pace so as not to place additional cost burden on innovative suppliers to accommodate the government's outdated bidding or order fulfilment processes by infusing intelligence into decision-making and planning with the use of business analytics. Data previously entered or created by people will be increasingly automated and collected by sensors and devices. Shipments will report on themselves as they move through the supply chain. Advancing technology has proven its impact to public procurement in recent decades, which includes every phase of the procurement cycle. As technology advances in the future, the supply chain will become increasingly interconnected and intelligent. Interconnectedness will create a more holistic view of the supply chain facilitating increased collaboration which will directly impact public procurement. Public procurement officers will use the increasing intelligence to not only make real-time decisions, but also predict future scenarios with increased participation in the planning phase. Technology will drive a shift in the role of the public procurement manager from monitor and respond to predict and act. Technology will be used to design further flexibility into each phase of the public procurement cycle. Simulations and scenario analysis modeling will be used during planning, increased interconnected networks of suppliers will be realized in the solicitation and supplier development phase, and cost optimization through data analytics will increase the contract administration phase. At the same time, visibility will continue to be driven by both reforms and public expectations.

REFERENCES

- Aberdeen Group (2009). *Spend Analysis: Transforming Data Into Value*. Boston, MA.
- Alkadry M. and Bhargava N (2005). *Organizational and Individual Drivers of Compensation in Public Sector Buyers, Challenges in Public Procurement: An International Perspective*, Boca Raton, FL: PrAdademics Press.
- Ariba (2013). *Achieving Results through Improved Strategic Sourcing and Contract Management Processes, Contract Management Case Studies*, www.ariba.com
- Aschhoff, B., & Sofka, W. (2009). Innovation on demand—Can public procurement drive market success of innovations? *Research Policy*, 38(8), 1235–1247.
doi:10.1016/j.respol.2009.06.011
- Blanchard, D. (2007). *Supply Chain Management: Best Practices* (p. 33). John Wiley & Sons.
- Buffington, K. and Flynn M. (2006). *Legal Aspects of Public Procurement*. NIGP
- Butner, K. (2010). The smarter supply chain of the future. *Strategy & Leadership*, 38(1), 22–31. doi:10.1108/10878571011009859
- Callender G. (2003). *A Short History of Procurement, Supply Chain Management: A Procurement Perspective*, Australian Institute of Purchasing and Materials Management.
- Callender G. and Matthews D. (2000). Public purchasing: An advancing profession? *Journal of Public Budgeting, Accounting and Financial Management*.
- Chartered Institute of Purchasing and Supply (CIPS). *Knowledge Summary, Developing and Implementing a Strategic Sourcing Strategy*, www.cips.org London.
- Coates, V., Farooque, M., Klavans, R., Lapid, K., Linstone, H. a., Pistorius, C., & Porter, A. L. (2001). On the Future of Technological Forecasting. *Technological Forecasting and Social Change*, 67(1), 1–17. doi:10.1016/S0040-1625(00)00122-0
- Croom, S., & Brandon-Jones, A. (2005). Key issue in E-Procurement: Procurement Implementation and Operation in the Public Sector. *Journal of Public Procurement*, 5(3).
- Davila, A., Gupta, M., & Palmer, R. (2003). Moving Procurement Systems to the Internet: *European Management Journal*, 21(1), 11–23. doi:10.1016/S0263-2373(02)00155-X
- Davison, B. (2000). *The Contract Administration Cycle, The Procurement Professional*, June/July, Herndon, VA: National Institute of Governmental Purchasing.
- Dwyer, C (2010). Adding value and driving performance with spend analysis, *American City and County*, April.

- Devezas, T. C., Linstone, H. a., & Santos, H. J. S. (2005). The growth dynamics of the Internet and the long wave theory. *Technological Forecasting and Social Change*, 72(8), 913–935. doi:10.1016/j.techfore.2005.06.001
- Edler, J., & Georghiou, L. (2007). Public procurement and innovation—Resurrecting the demand side. *Research Policy*, 36(7), 949–963. doi:10.1016/j.respol.2007.03.003
- Flynn N. (2012). *Public Sector Management*, Sixth Edition, Thousand Oaks, CA: Sage Publications.
- Government Procurement (2014). *Financial Integration with Purpose-Built Functionality*, January, Vol.
- Government Procurement (2013). *Tracking Procurement From Cradle to Grave*, September, Vol. 21, No. 4. Penton Media.
- Hardy, C. a., & Williams, S. P. (2008). E-government policy and practice: A theoretical and empirical exploration of public e-procurement. *Government Information Quarterly*, 25(2), 155–180. doi:10.1016/j.giq.2007.02.003
- Krappe K and Kallayill G (2003). *Contract Management is More Out of Control Than You Think*, Contract Management, April, National Contract Managemen Association.
- Marquis, Karla (2011) *Insourcing and Outsourcing for US Department of Defense IT Prprojects: A Model*, Computer Sciences Corporation, www.dtic.mil
- Matthews, D., & Calender, G. (2004). The Role of Immanence in the Future of Public Procurement. In *Internal Public Procurement Conference Proceedings* (Vol. 3).
- Matthews D. and Callender G. (2003). *We’ve Come A Long Way*. Government Procurement, Penton Media, April.
- Matthews, D. (2005). Strategic Procurement in the Public Sector: A Mask for Financial and Administrative Policy, *Journal of Public Procurement*, Vol. 5, No. 3.
- Matthews, D. (2002). *Ten Tips for Effective Contract Administration*, Contract Management, Ashburn, VA: National Contract Management Association.
- McAfee, A., & Brynjolfsson, E. (2012). Big data: the management revolution. *Harvard Business Review*, 90(10), 60–6, 68, 128. Retrieved from <http://www.ncbi.nlm.nih.gov/pubmed/23074865>
- McCue, C, Prier, E, and Bevis, M (2008). *Making It Happen: Public Procurement's Role in Integrating Economic Development and Sustainability Strategies for Local Governments in the USA*. International Public Procurement Proceedings, August 2008.

- Mccue, C., & Roman, A. V. (2012). E-Procurement: Myth or Reality? *Journal of Public Procurement*, 12(2), 212–238.
- Moon, M. (2005). E-Procurement management in state governments: Diffusion of E-Procurement practices and its determinants. *Journal of Public Procurement*, 5(1), 54–72.
- Mukhopadhyay, T., Kekre, S., & Kalathur, S. (2014). Business Value of Information Technology : A Study of Electronic Data Interchange. *MIS Quarterly*, 19(2), 137–156.
- Plimpton L (2008). Do you know where your contracts are? Entrepreneur, June.
www.entrepreneur.com
- Rendon, R. and Snider, K. (2010). Supply management in American public administration: Towards an academic discipline? *Journal of Purchasing and Supply Management*.
- Thai, K. (2011). *Towards New Horizons in Public Procurement*, Boca Raton, FL, USA: PrAcademic Press.
- Thai K. (2004). *Introduction to Public Procurement*, First Edition, Herndon, VA: National Institute of Governmental Procurement.
- Thai, K. and Pitzer J. (2009). *Introduction to Public Procurement*, Second Edition, Herndon, VA: National Institute of Governmental Procurement.
- Vaidya, K., Sajeev, A. S. M., & Callender, G. (2006). e-Procurement Initiatives in the Public Sector: A Literature Review of the Critical Success Factors. *Journal of Public Procurement*, 6(1&3), 70–99.
- White, J (2013). *First Step Toward Procurement Savings*, Government Procurement, Vol. 21, No. 4, Penton Media, Atlanta, GA.

The Municipal Partnering Initiative: Mixed Contracting in Local Government Procurement

David Rauch

Northern Illinois University
DeKalb, Illinois
E-mail: davidwrauch@gmail.com

Executive Summary

The Municipal Partnering Initiative (MPI) is an informal partnership of more than two dozen Chicago, Illinois, USA suburban communities which combine their purchasing power to procure contractor services. The MPI is unique among pooled purchasing groups in the area and U.S. because contractor services include complicated road services which require multiple communities to agree on common bid specifications. Additionally, there is no formal membership of the MPI, no fees, no defined duties, rather communities are expected to share the workload of contract management equitably. This paper examines the history of pooled purchasing in the Chicago area and how it led to the ICMA award-winning program. The cost of three contractor services are examined in the region over a six year period, 2008-2013, to compare line-item services costs before and after the program began in 2011. MPI prices are compared to pre-MPI prices as well as to non-MPI prices from neighboring communities. Analysis found that the MPI prices for the services are generally lower than non-MPI prices, but there are important administrative cost savings not currently being captured. A survey to the MPI communities also collected information about the internal workings of the MPI which leads to recommendations and best practices in pooled purchasing for contractor-provided services, particularly those related to public works.

Introduction

The Municipal Partnering Initiative, which formally began in 2011 in the northern suburbs of Chicago, can be described as an instance of mixed contracting. Mixed contracting occurs when multiple public agencies jointly contract services with a non-governmental agency for service delivery [1]. This is in contrast to joint contracting, which connotes a public entity contracting out some service to a private or non-profit organization singularly. More than 24 local governments in the MPI jointly craft mutually agreed-upon bid specifications for public works, construction, and administrative shared services through compromise and discussion [2 and 3]. Contracts with contractors are crafted to include all of the participating communities, with contractors working with the various communities to schedule their construction season. Some contracts have more than ten communities signing on, others have just two. Some services have two contracts within the MPI and are split by county, others by fiscal year, or service type. There are no memoranda of understanding, fees, or membership to be involved in the MPI, and communities have participated from four counties as of 2013: Cook, Lake, McHenry, and DuPage County. The participating communities are listed in Fig. 1.

MPI Survey Respondents		MPI Communities - Non-Survey Respondents
Arlington Heights	Lincolnshire	<i>Clarendon Hills</i>
Buffalo Grove	Lincolnwood	<i>Evanston</i>
Cary	Morton Grove	<i>Fox River Grove</i>
Glencoe	North Chicago	<i>Gurnee</i>
Glenview	Northbrook	<i>Lake Zurich</i>
Glenview Park District	Northfield	<i>Lindenhurst</i>
Grayslake	Skokie	<i>Park Ridge</i>
Highland Park	Vernon Hills	<i>Woodridge</i>
Kenilworth	Wheeling	
Lake Bluff	Wilmette	
Lake Forest	Winnetka	

Figure 1: MPI Communities

Table 1 presents the evolution of services provided under the MPI in the last three years, 2011-2013.

Table 1: MPI Services Offered*

2011 Services	# Comms.	2012 Services	# Comms.	2013 Services	# Comms.
Crack Sealing	12	Crack Sealing	14	Crack Sealing	15
Resurfacing	5	Resurfacing	8	Resurfacing	6
Concrete	8	Concrete	11	Concrete	15
Sewer Lining	12	Sewer Lining	10	Sewer Lining	14
Sewer TV	4	Sewer TV	7	Sewer TV	6
Leak Detection	5	Leak Detection	5	Leak Detection	7
Hydrant Painting	6	Hydrant Painting	6	Hydrant Painting	7
Emergency Contr. Asst.	11	Contractor Asst.	9	Emergency Contr. Asst.	9
Water Meter Service	3			Water Meter Service	7
		Cold Patch	9	Cold Patch	8
		Hauling And Delivery	5	PW Hauling/Delivery	3
		Pavement Marking	4	Line Painting	4
		Bridge/Retaining Wall	2	Bridge Inspections	2
		Custodial Services	8		
				Janitorial	4
				Asphalt Patching	4
				Tree Trimming	16
				Street Sweeping	3
				Sewer Cleaning	2
				Generator Maintenance	8
				HVAC Maintenance	8
				JULIE Locates	2
				Manhole Rehab	6
				Valve Turning	5
				Tree Removal/Stump Grind	16
				EAB Treatment	2
				Uniforms	5
				Auditing Services	6
				Inspectional Services	5
				Landscaping	10

**Some of these services are not delivered in a single contract, but rather some services are broken into groups according to budget year ending date, county, or funding source.*

Research Context - Region and History

Region

It will be useful to define the region in which the Municipal Partnering Initiative has occurred. When compared to the 50 largest metropolitan regions according to population as of 2002, [4, 101] states that the Chicago Metropolitan region contained the highest concentration of local governments (1,451 local governments) within its boundaries. The second highest was the New York City Metropolitan Region's 1,321. The number of local governments per capita is used as a measure of political fragmentation and the number of local governments per square mile as a measure of spatial fragmentation [4, 101]. The communities that make up the MPI have a median household income of \$110,174, nearly double the U.S. median household income of \$52,762 and the Chicago Metro Region's \$61,985 [6 and 7].

MPI Program Introduction - Logistics

MPI-bid services range from road resurfacing, crack sealing, auditing, and Information Technology. The service contracts are the sole binding document in the Municipal Partnering Initiative. Each community in the region is free to participate or not in any MPI contracts. During annual early spring MPI meetings, communities tentatively commit to participating in any of the given services in the MPI. In an attempt to find the ideal configuration for each contract service and determine complications in the bid specifications that may be affecting the contractor's previous performance, the MPI conducts post-service interviews with communities and contractors.

In the first year of the MPI, the village of Glenview took on a majority of the contract and bid specification duties. Glenview does not charge a fee for this service, nor does involvement with MPI necessitate a community contribute to the contract administration of any contract within the MPI. However, there is an understanding among the communities that each partner will contribute in their own way when possible to contract administration tasks. Many become the main contact for a service one year and lead the efforts involved with securing that particular service. For example, in 2013, the 15 joint bids issued by the construction committee were led by 11 different communities.

At the outset of awarding a bid, the contractor works with each participating community to create a schedule for service delivery. Some smaller communities have emphasized the balance they must weigh when contracting with the MPI; while contract costs may be lower due to leveraging economies of scale, it can be at the expense of being able to choose their place in the construction season schedule. Some community administrators have expressed frustration at their perception that larger municipalities get priority scheduling.

Each community is responsible for paying the contractor and monitoring its own contracts. It is important to note that joint purchasing language included in the joint bids allows other communities to participate after the bids are received, known as “piggy-backing.” MPI administrators prefer that communities participate from the beginning of the bidding process because more quantity at the outset can amount to a lower unit price. The ability for communities to piggy-back on a contract can also make it difficult to know which communities are utilizing the MPI-bid services, this because participation is self-reported.

MPI History

In 2010, Glenview and three other communities (Morton Grove, Wilmette, and Winnetka) made a mixed-contracting trial of four communities jointly contracting for crack sealing. Crack sealing is a program designed to extend the life of streets. Crack sealing is typically performed three to five years after the street is resurfaced because cracks develop on the street surface due to the weather. Cracks resulting from routine wear and tear need to be sealed as they develop to prevent moisture and road salt from seeping into the base, which can lead to potholes and more serious road failures.

To construct the joint contract, members of each community, from city managers to public works technicians, convened to create a single bid specification for all four communities concerning crack sealing delivery. Each community previously had different service specifications, especially in their contract legal boilerplates. Through compromise, with some communities decreasing the strictness of their language and others increasing their contractor expectations, the four communities together created a mutual bid document. They then advertised, received bids, opened the bids publicly, reviewed them, and signed a single contract for service.

Each of the four communities involved had previous experience with jointly contracting for crack sealing through a regional council of government purchasing program as recently as 2008, experience which proved to be valuable in the creation of the MPI. However, the council of government crack sealing contractor forfeited the contract in 2008 because it could not complete the work of all the communities in time. The COG did not continue the jointly-purchased road services after 2008. Many of the communities in the MPI area did not conduct crack sealing in 2009 due to budget cuts. The communities that did crack sealing in 2009 experienced unit price increases in 2009 due to their solitary bidding.

Glenview convened 18 communities in early 2011 to discuss a larger joint crack-sealing bid as well as other possibilities after sending out a survey to determine which services were routinely outsourced in the region. The survey identified roughly 40 commonly-outsourced services and commodities. These included services that each community outsourced every year. Based on that list, two committees were formed. The Public Works Committee relates to maintenance-type activities. The Construction Committee consists of sewer lining, road resurfacing, and other more engineering-intensive services. According to MPI administrators, the participating communities generally tended to bid the same projects every year and were in moderate fiscal shape coming out of the recession. The MPI administrators also searched for politically-stable communities. For the first year, communities were located in Lake and Cook Counties. All the Lake and Cook County communities that were chosen shared borders.

MPI-participating communities emphasized that they wanted to maintain their current levels of service. Even in working together, stretching village or city money, services to the residents were expected to remain the same, if not improve. Because Glenview was able to bring on 10 additional communities, the 2010 crack sealing contractor extended the length of the 2010 contract two years and also lowered its unit price from \$1.00 to \$.99, eventually to \$.98 in 2012. In 2011, the MPI also added construction projects: street resurfacing, concrete, and sewer lining. These projects were chosen because they were maintenance services that nearly all of the participating communities participate in every year. One of the results of joint bidding is decreasing the amount of staff time needed in each community for each project bid. Instead of having 10-12 engineers from each community putting the bid package together, 10-12 attorneys reviewing it, 10-12 purchasing agents reviewing and advertising for it, the MPI produced two or three bid packages with only one or two engineers or attorneys.

In the first year of the MPI, there was much time spent in crafting the joint contracts, with attorneys, engineers, purchasing agents, in addition to public works directors and city managers. Administrative burden of

joint contracting decreased each year following the first year of a service being jointly bid because contracts change only incrementally from year to year after the process of coming to mutually-acceptable boilerplate and bid specifications. Looking beyond the economies of scale achieved by joint bidding and the cost savings of coordinating schedules for contractors, MPI communities have reported staffing efficiencies as a result of working together in decreased bid advertising costs, decreased reliance on contracted professional work for bid creation, and increased levels of sharing of each communities' bid specifications.

According to Glenview staff, one of the largest hurdles to overcome was the difference in bid specifications. For example, concerning the MPI's first road resurfacing bid, one MPI administrator from Glenview said that even after working in road projects for many years previous, he had never known that there were so many different kinds of asphalt mix, with each town having its own mix. However, through compromise, communities were able to overcome some of these differences in specifications. In the first two of the MPI's yearly contracts for road resurfacing, with five communities in 2011 and eight communities represented in 2012, there were two contracts awarded each year, one each for Cook and Lake Counties, with each community within the county group having identical bid specifications. In 2013, road resurfacing has three separate contracts, and concrete services had five contracts. Concrete services for curb/gutter and sidewalk used to be bid together but are now being bid as separate services. MPI administrators have found that while some services benefit from increasing economies of scale, others benefit from geographic proximity to best economize mobilization costs.

In addition to geographic concerns, the MPI has had to accommodate communities with different budget years. Some communities operated under a January first fiscal-end year, while others ended in May or June. When appropriate, municipalities are grouped according to budget year. When division was not feasible, the MPI does insert a clause into the bid document giving, for example, one-hundred days to award a bid, allowing communities flexibility to award contracts when they see it as advantageous. Concerning contract scheduling, communities demonstrated trepidation about losing an element of control in choosing when the vendor would provide the service during the construction season. This requires compromise, and when services are delayed due to weather or other extenuating circumstances, scheduling conflicts between communities have been the cause for consternation. In some situations, the MPI simply picks communities' names blindly out of a hat to choose scheduling. The MPI has demonstrated flexibility for communities that change position in the schedule due to changes in street selection and other decisions.

When it is appropriate, the MPI splits communities into two groups: Motor Fuel Tax (MFT) and non-MFT. For example, when creating a crack sealing joint bid, ten communities may use motor fuel tax, and five communities do not. The MPI divides these into two groups because MFT funds must be spent on Illinois Department of Transportation (IDOT) approved contracts, and IDOT approval requires a certain level of rigor concerning insurance and specifications that communities can otherwise avoid by using other funding sources. Sewer-lining service provision, which involves reinforcing underground water pipes through a highly-technical [5] process of curing resin inside the pipes, preventing costly road excavation, proved to be a difficult service to bring about common bid specifications among the communities. In the initial year 2011, the MPI attempted to incorporate each community's specifications as opposed to a single mutually-agree-upon specification. This was administratively very complicated according to Glenview staff. In 2012, the document was shortened considerably, and mutual specifications were agreed upon.

In the first year, 2011, the MPI awarded 11 joint bids with 20 communities. Glenview administrators state that, initially, it was challenging to find an individual to lead joint bids outside of Glenview. One Glenview administrator likened it to trying to find friends to help one move, saying that there is a lot of verbal support, but when one tries to set a date, it can be a little challenging. Glenview staff go on to say that in 2011, there were many compromises, and Glenview did take on a majority of the bid specification work and coordination. However, after the first year, many of the joint bid documents do not vary greatly from year to year. MPI communities have created a list of responsibilities for those who would be leading a joint bid such as coordinate, schedule meetings, make any minor changes, receive the bids, and distribute them at the very end. After bids are received by a community, just as if each community were doing a bid contract in their own town, it is their responsibility to award and monitor the contract as the service is delivered.

Early MPI Obstacles

Glenview staff identified obstacles early in the MPI process and have reflected on how they attempted to overcome those obstacles. Initially, other communities' municipal staff were concerned about losing or ruining relationships with contractors with whom they have had a relationship over many years. Some regular contractors work collaboratively with staff and have for many years. However, Glenview administrators observed that some previous contractors have been able to successfully bid for MPI contracts, scheduling an entire construction season of work with 15-20 communities with one contract. Also, municipalities have numerous smaller contracts for construction and public works projects outside of the annual main contract. Smaller contractors can still bid on these other projects. There was also concern among municipalities about the multi-governmental impact of an MPI contractor going out of business or not performing up to specifications for large MPI projects. There has been a multi-pronged response in order to guard against contractor failure, largely in part due to the previous failure of the

Northwest Municipal League’s crack sealing contractor in 2008; including provisions to allow the village and its partners to cancel a contract within 60 days of the award due to poor performance if necessary. The 2008 contract was forfeited due the contractor not being able to complete work on schedule.

Another challenge was that within the MPI area, communities have very different bid specifications and legal boilerplate. Administrators found that MPI-service contract managers must work with village/city managers, attorneys, and purchasing managers to find compromise on contract language. MPI administrators found that scheduling a time for all the actors to meet and physically sit down made for more productive discussions [16]. Finding time for these discussions remains a challenge.

MPI-participating communities were concerned about the order in which they would appear in contractor service delivery, and with so many communities represented in some contracts, MPI actors are often forced to adjust their construction schedules in the case of emergencies or weather. Communities were forced to be flexible working with weather conditions with the contractors, which is not entirely uncommon even in non-joint bidding circumstances. There were multiple instances where a vendor already served many of the same MPI communities in a single year, working with each community to schedule the contract dates.

MPI Cost Savings - Current State of MPI

Cost savings calculations are left to each community within the MPI, some utilizing line item and unit price comparisons from years earlier or comparable communities or projects. The Glenview staff create an aggregate savings presentation each year for MPI communities based on the cost savings estimates they receive and their own calculations. An example of a single service cost savings calculation is presented in Fig. 2.

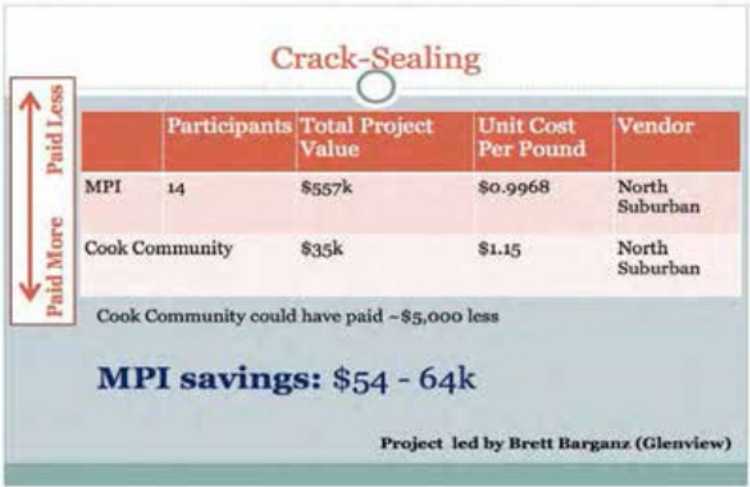


Figure 2: MPI Crack Sealing Cost Savings Calculation (Source: Village of Glenview Staff Report 2011)

Cost savings are calculated by Glenview staff by examining comparable line items between participating MPI prices and similar area communities’ non-MPI prices, allowing for a range of savings from their calculations, depending on the scale of the projects. Savings over unit prices are multiplied by the number of communities participating. A summary of cost savings is created for a presentation to the MPI communities at the end of the construction season each year. The range reflects the combined variability incorporated into the cost savings, as calculated by Glenview staff, see Fig. 3.

Summary of Completed 2011 Projects			
Project	Number of Communities	Total Project Value	Savings
Crack-Sealing	12	\$421k	\$50-70k
Resurfacing (Lake)	3	\$2.99m	\$100-120k
Resurfacing (Cook)	2	\$2.84m	\$80-100k
Concrete	8	\$966k	\$15-20k
Sewer Lining (group one)	5	\$1.09m	\$30-50k
Sewer Lining (group two)	7	\$945k	\$60-90k
Sewer Televising	4	\$365k	\$16-26k
Leak Detection	5	\$71k	\$3-5k
Hydrant Painting	6	\$60k	\$8-10k
Water Meter Testing	3	\$20k	\$500.00-1.5k
Emergency Contractor Assistance	11	\$150k	\$27-37k
TOTAL SAVINGS REALIZED <u>\$389,500 – \$529,500</u>			

Figure 3: Summary of Cost Savings - Glenview Staff Report Source: Village of Glenview Staff Report 2011

Glenview has not attempted to calculate the *administrative* savings for the whole MPI area due to decreased staff time on bid creation and advertisement, nor have communities calculated the exact cost savings of moving from in-house production of a service to an MPI-administered outsourced service. One MPI-participating community public works director said the savings with the MPI were very apparent in the unit prices but also said that a significant benefit was experienced when a city had not done much of a certain service contracting. The director said that the other cities in the MPI with experience helped a great deal, and that their community completely avoided in-house bidding by moving directly from in-house provision to MPI-contracted services.

Even as services are provided more efficiently, communities may not have experienced cost savings because some efficiencies do not result in go-away costs, such as staff salary costs, unless the number of positions are reduced. However, some of the smaller communities in the MPI were paying contracted engineers for the creation of bid specifications and are now saving that cost by having one community do the bid creation and advertisement on behalf of all of the others, eliminating engineer contractor costs.

Variety of Intergovernmental Joint or "Mixed" Purchasing

There is variety of area pooled purchasing models listed in the following section, supplemented by Appendix A. These pooled or mixed purchasing pools exist in various states of completion (Western Cook County at the young end of the spectrum and the Illinois Purchasing Bulletin more than 30 years old) and in varying network structures (COG-centric versus Municipality-centric versus state-centric). Comparing and contrasting these models illuminates the strengths and weaknesses inherent in each. One common theme appears to be that many communities began their joint or mixed contracting programs with a survey to interested communities, listing services each community commonly contracted out, also asking each community to register their level of interest in jointly contracting for that service. At some point during the formation process, the groups must decide the degree to which the communities will be legally bound together, either through MOUs, letters of intent for each service, membership which may or may not include payment, or in the MPI's case, none of the above.

When considering the MPI and where it rests within the many permutations of pooled procurement, it is important to contrast it with other configurations. In some instances, the MPI was directly affected by the pooled purchasing group to be mentioned. In other instances, alternative models are proposed which may highlight the unique qualities of the MPI (see Appendix A).

Lake County Municipal League

Lake County Council of Government's mission is to serve as a vehicle for member municipalities to take joint action on matters affecting the Lake County area. Membership is open only for Lake County communities and costs an annual \$500. The organization currently serves 38 communities. Besides promoting the interests of its members in the region and Illinois capital, for the first time (starting in the 2013 construction season), the COG offered three road-related joint purchasing services for joint purchasing: crack sealing, pavement marking, and street sweeping. There are currently no administrative fees for municipalities associated with joining the bids. The

bid writing, advertising, and coordination was a mutual effort by the LCML executive director and Lake County community administrators.

The three services for the first year were chosen out of a dozen which were identified as possible services to be jointly bid, determined by a survey sent to interested communities in Lake County earlier in the year. At the beginning of the bid creation process, communities signed a letter of intent to be a party to the upcoming joint-bid contract in which communities include their desired quantity of service based on mutually-agreed-upon general bid specifications, with variations remaining from community to community. Communities are committed by the letter of intent to remaining with the joint bid through the process unless, after the bid prices had been received from contractors, a majority of the communities decide together not to use the bid and instead contract independently, which did not happen with any of the three contracts the first year. Each community signs and awards its own contract with the contractor with the pre-arranged bulk price for all. This is in contrast to the MPI model where all the participating MPI communities sign the same, single contract with common boilerplate language.

Northwest Municipal Conference

The Northwest Municipal Conference (NWMC) was founded in 1958 and represents communities north and northwest of Chicago, many of which are in the MPI. Currently, 42 communities and one township belong to the council of government. Involved with the NWMC's mission is the Suburban Purchasing Cooperative (SPC), a joint-purchasing program sponsored by the Northwest Municipal Conference (NWMC), DuPage Mayors & Managers Conference (DMMC) South Suburban Mayors and Managers Association (SSMMA), and Will County Governmental League (WCGL). Together the SPC represents 137 municipalities and townships in the northeastern Illinois (SPC Homepage 2013). Focusing on providing bulk purchasing goods, such as vehicles, liquid calcium chloride and natural deicing liquid (beet juice) for snow removal, and office supplies, the only road project the SPC offers wherein a contractor performs a service in the community directly is pavement marking, a service the MPI also offers.

It is important to note that the SPC did offer crack sealing joint contracts and lane marking as recently as 2008. In 2006, SPC crack sealing prices were \$.987 per pound with a two cent per pound administrative fee added. 2007 contractor prices came to \$.951 per pound with the same administrative fee, coming to \$.971 per pound for communities. In 2007, 29 municipalities participated with an estimated 692,000 pounds of sealant. The 2008 SPC crack sealing price for 16 communities came from Complete Asphalt Service at \$.987 per pound, in addition to the same administrative fee. Due to the failure of the contractor meeting contract dates in the Northwest Municipal Conference's 2008 Crack Sealing Program, the contract was forfeited before completion, after which the NWMC chose to discontinue its joint crack sealing program, leaving communities in 2009 to bid their own crack sealing programs. The NWMC vendor default made MPI communities sensitive to the impact of vendor difficulties. In 2010, the MPI began joint bidding with the four original communities.

Challenges

There were many challenges faced by MPI administrators when creating the MPI, and there are many challenges still being faced by communities both participating and otherwise. An intrinsic challenge faced by administrators at the early stages of the MPI is perception of risk. While some members of the MPI area embraced an external perspective and appetite for risk, research by Kahneman and Tversky [8] found that rather than having a propensity for more or less risk, individuals are biased against losses and often lack regret over missed gains. With a myriad of possible negative outcomes, actors in the MPI did overcome innate biases in order to collaborate, especially in a model without formalized rules and obligation, as is the case of the MPI.

One of the perennial challenges in the region is the maldistribution of taxable resources, be they property or sales tax. This disparity results in competition in the realm particularly of economic development, which can have lasting impacts in social capital and intergovernmental relations in the area [9, 94]. Governments in fragmented systems, experiencing competition and perceiving the struggle as a zero-sum gain have less motivation to collaborate or to "provide goods and services that generate positive externalities, or to reduce services that generate negative externalities" [4, 102].

Challenges also include elected-official approval. Community administrators have said that issues with control and accountability have made some members of their elected board, and staff, uncomfortable. As the MPI continues to adapt, sizing contracts in different configurations each year and changing contract language, some community administrators state that they are forced to change their arguments for or against particular MPI policies to their board each year. On the other hand, communities experience frequent changes in contract language as they are forced to adapt to the ever-changing marketplace for services. At an Alternative Service Delivery Symposium hosted by Northern Illinois University, an administrator said that contract language and specifications must evolve. However, that evolution can be challenging for administrators to a governing board. Sometimes, administrators must take positions that may be the opposite of their stance the year before, and they must have faith from their board that their adaptations are purposeful and not haphazard.

Adaptation is necessary because Chicago metropolitan communities have experienced changes in their various revenue bases for many years, which creates fiscal stress or munificence for these governments [4, 113].

According to Hendrick [4, 114]: “Although... many government recovered from the 2001 recession by 2005, the situation changed dramatically for them in the first six months of 2009...sales receipts fell by a record \$5.8 billion, or 11.5 percent, in the Chicago metropolitan region compared to the same period a year prior.”

This kind of fiscal stress can lead to innovation and increased cooperation among area actors. Glenview’s staff, which had experience with joint contracting through many of the various pooled purchasing authorities described in Appendix A, seemed poised for action when the recession occurred. Glenview management stressed that staff must constantly innovate because that is the only way to make sure contractors are doing what Glenview staff believe they should be doing. Glenview management expressly state that they built their management team around innovative individuals. This mentality was extended to the MPI, and through multiple meetings with city and village managers, attorneys, purchasing agents, many communities embraced the initiative, enough to include more than 24 communities within its roster of participants

Methodology

In order to understand the intergovernmental and economic dynamics that contributed to the MPI, the researcher attended and reviewed various presentations on the MPI given by Village of Glenview staff, researched the history of joint purchasing in the Northern Illinois area, and examined other models of pooled purchasing for comparison and contrast to the MPI model. Simply comparing prices simply between 2010 (Pre-MPI) and 2011 (MPI years) would not result in accurate cost savings estimates, due to variations in contract size and scope that could distort price differences. Instead, tracking prices three years before the MPI (2008-2010) and three years during the MPI (2011-2013) better reflect trends in cost. Finding these figures required a survey to be generated and sent to the MPI communities. Qualitative questions were added to the survey to determine whether the MPI adapts to new information and if there are lessons to be learned from the MPI’s experience.

This paper is intended to examine both the cost savings and inter-organizational dynamics that influenced the MPI’s creation and continuing services. The research questions are:

- What were the intergovernmental dynamics that lead to the MPI?
- Have the communities that are involved saved money as a result of their participation?
- How has the MPI evolved since its inception?
- Are there lessons to be learned from the MPI’s experience?

The hypotheses are:

-H1- All communities involved will save money on unit pricing of the three examined road services due to increased economies of scale.

-H2- MPI service contract sizes will change the number and configuration of communities involved in each service in an attempt to find the ideal size for cost savings.

Survey

Investigation of the contract data available online going back to 2008 revealed incomplete records. A survey was needed to collect procurement data. An IRB-approved survey document was sent to the 24 MPI communities (as identified by the staff at Glenview) via email. The survey was sent in the summer of 2013 as a fillable form that could be filled out on a computer and sent back electronically. The researcher remained in frequent conversation with the survey recipients while surveys were being completed. See Figure 1 for survey respondents.

The survey was created to collect two kinds of information: procurement and qualitative. First, the survey collected procurement data from the years 2008-2013 in the jointly-contracted service provision of crack sealing, concrete sidewalk replacement, and cold patch. For each service, the survey also collected quantity of services. The survey captured the variations of how services were specified and delivered before the MPI in order to determine if there were significant differences in service provision before and after the MPI that may have influenced prices and cost savings experienced by communities. The procurement questions presented for 2011-2013 are the same as for 2008-2010. A total of 12 completed surveys were returned with at least some procurement and all qualitative questions answers. An additional eight organizations responded with only qualitative questions answered, for a total of 20 responses with at least some useful information. This comes to an 83.5% response rate for qualitative questions and 50% response rate for quantitative questions. Further quantitative data was obtained by research from MPI community municipal minutes.

The data were used to examine how prices from MPI-area communities have changed over the six-year period, before and after the MPI. The data indicate only line item unit prices, such as cost per ton. Contractor labor is factored into cost per pound for fiber-based crack sealing, as well as concrete sidewalk replacement, whose cost in this paper is calculated by cost per foot. Both services involve contractors supplying both material and labor, which distinguishes these MPI services from simple bulk purchasing programs [10, 11, 12]. This paper will look specifically at five-foot-wide and five-inch-thick concrete sidewalk, which is a common size for which most municipalities contract.

Cold patch is a product used to fill potholes and small road issues without the need for heating equipment. Cold-patch asphalt is treated with a variety of polymers which allows the asphalt to be pliable enough to be spread into cracks without the use of heat and strong enough, after having been set and compacted, to weather the impacts of vehicular traffic. Cold patch is purchased in bulk by the ton, and the municipalities supply the labor of patching roads spots.

There are many other costs associated with contracting services which include bid creation, staff research time, bid advertisement, bid awarding, contract supervision, etc. These additional administrative costs or savings are not reflected in the unit prices examined in this research. Additionally, the particular three services chosen for data collection are services that tend not to deviate in service provision specifications from community to community compared to other construction services. Construction committee services such as road resurfacing and sewer lining contained dozens of variations in funding mechanisms and specifications, which inhibit useful price comparisons.

The years in which data were collected (2008-2013) represent a very tumultuous time in municipal government service provision and contractor pricing, largely due to the recession. Cost changes experienced post 2008 will be impacted by the recession, which may have reduced service provision costs due to a level of desperation for contractor work regardless of the MPI's economies of scale. In order to account for the impacts of the recession and other factors, the author has aggregated various road construction-related price indices, including fuel cost, civilian employee cost per hour, bituminous asphalt (most basic and common road asphalt) price, and standard concrete price. Employee cost and the ready-mix concrete cost index data come from the Bureau of Labor Statistics. Fuel information is specific to the Midwest and comes from the U.S. Energy Information Administration. Bituminous Asphalt price indices come from IDOT's annual reports on commodity prices for road construction.

This survey attempted to collect data from communities in the MPI area that did not use the MPI for services, to provide a comparison to MPI prices. The author collected 2008-2013 procurement data from six neighboring DuPage County communities, none of which have contracted with the MPI or participated in pooled-purchasing services for the three services examined. The number of DuPage community procurement data ranges from service to service and year to year, ranging from only a single community's data in one service year to six. The small amount of data for some service's years negatively impacts the DuPage County group's usefulness as a comparison.

Surveys also collected the opinions of MPI communities concerning ideal size of contracts, the role of Glenview as the central organization, questions concerning challenges other area initiatives would face if creating a similar program, and others. Cross tabulation was used to compare responses to community demographic information including: county, population size, percent change in population from 2000-2010, area, density, form of government, and whether the community was home rule or not.

The mean population size of communities that responded to the survey (a total of 19 communities and one park district) is 28,395 residents (see Table 2). The mean percent change in population from 2000-2010 was an increase of 3.77%. The average area is 8.51 square miles, and the average density of resident per square mile is 3,370. 74% of the communities are council-manager led, and 84% have home-rule status. The median household income for the whole MPI was \$110,174, nearly double the national average of \$52,762 and still significantly more than the Chicago metropolitan region's \$61,985 [6 and 7].

Table 2- MPI Survey Responding Community Statistics

	Population	Percent Population change 2000-2010	Area (square miles)	Density (population per square mile)	Form of Government	Home Rule	County
Mean	28394	3.77	8.51	3370	74% Council-Manager	16% Non Home Rule	42% Lake County
Total	539496	72	162	64038	26% Mayor-Council	84% Home Rule	58% Cook County

The demographic and size differences between the DuPage County Communities and the average MPI community are small. The DuPage County Communities include Glen Ellyn, Downers Grove, Woodridge, Lisle, and Burr Ridge. Many of their attributes are similar to the MPI average.

Area: 8.86 square miles
Population: 28,546
Median household income: \$97,618

Calculations

Procurement data were collected for each of the three services for the 18 communities over the six years of 2008-2013. Prices were separated into MPI and non-MPI, and averages were collected for each service each year. In order to calculate price changes in 2013 dollars, averages of previous years were altered to account for inflation. These averages were then compared across the years collected.

Due to the impact of self-selection that determined whether communities will respond to an MPI-related survey, most communities that responded with procurement data regularly contracted with the MPI post 2010, leaving the author with a small sample of non-MPI procurement figures post 2010, particularly in crack sealing services. Additionally, at least six of the communities that did not participate in the MPI crack sealing bid between 2011-2013 did not perform crack sealing. Another issue with self-selection that must be taken into mind when analyzing the data is the bias toward larger organizations responding with procurement data over smaller organizations. Since smaller organizations would be more likely to experience cost savings related to economies of scale, and the impact of the MPI could be more significant for smaller communities. Their experience is not as well documented in the procurement data.

It is also very challenging to isolate the impact of one program on prices of services over a large geographic area over a very tumultuous time in the world economy. While MPI average prices over a number of years can be compared to the same communities' prices before the MPI, one must account for changes in the economy between the two time periods. Comparisons to other communities outside of the MPI are complicated by differing demographic make-up, vendor populations, and service-level expectations.

It must be noted that these figures represent only three of the MPI program's many services that are jointly contracted, and they do not reflect the experience of other services. These price comparisons also do not reflect any changes in staff hours worked extra or saved due to the MPI, in addition to advertising and bid creation costs saved due to consolidated contract administration. On the other hand, much staff time was invested, especially initially, in order to create the MPI, the costs and savings of which are not reflected in this analysis.

Analysis

Contract Data Analysis

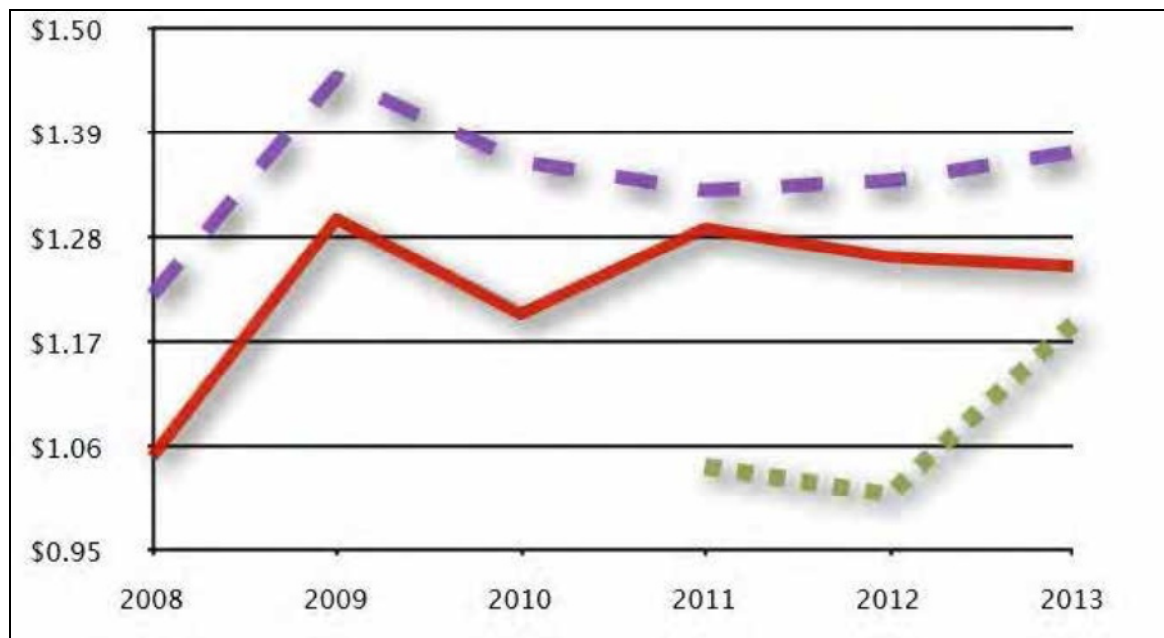


Figure 4: Crack Sealing 2008-2013 Price Comparison (price per pound)

Non-MPI Price – Red Solid Line

MPI Price (2011-2013) – Green Square Line

DuPage Community Price – Purple Rectangular Line

This graph and all below reflects inflation-corrected values to represent all values in 2013 dollars.

Fig. 4 presents the average unit price of crack sealing per pound, rubber-based from 2008-2013 for each of the three groups, non-MPI, MPI, and DuPage County. It is possible that the MPI is affecting vendor prices in the

region, possibly driving down prices for non-MPI communities in order to compete with MPI prices. Conversely, price for non-MPI communities could increase because the number of vendors might decrease as large vendors who contract with the MPI dominate the landscape.

The two communities that represent the non-MPI 2008 procurement numbers in Fig. 10 reflect the price of crack sealing through the Northwest Municipal Conference (the numbers have been adjusted for CPI to 2013 dollars). The discontinuance of the NWMC crack sealing program after 2008 may partially explain the increase in price for the MPI-area communities from 2008-2009. The 2010 procurement data reflect six communities, four of which banded together to form the precursor to the MPI for crack sealing that year. A majority of the responses (four out of six) are not single-community prices.

In an attempt to demonstrate the market forces that influence the price of selected contracting services, the following costs of essential construction items have been collected below, with all figures being represented in 2013 dollars: Illinois highway laborer prevailing wage, bituminous asphalt, fuel, and concrete pavement. Employer costs for employee compensation demonstrates employment costs for contractors per hour on average. Bituminous Asphalt (a basic component for petroleum-based road products) figures were collected from IDOT's yearly survey of roadway-construction-material costs. Fuel information is specific to the Midwest and comes from the U.S. Energy Information Administration. Concrete prices are Bureau of Labor Statistics National Ready-Mix Concrete Index (the industry standard for concrete construction).

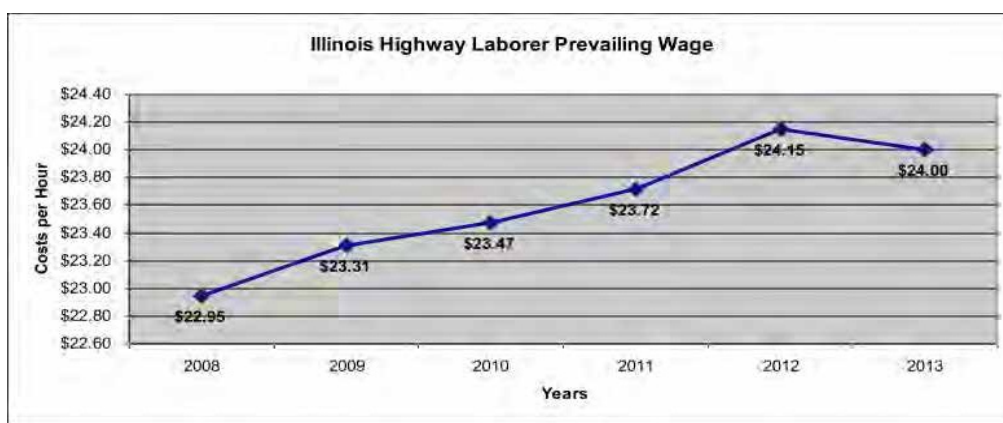


Figure 5: Illinois Highway Prevailing Wage 2008-2013

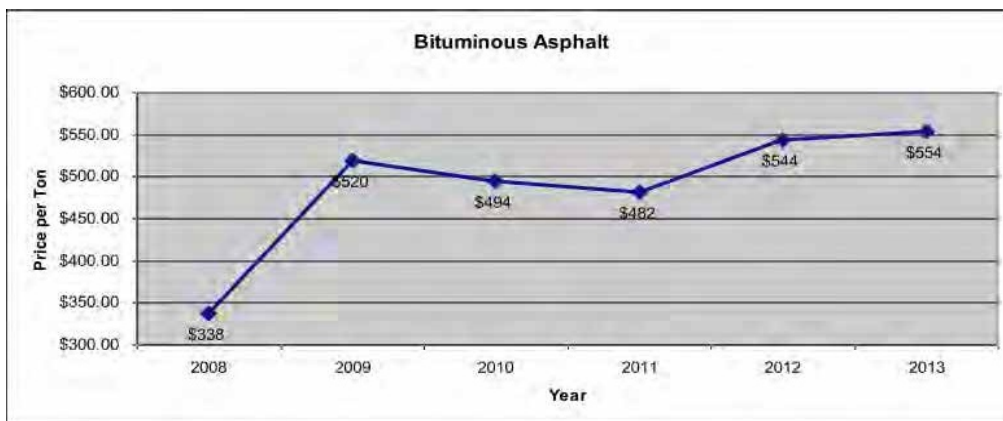


Figure 6: Asphalt Cost 2008-2013

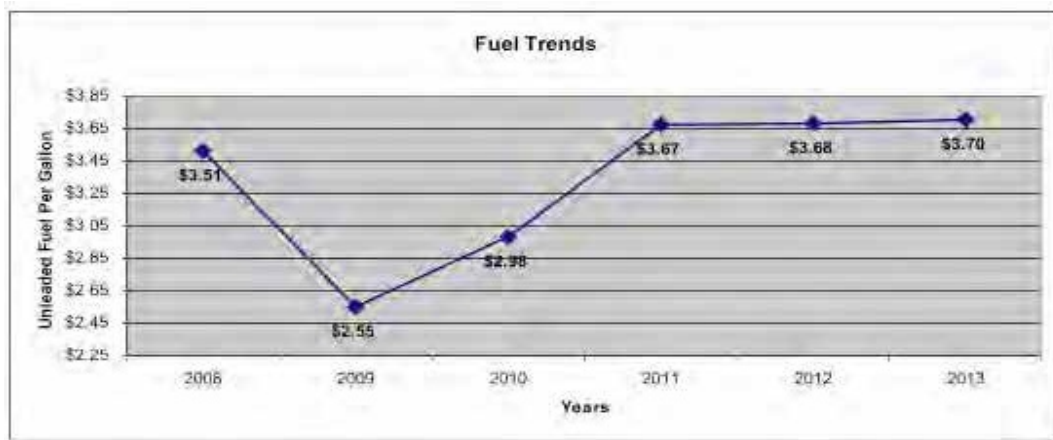


Figure 7: Fuel Cost Numbers 2008-2013

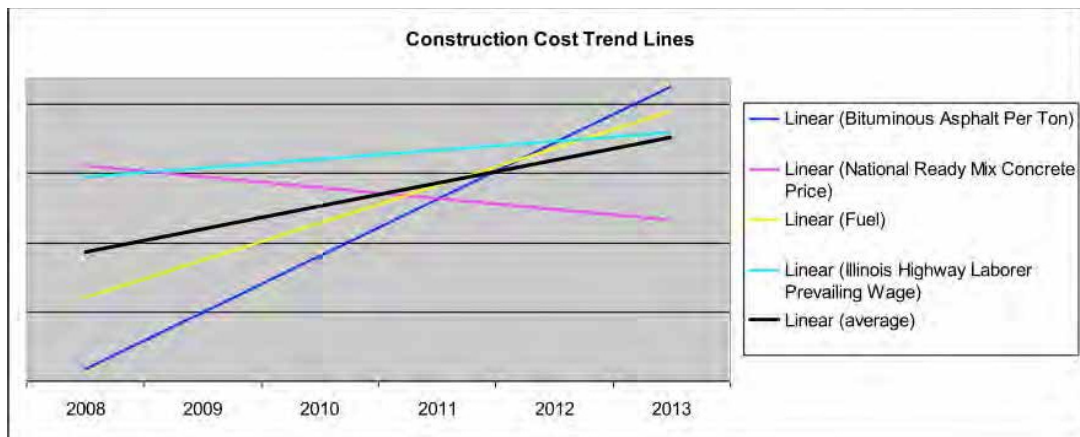


Figure 8: Construction Cost Trend Lines 2008-2013

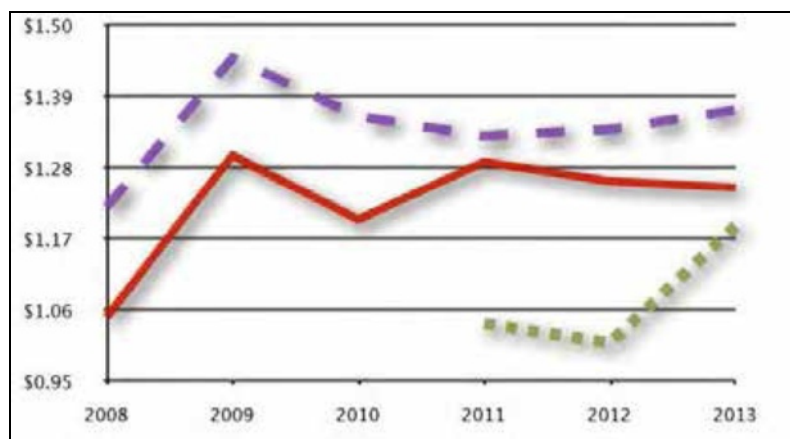


Figure 9: Crack Sealing 2008-2013 Price Comparison (price per pound)

Non-MPI Price – Red Solid Line
MPI Price (2011-2013) – Green Square Line
DuPage Community Price – Purple Rectangular Line

One can see in Fig. 5-8 that fuel, labor and asphalt (made from the same basic materials as crack sealing) have increased while MPI community prices have stayed at or below 2010 prices (see Fig. 9).

As mentioned during the history of the MPI, prices fell from 2010-2012 due to an increasing number of communities participating in the MPI price, with administrators renegotiating the price lower each year with the

same contractor as communities continued to join and MPI administrators refined the mixed-purchasing method. The sharp rise from 2012 to 2013 is the result of the MPI communities contracting with a new vendor after the MPI vendor's president, Alan M. Harris, was charged with theft of government property and mail fraud in 2012.

The 2013 MPI joint contract requested pricing for 2014 (\$1.22 per pound) and 2015 (\$1.25 per pound), and MPI communities will discuss whether they will rebid the contract with the same contractor based on multiple factors including performance and price. Lake County Municipal League's own purchasing group is scheduled to continue in 2014. There is the possibility of competition between the LCML and the MPI if any communities currently with the MPI which reside in Lake County decide to contract with the LCML, whose price is currently lower than the MPI's per unit. Neither program currently carries with it an administrative fee, although membership of LCML (along with access to the pooled purchasing services) is based on population and Equalized Assessed Value (EAV) and vary by municipality. The costs range from \$600-\$2200 annually depending on population and EAV.

One lesson taken from analyzing the crack sealing procurement data is the challenge of interpreting the collected data to explain variations in pricing alone. Each year, communities may dramatically change the scope and quantity of a service, contractors' prices may vary depending on the economic climate, and in such an interconnected area there can be many permutations of joint purchasing that impact pricing. MPI prices remain below the non-MPI or DuPage county prices from year to year.

Sidewalk Replacement and Reconstruction Analysis

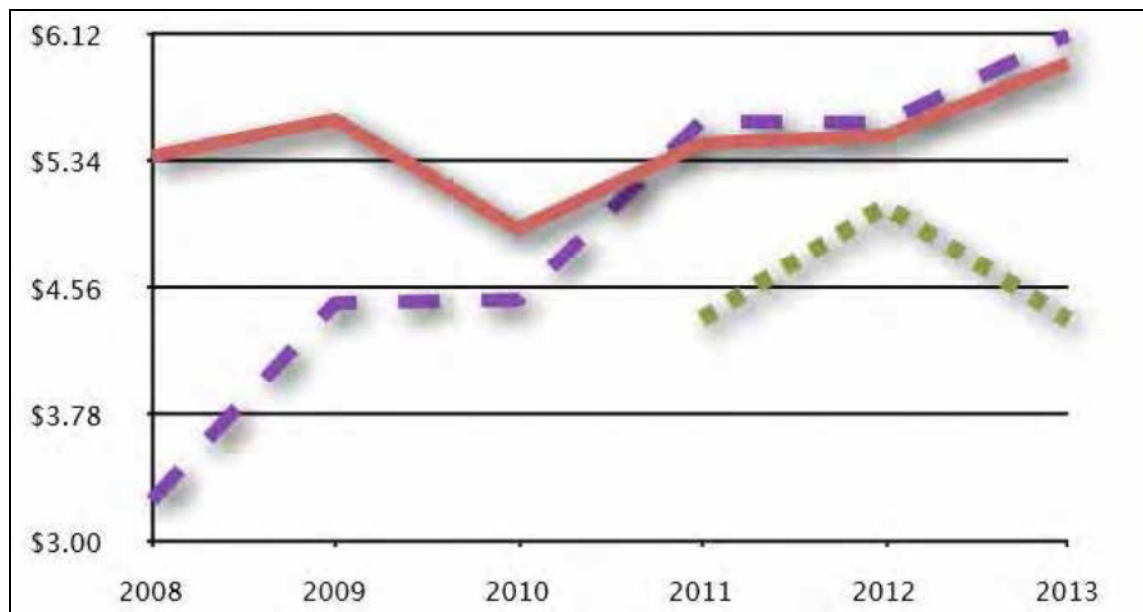


Figure 10: Concrete Sidewalk Replacement (Price Per Square Foot) 2008-2013

Non-MPI Price – Red Solid Line
MPI Price (2011-2013) – Green Square Line
DuPage Community Price – Purple Rectangular Line

Fig. 10 presents the variable nature of the procurement data for sidewalk replacement and reconstruction. One can also see the non-MPI prices rising during the 2011-2013 years in contrast to the MPI pricing which has consistently remained near or below the 2008-2013 average. MPI administrators in 2013 broke concrete services into seven groups in order to achieve best costs, which follows the hypothesis that MPI contract size would continue to be adjusted in an attempt to find the best prices.

Concrete Comparison to National Data



Figure 11: Concrete Pavement Cost 2008-2013

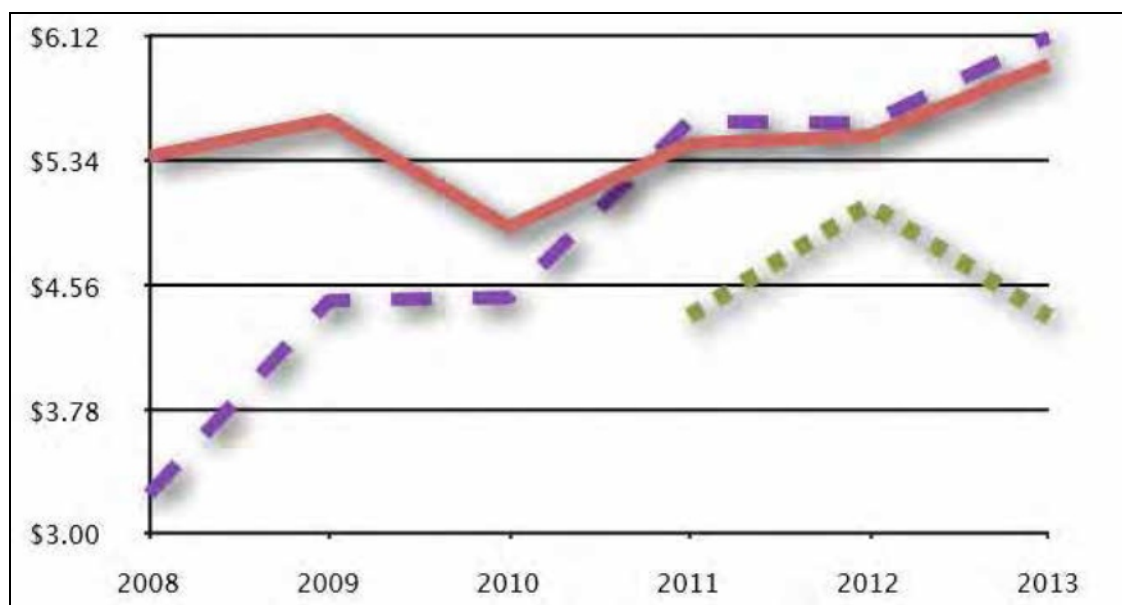


Figure 12: Concrete Removal and Reconstruction Prices 2008-2013

Non-MPI Price – Red Solid Line
MPI Price (2011-2013) – Green Square Line
DuPage Community Price – Purple Rectangular Line

Fig. 11 presents an increase in commodity prices from 2008-2009 followed by a decline until 2011. Despite the decline in value of concrete from 2009-2011, communities continues to pay increasingly more per unit (fig. 12). This is likely due to the impact of other cost drivers in contracted service delivery including increases in fuel and labor (see Fig. 13). However, from 2011-2013, MPI prices came in below non-MPI and DuPage prices. Only the MPI-participating communities have been able to experience reduced costs during the 2011-2013 period.

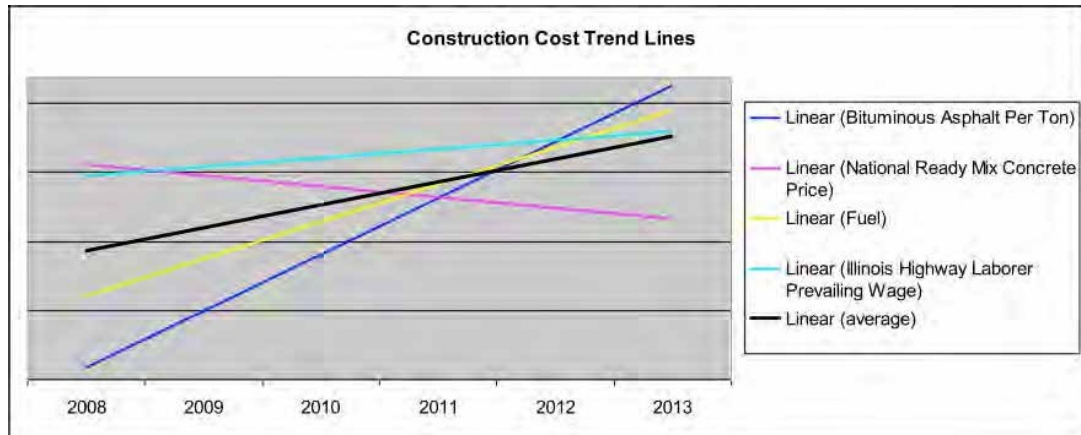


Figure 13 - Construction Cost Trend Lines 2008-2013

Cold Patch

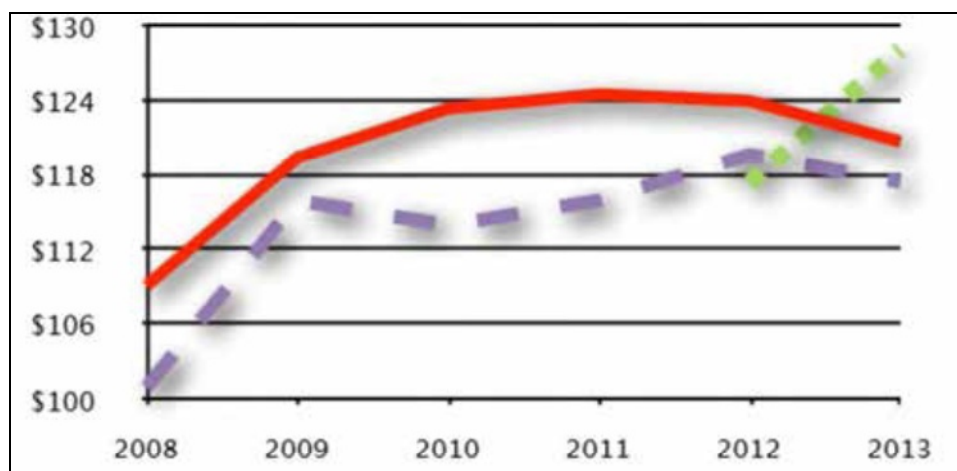


Figure 14: Cold Patch (Price Per Ton) 2008-2013

Non-MPI Price – Red Solid Line
MPI Price (2011-2013) – Green Square Line
DuPage Community Price – Purple Rectangular Line

Fig. 14 shows that cold patch prices among MPI communities and a single DuPage County community (Glen Ellyn) are lowest at the beginning of the data recorded for this paper in 2008, with an increase over the next five years followed by a drop-off in 2013. MPI-area communities encounter a small dip in price in 2012, when the MPI first began its cold patch purchasing pool. One can see the non-MPI average price of 2013 achieving a lower price than MPI.

Price Comparison for Cold Patch

One can see in Fig. 15 the persistent climbing of asphalt cost from 2008 to 2013 mirrored by the data collected locally until 2012. When the MPI begins its cold patch service in 2012 (Fig. 20), one can see a sharp contrast between the increase from 2011-2012 in the asphalt cost and the MPI price's dip. The increase in the average may also be partially explained by the percent of communities using Unique Paving Material (UPM) increased from 86% in the pre-MPI years of 2008-2010 to 100% from 2011-2013. UPM is a premium cold patch material that costs more than standard cold patch material. One would expect an increase in average price with an increase in the ratio of UPM versus cold patch in the MPI prices. While the MPI communities experienced an increase from 2012-2013, their cost has remained nearly the same from 2011 to 2013. The 2013 bidding process involved a single bidder which may explain a less-competitive price. It must be noted the non-MPI communities experienced lower prices than the MPI communities, decreasing from 2012-2013.

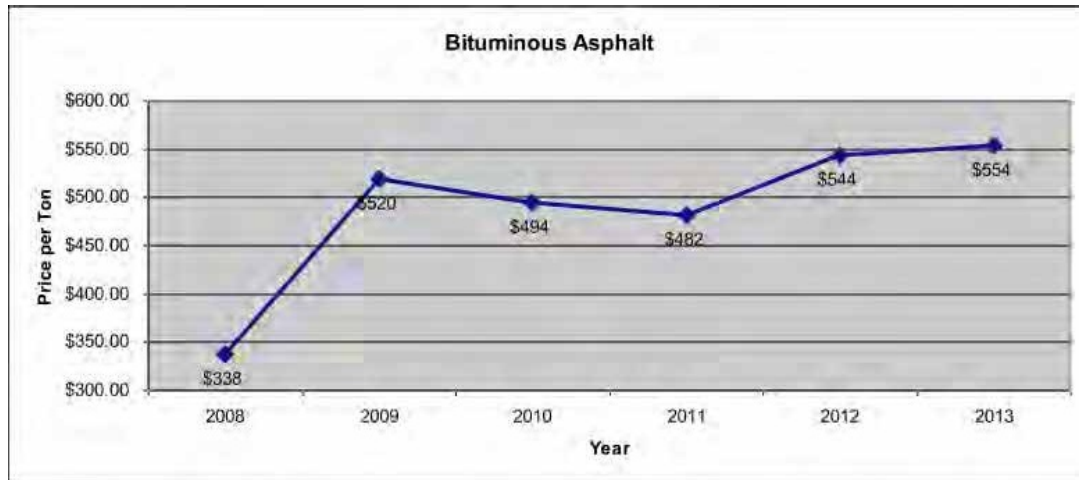


Figure 15: Asphalt Cost Index 2008-2013

Hypothesis testing for Qualitative Analysis

Hypothesis -H1: All communities involved will save money on unit pricing of the three examined road services due to increased economies of scale.

There is insufficient evidence to support Hypothesis 1 due to the complicating factors of the recession, along with changing commodity price, bid specifications, and project size. According to results from the MPI survey, for crack sealing and concrete sidewalk services, MPI prices were lower than area non-participating communities. For cold patch, responding non-MPI communities achieved a lower unit price compare to the MPI. This analysis does not take into account administrative costs or savings. It is also unclear what impact MPI pricing has had on prices achieved by other communities. It is likely that the pooled purchasing program has had an impact on the vendor population, creating opportunities for larger vendors and decreasing opportunities for smaller vendors less capable of fulfilling multiple-community contracts with the MPI. If smaller organizations cannot thrive or adapt in the new atmosphere of pooled purchasing, competition may decrease for contractor services. Lower unit prices for MPI communities may also influence other area communities to demand lower prices from vendors.

The MPI experience - Questions to MPI Communities

The survey asked communities many questions concerning how they feel about the MPI. For the purpose of comparing answers based on population, municipal populations are divided according to the United States Census with small being zero through 24,999; medium being 25,000 through 64,999; and large being 65,000 and above [6].

COG, County or Municipality-Centric

Communities were asked three questions to find which would be the best kind of organization to lead a program like the MPI: a municipality, a COG, or a county. Answers range from strongly disagree strongly agree. Fig. 16 reveals that the municipality-led option is the most positively viewed (60% positive) of the forms of organizations to lead the MPI. This could be because the MPI is, in fact, led by a municipality, and so the MPI may appear to be naturally fit for a municipality. However, many of these communities have experience purchasing from various types of organizations in the past, including county and COG-led programs. One can see a spike of negativity regarding how municipalities feel about a county-led MPI program.

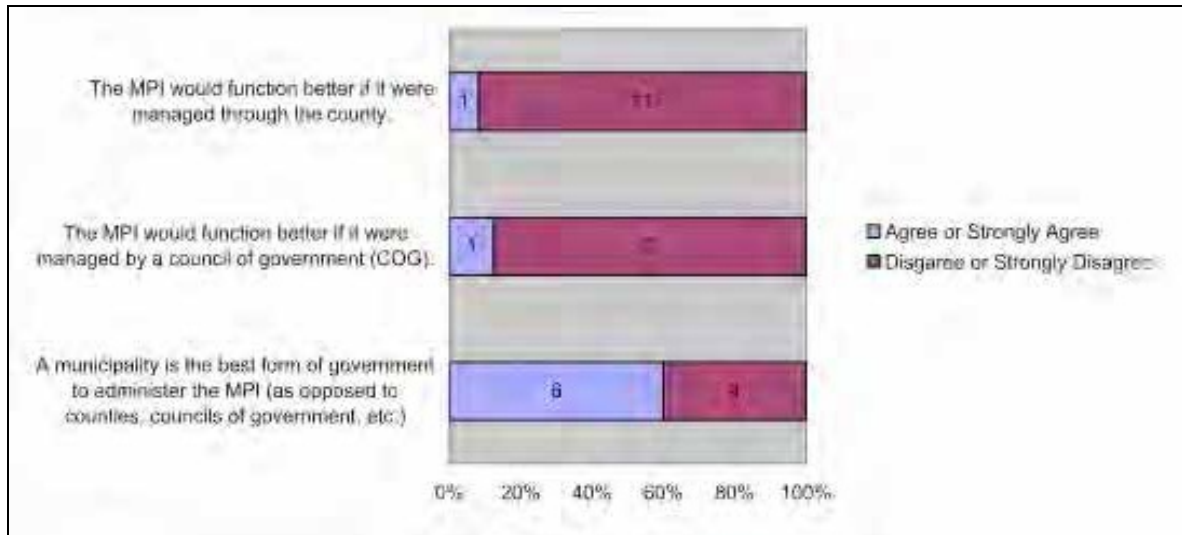


Figure 16: Preferred Form of Governance

Sense of Community

The MPI is now comprised of communities from four counties: Lake, Cook, DuPage, and McHenry. When asked whether their communities feel like a “part of a community of municipalities,” 68% agree that they feel part of a community of municipalities (Fig. 17). The sentiment is evenly split between neutral and agreement for Lake County communities, while Cook County municipalities are three times more likely to agree to feeling a sense of belonging to a group opposed to neutral. This sense of belonging can have a significant impact on the likelihood of communities to interact, their sense of social capital and their ability to bargain and negotiate.

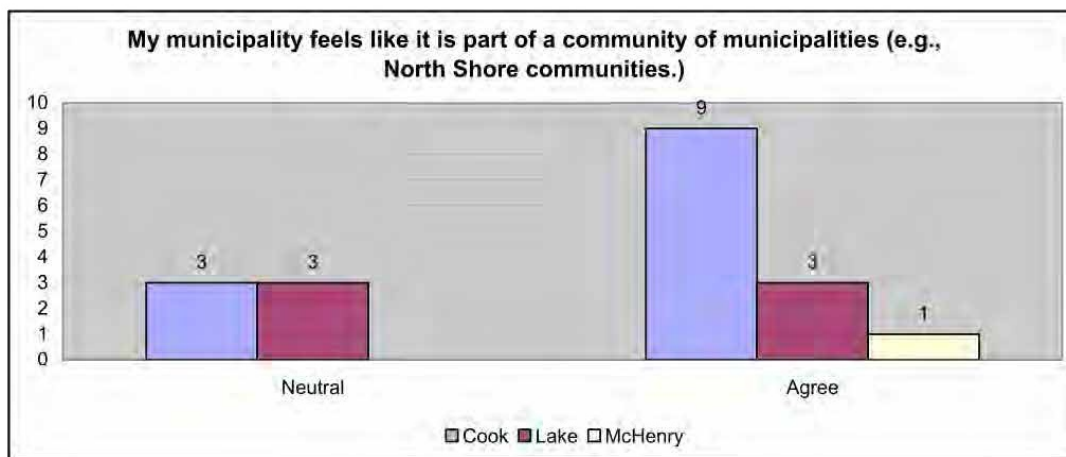


Figure 17 - Sense of Community

How will savings (if experienced) be reallocated?

Communities were asked how their community's savings were likely to be reallocated: reduced staffing levels, increase service levels, cut taxes to residents, or maintain services despite funding cuts/increased costs. This question presupposes some savings with the MPI, which not all community respondents necessarily believe they have experienced, and savings can mean cost savings as well as savings due to contract administration efficiencies during the contract or contract language quality increases, if experienced. The option with the most positive response rate is maintaining services despite funding cuts and/or increased costs, followed by increasing service levels (Fig. 18).

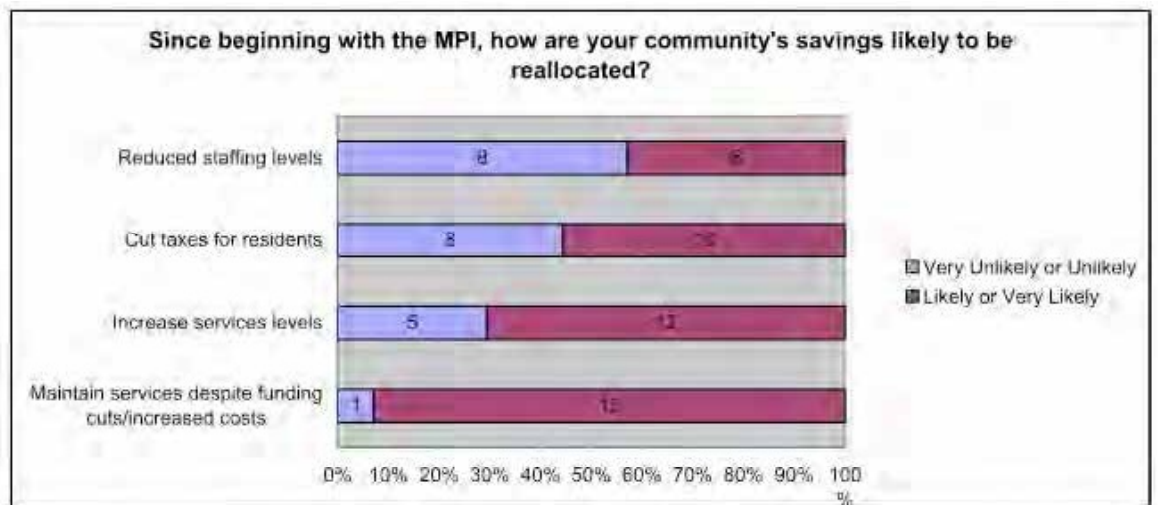


Figure 18: MPI Savings

Why MPI Costs Are Perceived to be Lower (if they are)?

Respondents ranked their top three reasons why MPI prices would be lower than individually-bid contractor services: geographic proximity, economies of scale (bulk cost per unit reduction), sharing of contract administration best practices, and convenience to contractors (one contract, one bid etc.) Fig. 19 suggests that communities believe MPI savings are most significantly derived from economies of scale experienced by pooled purchasing. Geographic proximity and convenience for contractors are similarly placed in the second choice for cost savings, while sharing of contract administration best practices has the lowest average score and number of respondents.

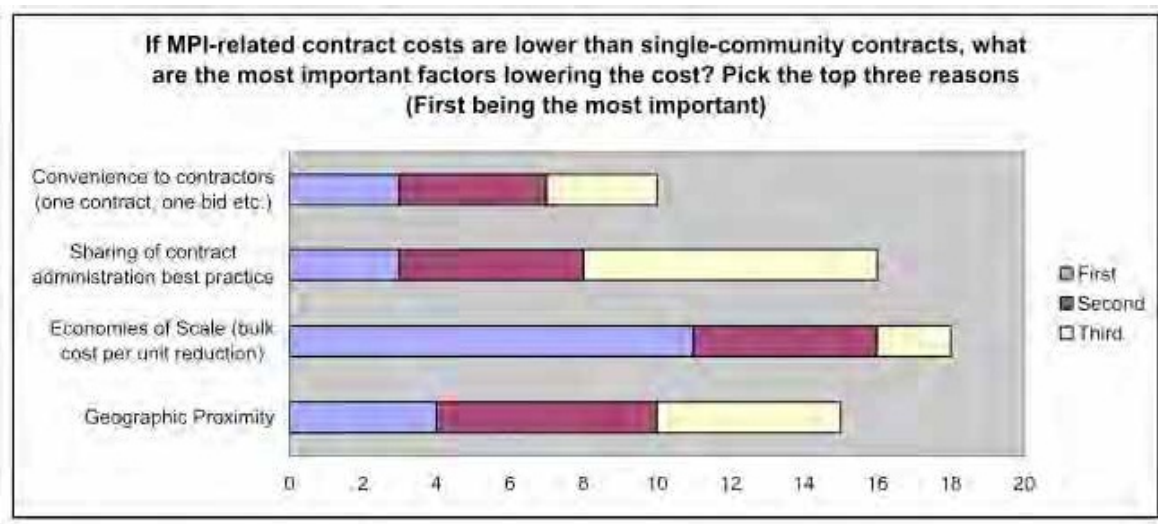


Figure 19: Why Are MPI Costs Lower

Why are MPI Prices Higher?

Communities were asked to rank why MPI prices might be higher than individual bidding, just as they were asked why prices might be lower in the previous question. "Jointly bid projects becoming too large" appears 15 times compared to the nine responses for "Already Good Prices," which has the next highest responses as most important reason for higher prices (Fig. 20). Many of these options are interrelated. For instance, perhaps a community gets good prices because it has established relationships with vendors, combining two options. The impact of other communities with bad vendor relations on MPI prices seems to be the least consequential of all the options listed, not garnering a single top reason for higher prices. The results suggest that communities are less concerned about the impacts of another community on the MPI pricing and more concerned about their own relationship to current vendors or contract size.

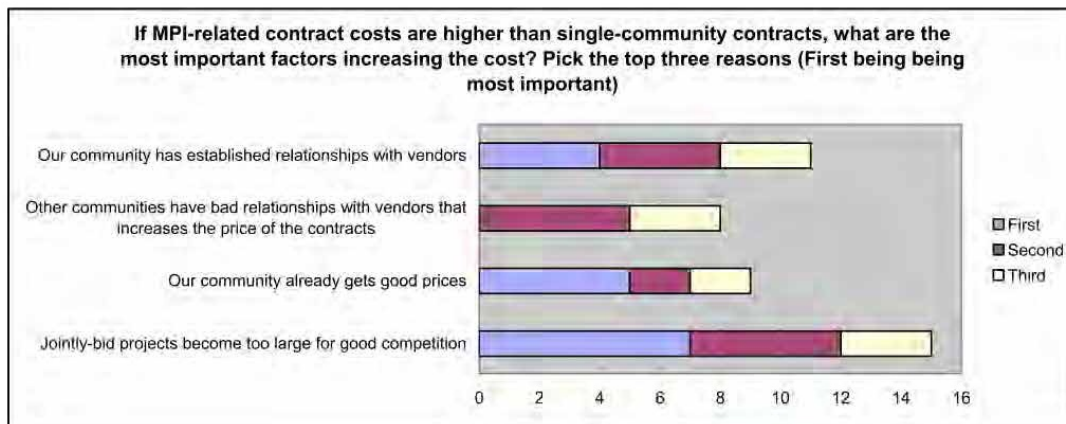


Figure 20: Why Are MPI Costs Higher?

Why Participate in the MPI?

Communities ranked the top three reasons their organization became involved with the MPI. Communities do not officially join the MPI but rather can choose freely to participate in contracts or not. Previous experience with joint contracting was rated as the most important reason for choosing to participate in the MPI (see Fig. 21). It is rated as more important than the financial crisis. This is significant because this speaks to the suggestion in intergovernmental relations literature that an organization's likelihood to participate in ILAs or joint service contracts increases as the number of agreements increase. The recession is also highly ranked as a reason to participate in the MPI, supporting Westley and Vredenburg's [13] theory that fiscal and environmental stress increase an organization's likelihood to work intergovernmentally to find solutions to the issue. Professional associations encouraging shared service delivery was the most likely second top reason for joining the MPI.

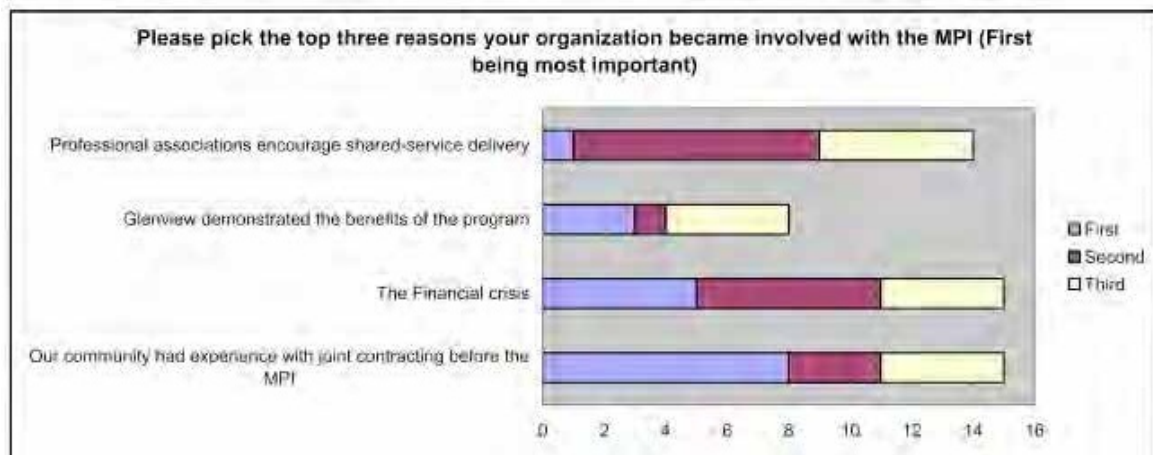


Figure 21: Reasons for Joining MPI

Mayoral, Council, and Manager Support

MPI administrators assessed to what extent mayoral, manager, and council support was essential for their community joining the MPI. Responses for mayoral and council support are similarly in agreement for both forms of government when accounting for the higher number of council-manager governments in the MPI area (Fig. 22). However, form of government has a large impact on the importance of the manager support in partnering with the MPI. Council-Manager governments are more than twice as likely to believe that manager support was essential compared to Mayor-Council governments.

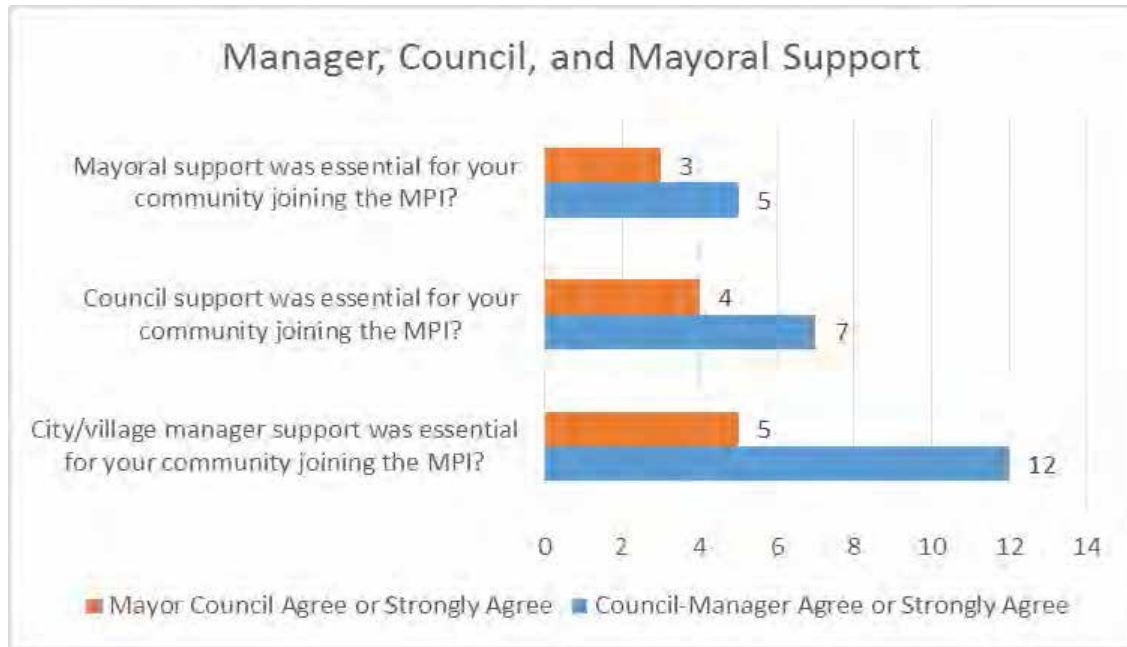


Figure 22: Mayoral, Council, and Manager Support

Distribution of MPI-Related Duties

The question: “My community would be comfortable taking on more responsibility of MPI contract administration,” is intended to find how MPI responsibilities can be distributed among the communities. Though much of the initial contract work was done by Glenview staff, 11 of the 15 contracts with the MPI in 2013 are being led by communities other than Glenview (Fig. 23). There is a clear break between small and medium communities concerning their comfort level in taking on more MPI-related responsibilities. Among small communities, the level of interest is negative, with only one community in agreement and two disagreeing. Medium-and-large-sized communities are more comfortable taking on more responsibilities. This survey was sent after 2013 MPI contract work had already been more evenly distributed to eleven communities, so this question is assessing whether communities would be comfortable taking on even more of the workload.

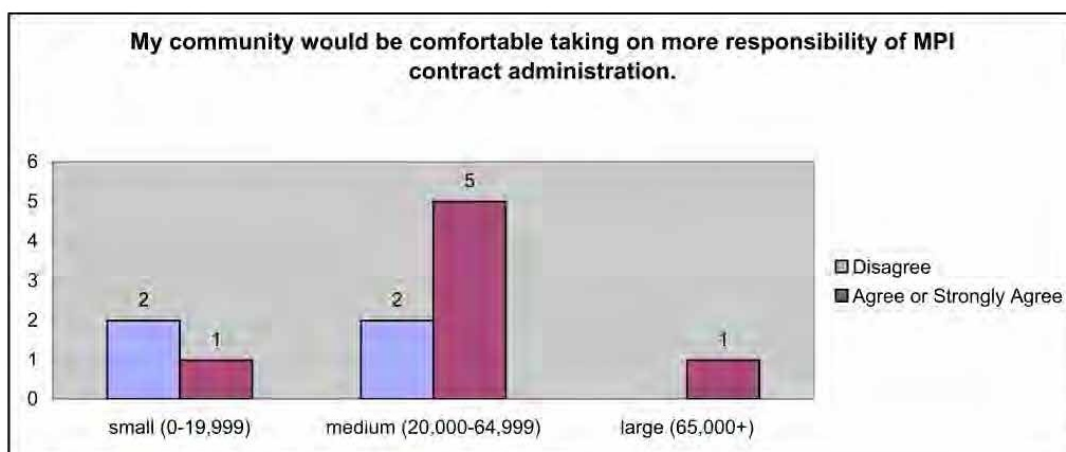


Figure 23: Contract Administration Duties

While small communities responding more negatively to taking on more MPI-related responsibilities compared to large and medium-sized communities, small communities respond comparatively more favorably when asked whether they would pay a fee MPI for services (Fig. 24). Medium-sized communities lean toward disagreement, along with a single larger community. One MPI-community public works director expressed the irony that small communities often have the least to offer in terms of money or resources for joint contracting, but they often have the most to gain in economies of scale. However, in this example, smaller communities are more

willing to contribute a fee for MPI services, while medium-to-large-sized communities are less willing to contribute staff resources, as identified in the previous question about MPI contract administration assistance.

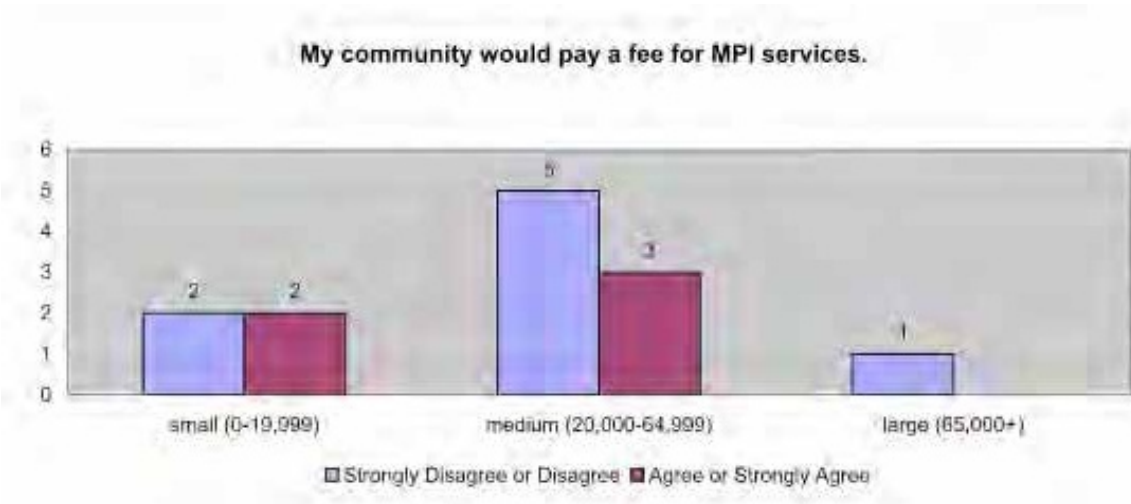


Figure 24: MPI Fee

Fee Amount

When asked what kind of fee they would be willing to pay, communities that generally responded as neutral in the previous question now indicated that no fee was acceptable (Fig. 25). Of the communities that responded positively, three stated they would pay a half percent fee, three responded that they would pay a one percent fee, and one stated it would consider paying a three percent fee.

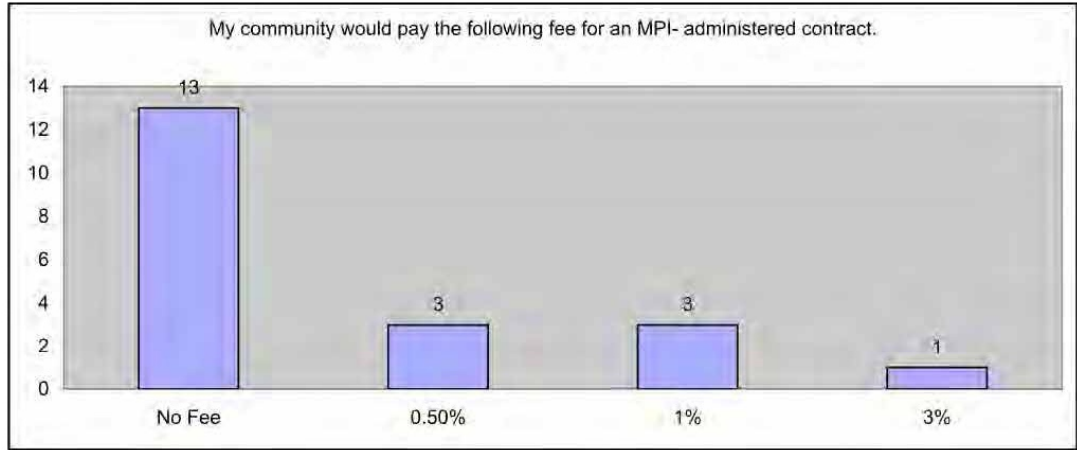


Figure 25: Fee Amount

Central Organization

- Communities were asked to consider the following questions:
- *An initiative like the MPI needs a central organization to champion and sustain the initiative.*
 - *The village of Glenview is the central organization of the MPI.*
 - *The MPI would not have come into existence if not for the involvement of a central organization in its creation.*

These questions attempt to determine the extent to which Glenview was essential to the creation of the MPI as well as some of the dynamics that led to the MPI's creation. There is general agreement that something like the MPI needs a central organization, that Glenview is that central organization, and that if not for that central organization (Glenview), the MPI would not have come into existence (Fig. 26). The most conflicted view is whether the MPI would not have come into existence if not for the central organization. This level of conflict leads the author to consider whether communities believe there could have been other formations of a mixed-contracting pool in the area. However, within the MPI, Glenview is considered the central organization, and MPI members believe an initiative like the MPI needs a central organization to champion and sustain the initiative.

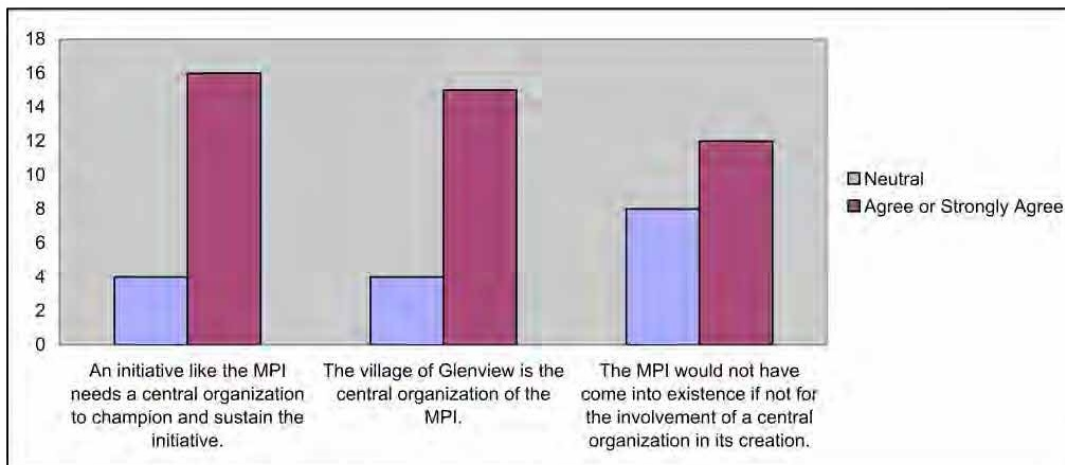


Figure 26: Central Organization

The Importance of Voluntary Participation

Communities feel very favorable about the voluntary nature of MPI participation (Fig. 27). Many communities appreciate being able to pick which services to participate in based on their preferences, and the MPI contract's ability to realize cost savings for them. Some larger community administrators say that as long as the contract is at least the same price that they otherwise would have paid going into the contract as a single community, they choose to purchase with the MPI in order to benefit other communities, who may benefit from the increased economies of scale.

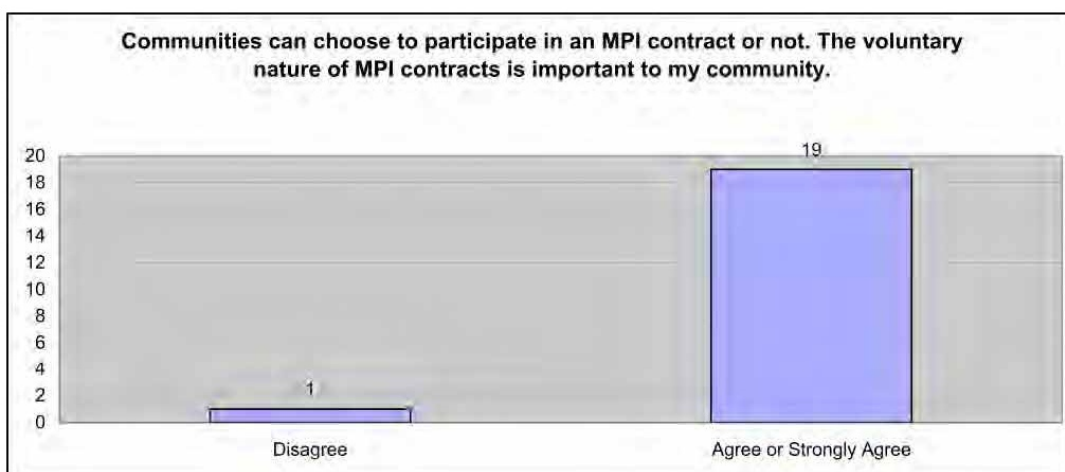


Figure 27: Voluntary Nature

Learning Organization

In order to determine how communities feel about the MPI's ability to evolve, communities were asked whether the MPI demonstrates the qualities of a learning organization. Learning organizations adapt themselves by constantly measuring results and responding to feedback. Fig. 28 presents the response being generally positive, with 13 communities agreeing or strongly agreeing that the MPI demonstrates qualities of a learning organization. The MPI continues to adapt the contracting size and scope of its services in order to create the ideal cost savings for communities.

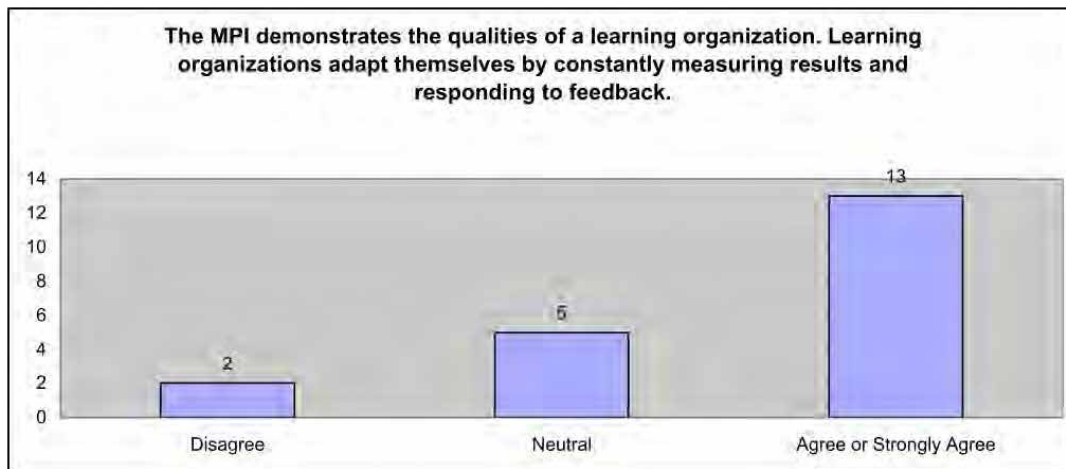


Figure 28: Learning Organization

Research Questions Answered

What were the intergovernmental dynamics that lead to the MPI?

The structure of the MPI is a response to the intergovernmental dynamics in the northern Illinois area. Previous experience with pooled purchasing for contractor-provided road services primed communities to be more comfortable with the practice. Communities in the area are also closely knit by the connections formed through membership of various overlapping councils of government, planning agencies, purchasing groups, and informal partnerships.

How has the MPI adapted since its inception?

-Hypothesis 2- MPI service contract sizes will change the number and configuration of communities involved in each service in an attempt to find the ideal size for cost savings.

Since its inception in 2011, the MPI has changed dramatically in scope and size. Beginning with 20 communities and nine services in 2011, the MPI offers 23 services to 29 communities. Group sizes for individual services have also adapted during the three years. Some services have increased the number of communities participating in a single contract each year, such as crack sealing, while others have decreased the average number of communities per individual contract, such as concrete work. Lead contract administrators from each community work together each year to find the right size for each contract, attempting to strike a balance between size and specifications. Some services benefit from smaller contract sizes in order to decrease contractor mobilization costs. Other services benefit from dividing groups into fiscal year calendar, county, and funding source. Communities in the MPI agree that the MPI exhibits characteristics of a learning organization, adapting each year in order to increase efficiency and cost savings for communities.

Are there lessons to be learned from the MPI's experience?

The MPI is primarily the creation of one community, the Village of Glenview. Having a community at the center of a pooled purchasing group is relatively unique in governmental pooled purchasing. More commonly, pooled purchasing programs are managed through a Council of Government, county, state, or regional planning organization. These umbrella organizations are perceived as a more natural fit for region-wide collaboration because the organizations' perspectives are generally regional, and the benefits from a pooled purchasing program are generally experienced region-wide. However, the MPI was created and largely maintained (especially for the first two years) by a single community. Glenview undertook a majority of the contract management work in 2011 and 2013 even though the benefits of pooled purchasing were shared region wide. This brings up issues of the equitable sharing of benefits and responsibility in intergovernmental relations, and communities have responded by taking on more contract administration duties each successive year of the MPI.

With many models for pooled purchasing in local government, communities should consider the pros and cons of a municipality-run program and compare them to alternative models. The MPI is a product of a single community that determined it had the capacity to create the MPI and did not want to wait for another organization to take on the task. While a municipality may have more administrative capacity for complicated engineering-related contract administration, a COG may be more regionally focused and less apt to leave peripheral communities out of discussions. Private contractors are at the center of the job-order contracting pooled purchasing

model, but public organizations must consider the conflict between public and private values when contracting exclusively with private organizations for pooled purchasing.

Discussion

The variety of intergovernmental joint purchasing formulations in the Northern Illinois area is considerable. The pooled purchasing collectives can be led by a municipality, a county, a COG, a private organization (the case of a Job-Order Contractor), the state, or the federal government. Looking at Agranoff and McGuire's [14] four models of intergovernmental relations (top-down, donor-recipient, jurisdiction-based, and network), each form of pooled purchasing has characteristics of the models. With increased intergovernmental cooperation, horizontal links in the metaphorical picket-fence of IGR are emphasized, sometimes weakening the hold of the top-down model. As local governments increasingly act together to solve problems (temporary or long-term), relationships that used to be dominated by a central player, typically the state or federal government, will change from top-down to the more shared relationships characterized by the donor-recipient, jurisdiction-based, and network models.

However, within the local government networks, there are still inequalities of power and influence. When a community, such as Glenview, or a group of closely-linked and populous communities spearhead an effort, it is not likely that the interactions will be characterized in a way "wherein no one actor has the power to determine the strategies of other actors" [14, 676]. Some of the smaller or geographically-disparate communities involved in the MPI have expressed their concerns that they feel their place in the community of communities is secondary, either due to their geographic location or relative size. However, it can be their size or staffing levels that determine their ability to contribute to the MPI process by taking on lead roles in the contracts, or in the case of location, a community in the periphery of the MPI area may negatively influence contractor prices due to the high cost of contractor mobilization.

One of the impacts of the MPI in the region, not just within the MPI community area but the Northern Illinois area as a whole (and arguably the nation), has been to foster discussion, debate, and in some instances, variations of the MPI. A western Cook County group of communities, including Western Springs and Riverside have based their initiative heavily on the MPI, albeit without one central community doing a majority of the work in the first year. The Western Cook County initiative is possible in part because the MPI has provided a useful model, with publicly-available legal documents with their jointly-bid boilerplate, cost-savings estimates, and technical advice to those communities with questions about the mixed-purchasing process. A similar effort is beginning in DuPage County, with a group of communities forming a team to evaluate joint purchasing for commonly-outsourced services. The services are the same as the MPI in its early years, and common bid specification ideas are being borrowed from the MPI's agreements. Administrators in western Cook County have likened the MPI's impact on their process to not needing to reinvent the wheel. MPI documents already show a framework on which to base a mixed-purchasing program.

Recommendations

Based on findings and discussion of this paper, a checklist for creating a program similar to the MPI would include the following:

1. Examine your community and region's history with pooled purchasing - Begin with an examination of previous joint-purchasing experiences. Ask which kind of organization was in control: the state, a COG, the county, a municipality, and consider the impacts that each central-party category has had on the performance of the joint-purchasing program. Many communities in the MPI participated in joint purchasing before the MPI (this reason was the top choice for why communities participated in the MPI). Glenview administrators preferred to create a municipality-centric program because they perceived that municipalities typically have more administrative capacity than COGs to take on the arduous task of finding compromise on bid specifications. However, with the help of municipalities in its area, the Lake County Municipal League (LCML) was able to effectively jointly purchase for three road-related services in 2013. LCML has a full-time staff of one, but if the joint-purchasing program should expand, the director has said she would consider bringing on staff to help administer the program. It is also interesting to note that in 2013, the MPI considered bidding thermoplastic road-striping services through the Northwest Municipal Conference's Suburban Purchasing Cooperative. This option did not come to pass, but it demonstrates an interesting possibility for purchasing cooperatives to work collaboratively to offer the best prices for communities.

Each configuration has benefits and potential drawbacks. There are also tradeoffs involved. While a COG may have less capacity and staff typically, COGs are by nature more regionally focused. While a central municipality may focus more locally, they exist to serve their residents. However, a question raised in public administration research is whether local governments exist only to serve *their* residents. There are many questions as to what obligations local governments have to other local governments and their residents, regionally, nationally,

and internationally. Different communities have different attitudes. Thurmaier and Wood [15, 595] write of the sentiment among communities in the Kansas City area, concerning interlocal agreements and joint purchasing (ILA):

Several of the largest jurisdictions view the system as a way to help smaller neighboring jurisdictions save costs by letting them piggyback on their large contracts. This speaks to a metropolitan culture of cooperation, repeatedly expressed by a wide range of actors across the jurisdictions.

2. Consider the impetus - The second-most important reason communities chose to partner with the MPI was the financial crisis. As Westley and Vredenburg [13] suggest, communities are more likely to collaborate when they are in fiscal distress. In tumultuous situations, entrepreneurial administrators look outside of their organization for solutions to problems [4]. This is to suggest that the MPI's creation may be described, at least partly, as a response to the financial crisis. It would be challenging to determine to what extent a similar program would have come into being if not for the financial crisis, but the answer to "Why did my community choose to partner with the MPI" was *firstly* "previous experience" and *secondly* "the financial crisis." It is possible to consider that a program such as the MPI would have come into being regardless of the crisis. "Professional associations encouraging pooled purchasing" is also the most-likely second choice for partnering with the MPI. As has been discussed, the financial crisis is only one of many factors impacting Northern Illinois communities' fiscal condition, so one cannot discount the changing nature of tax sources and intergovernmental aid (or lack thereof) when considering all the motivations for partnering. Hendrick [4] also notes that communities are most likely to collaborate at the stretching phase of fiscal distress, not when they are near the breaking point of financial collapse. Glenview was in self-described moderate fiscal shape coming out of the recession. Glenview administrators looked for communities similarly stretching their dollars but not on the verge of financial collapse for initial MPI partners.

3. Consider the size - Each year, the MPI changes the size and shape of its contracts in an attempt to find the ideal configuration for each service. Some services have increased in the number of communities participating since 2011, others have decreased, while others still have split into additional contracts based on county, funding source, or work specifications. At the end of each MPI contract in the fall, communities fill out surveys asking for general and specific feedback for each service provided, allowing communities also to offer suggestion for future services to be bid through the MPI or reasons they chose not to participate in an MPI contract.

4. Start with a survey - The MPI sent out a survey to area communities in order to determine which services were commonly outsourced, which services had interest for joint bidding, and how often were these services conducted (annually, biennially or infrequently). This is an important first step because it allows the program to begin with the most commonly-agreed-upon programs. Crack sealing is a common first program. Concrete sidewalk was the first project of the West Cook County communities, and relative agreement was achieved in under three hours. There are few examples of pooled-purchasing programs that contract for services as complicated as road resurfacing or sewer-lining as the MPI does, but these services have contributed the most to the savings as reported by Glenview and the communities with the MPI. These complicated road-construction-related services are more likely to be attempted for pooled purchasing by municipal staff as opposed to regional COGs, only because municipalities are arguably more likely to have various trained engineering staff on hand capable of handling all the competing specifications and bringing about compromise with area public works staff. However, COG staff could facilitate pooled purchasing programs with local municipal engineers, as LCML did for its 2013 services.

Services with less deviations from community to community (sidewalk concrete, crack sealing) are easier to monitor for cost savings and service quality, improving accountability. More complicated services with higher variability, make cost comparisons more difficult, as well as determining accountability more nuanced. As jointly-purchased projects get more complicated, the level of trust necessary for participation also must rise. As Brown (2008, 382) found, in examining the dynamics of government-to-government contracting:

Contracting governments perceive other governments--perhaps because their shared governance structures diminish the risk of opportunism--as inherently trustworthy. Clearly other factors drive government-to-government contracting -- notably economies of scale and proximity -- but faith in the good intentions of other governments, and the relative ease to confirm those intentions through monitoring and oversight, appears to make other governments preferred vendors in high-risk areas.

While fellow governments may not be the vendors in mixed purchasing, when government entities come together to purchase services jointly, especially in high-complexity services, they may be able to diminish the risk of vendor opportunism by pooling their mutual experience as well as their influence.

5. Report Intergovernmental Activities - Wikstrom and Stephens [9, 273] suggest all communities should have an individual within their organization who is aware of and involved in all intergovernmental relations and that all

the intergovernmental activities should be shared with the regional planning authority. If communities are considering ILAs, they would benefit from having as complete a catalogue of regional IGR efforts as possible. There is much sharing of joint-purchasing knowledge among Northern Illinois communities, but much of it is informal and not centralized. For instance, the MPI does not have a publicly-available website for those interested in examining boilerplate or bid specifications, but Glenview staff have been obliging to organizations that contact them for that purpose, and the MPI does have a shared DropBox account for all presentations, contracts, and bid specifications.

6. Equity - Communities should be aware of the problems related to designating a central organization in an intergovernmental program. When duties are not evenly distributed (as they were in the early years of the MPI), there are sincere concerns about equity and the fair distribution of duties and benefits. If larger communities bear the burden of contract administration, as well as diminished returns relative to smaller communities, that disparity can engender negative relations among communities or program failure. Equity must be considered, as “the shared norms of reciprocity and equity are an essential ingredient in collaborative efforts as participating individuals or organizations strive to overcome collective action problems” [17, pg. 28]. Organizations facing unequal contributions from participating communities should consider either dividing the duties (as is now the case with the MPI, with 12 communities leading the various MPI bids) or charging a fee for communities unable to do so. Survey results suggest that smaller communities were more likely to consider paying a fee for the services while they are also less inclined to contribute more to contract administration, as evidenced in the related question. A majority of communities either disagreed or strongly disagreed to a fee.

7. Cost Savings Calculations- If the MPI is to be touted as a model for intergovernmental joint contracting (as ICMA has done by awarding it the Community Partnership Award Winner for 2012), communities individually and as a whole should thoroughly assess cost savings, not related solely to unit prices but also contract administration costs. As practiced by the Kansas City joint purchasing arm of the regional COG, the KCRPC, fees for the joint purchasing program are justified by calculating the average cost of bid advertisement, issuing purchase orders, and other aspects of the procurement process that are largely avoided by joint purchasing. If MPI communities were interested in monitoring their administrative cost savings, they should consider doing the KCRPC’s analysis. As recommended by Ammons [18], activity-based costing may allow communities individually to determine how much staff time goes into bid creation, advertisement, and awarding. However, calculating the cost of these activities is not enough to determine cost savings because with staff-time efficiencies, the organization will not realize actual cost savings unless positions are eliminated or freed-up time is used for more value-added activities. Also, when communities go directly from in-house service provision to MPI-related service provision, there should be some form of calculation to determine the significant amount of administrative time and effort avoided by tapping into pooled experience of the MPI communities. By calculating these administrative cost savings, administrators may be able to make stronger arguments for participating with the MPI even if unit costs are similar or only slightly lower.

Conclusion

The procurement data analysis in this paper was not able to definitively determine if the MPI has saved MPI-area communities money per unit purchased. Unless each community bid each service and compares prices between the MPI and their own each year, the exact savings or lack thereof will only be only an estimate. MPI prices were generally lower than the average non-MPI price besides one year of cold patch. Prices for commodities such as bulk concrete, fuel, and asphalt rose during the years of 2008-2013 besides employment costs beginning and ending the period nearly even. Consider that these were only three services of nearly 30 offered by the MPI. According to Glenview estimates, the MPI and all of its contracts have saved the participating communities, in unit price decreases alone, at close to \$1 million between 2010-2013. However, the value of intergovernmental mixed contracting is not necessarily the reductions in unit prices or reduced staff duties. It is important to consider the increasing diversity of the ties that link communities and regions together and the shared sense of responsibility inherent in thinking of solutions outside of one’s borders. New ideas and innovations occur at the edges of jurisdictions, job duties, and situations [19]. Agranoff [20, pg. 21] states that “most knowledge creation and learning occurs when people are reacting to others’ thinking. Communities of problem solvers are thus important parts of contemporary knowledge program architectures.”

In this way, the MPI and other mixed purchasing programs are not only a product of previous interactions, they are producers of future ideas and configurations of service delivery. This is important because among the top 50 most populous metropolitan regions, the Chicago Metropolitan region has the highest density of individual units of local government. With the high density of local governments comes fragmentation as well as innovation. Communities are forced to compete, cooperate, and collaborate in an attempt to maximize ever-changing resources. The MPI is an example of one region’s attempt to maximize resources; while it will continue to face many challenges, it has been identified as one of many models for intergovernmental interaction by national professional associations and peer communities. It is one defined by a lack of formal membership, fees, and spelled-out duties.

Calculating cost savings associated with the program is challenging, but if the MPI is to be adopted as a model by other communities, as it already has been in the western Chicago suburbs, a rigorous attempt should be made to determine not only the unit price savings but any administrative costs savings and how any savings is being utilized.

Appendix A - Alternative pooled purchasing models

Naperville Job-Order Contracting

Oriented toward facility-related services, the City of Naperville approved its Job Order Contracting (JOC) contract June 7, 2011 for a two-year term (the contract was extended another two years on May 7, 2013). At the time of its approval with city council, Chief Procurement Officer Mike Bevis wrote in its related agenda item: "This Contract is designed to be used as a joint purchase agreement between the City, Naperville Community Unit School District 203, Indian Prairie School District 204 and the Naperville Park District as well as other agencies located within the Six County Area and State of Illinois." It has since expanded to dozens of communities in the whole Chicago-area, including MPI-area communities. To explain how a JOC system works, Kashiwagi and Sharmani [21, pg. 189] writes that "a JOC system is based on a competitively bid, indefinite delivery - indefinite quantity (IDIQ) contract between a facility owner and a construction general contractor. The contract predefines basic construction units of work in a unit price book (UPB). This book defines a unit price to be paid for each of the construction line items."

Illinois Purchasing Bulletin

Managed by the Illinois Department of Central Management Services, the Illinois Procurement Bulletin (IPB) lists contracting opportunities for local governments with the state in a number of areas including Equipment/Commodities, IT/Telecom, Facilities and General Services [22]. The IPB collectively oversees the procurement of up to \$15 billion of goods and services per year (State of Illinois Office of Central Management Services Website 2013). Made available to governments in Illinois by the passage of the Governmental Joint Purchasing Act (30 ILCS 525/), the IPB manages the entire development, bid and contracting process for these joint purchasing contracts [23]. For its use of knowledge management in the administration of the program, in 2005 the Bureau of Strategic Sourcing and Procurement arm of the State of Illinois Central Management Services Agency was recognized as one of the three best national public agencies by the E-Government Institute [24, pg. 71]. Participation in the program is voluntary and allows local governments to take advantage of one form of cooperative purchasing [25, pg. 14]. There is no cost to participate in the service, and just as with the NJPA, it does not offer jointly-bid services but rather bulk goods.

Kansas City Regional Purchasing Cooperative (KCRPC)

The Mid-America Regional Council (MARC), serving the Kansas City metropolitan and suburban area has operated a joint purchasing pool called the Kansas City Regional Purchasing Cooperative (KCRPC) since 2003. Services include bulk purchases such as document preservation, temporary staffing of RN/LPN's, auction services for surplus disposal, trash disposal, surveillance cameras, and storm-warning sirens. Commodities for bulk purchase include office paper, petroleum products, high efficiency street lights, and snow and ice control materials. The MARC/KCRPC program coordinator said that asphalt work was considered as a service to offer, but the program did not go forward because area public works directors felt the specifications would vary too greatly from community to community to effectively bid together. However, the KCRPC partnered with the Houston-Galveston Area Council (H-GAC), a Texas-based regional council of government, beginning a few years ago to extend contracts such as fire apparatus, ambulances, grounds maintenance equipment, cured-in-place pipe and water meters from the Texas COG to KCRPC members. Other contracts available include lease-financing, temporary staffing and citizen involvement outreach. It is interesting to note that COGs also function in horizontal networks with other COGs throughout the country.

KCRPC tracks its communities' savings by separating savings into administrative, advertising, and actual reported cost savings per unit price. The KCRPC established criteria for administrative savings based on whether an agency has a centralized or decentralized procurement department, and if they are large (such as Kansas City MO), medium (cities with centralized procurement) or small agencies (de-centralized). Since KCRPC pays for the advertising costs, they include this in their savings reports for communities. KCRPC staff estimate, based on figures provided by participating organizations and common practices, that it would cost an agency \$2,500 to issue a purchase order. KCRPC uses these savings as justification for an administrative fee they charge for the service of leading the joint-purchasing effort and administrative costs to maintain the contracts.

References

[1] M. E. Warner and A. Hefetz. (2008): Managing Markets for Public Service: The Role of Mixed Public-Private Delivery of City Services pp 155-166. *Public Administration Review* 68, no. 1.

- [2] Northern Illinois University Alternative Service Delivery Symposium. Naperville, Illinois. November 9, 2012.
- [3] Village of Glenview Staff. Municipal Partnering Initiative 'No Municipality is an Island. Presentation at the American Public Works Association 2013 Congress, Chicago, Illinois, August 28, 2013.
- [4] R.M. Hendrick. (2011): Managing the Fiscal Metropolis: The Financial Policies, Practices, and Health of Suburban Municipalities. Georgetown University Press, Washington D.C.
- [5] Staff. (2011): IDOT Contract Processing. Illinois Department of Transportation. <http://www.dot.state.il.us/desenv/bde%20manual/bde/pdf/chapter%2066%20contract%20processing.pdf>. Accessed September 5, 2013.
- [6] U.S. Census Bureau. (2010): Census. <http://www.census.gov/2010census/>. Accessed July 10, 2013.
- [7] Chicago Metropolitan Planning Commission Staff. Shifts in Population and Household Income in Metropolitan Chicago. http://www.cmap.illinois.gov/ca/moving-forward/efficientgovernance-in-detail/asset_publisher/Q4En/blog/shifts-in-population-andhousehold-income-in-metropolitan-chicago/276584isMovingForward=1. CMAP. Accessed September 10, 2013.
- [8] D. Kahneman, and A. Tversky. (1979): Prospect Theory: An Analysis of Decision Under Risk pp 263-291. *Econometrica: Journal of the Econometric Society*.
- [9] G.R. Stephens, and N. Wikstrom. (2007): American Intergovernmental Relations: A Fragmented Federal Polity. Oxford University Press, New York.
- [10] U.S. Energy Information Administration. Weekly Retail Gasoline and Diesel Prices. http://www.eia.gov/dnav/pet/pet_pri_gnd_dcus_r20_m.htm. Accessed September 15, 2013.
- [11] Illinois Department of Labor. Illinois Prevailing Wage Rates. <http://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/prevailing-wage-rates.aspx>. Accessed September 20, 2013.
- [12] Illinois Department of Transportation. Price Indices. <http://www.dot.state.il.us/desenv/asphaltpi.html>. Accessed September 15, 2013.
- [13] F. Westley and H. Vredenburg. (1991): Strategic Bridging: The Collaboration Between Environmentalists and Business in the Marketing of Green Products pp 65-90. *The Journal of Applied Behavioral Science* 27, no. 1.
- [14] R. Agranoff and M. McGuire. (2001): American Federalism and the Search for Models of Management pp 671-681. *Public Administration Review* 61, no. 6.
- [15] K. Thurmaier, and C. Wood. (2002): Interlocal Agreements as Overlapping Social Networks: Picket-Fence Regionalism in Metropolitan Kansas City pp 585-598. *Public Administration Review* 62, no. 5.
- [16] Y. C. Chen and K. Thurmaier. (2009): Interlocal Agreements as Collaborations An Empirical Investigation of Impetuses, Norms, and Success pp 536-552. *The American Review of Public Administration* 39, no. 5.
- [17] E. Ostrom. (1998): A behavioral approach to the rational choice theory of collective action pp 1-22. *American Political Science Review*, 92.
- [18] D.N. Ammons. (2008): Tools for Decision Making: A Practical Guide for Local Government. SAGE, Washington D.C.
- [19] S. Johnson. (2011): The Innovator's Cookbook: Essentials for Inventing What Is Next. Penguin.
- [20] R. Agranoff. (2005): Managing Collaborative Performance: Changing the Boundaries of the State pp 18-45. *Public Performance & Management Review* 29, no. 1.
- [21] D.T. Kashiwagi and Z.A. Sharmani. (1999): Development of the Job Order Contracting (JOC) Process for the 21st Century pp 187-195. *Journal of Construction Education* 4, no. 2.

[22] Procurement. <http://www2.illinois.gov/cms/business/procurement/Pages/default.aspx>. Illinois Department of Central Management Services. Accessed September 12, 2013.

[23] Illinois. Office of Secretary of State. Constitution of the State of Illinois. Secretary of State, 1914.

[24] D.E. McNabb. (2006): Knowledge Management in the Public Sector: A Blueprint for Innovation in Government. ME Sharpe.

[25] S. McClure. (1990): Joint Purchasing with the State pp 14-16. Illinois Municipal Review, July.

Acknowledgements

Thank you to Dr. Curtis Thurmaier, my faculty research adviser. Also, thank you to the Village of Glenview Staff for their constant assistance.

Procure to Pay – The Introduction of an e-procurement system to the Republic of Kenya

by Mathias Muehle¹⁾ and Jerome Ochieng²⁾ (for oral or poster presentation)

I. Introduction

a) Legal background

The Public procurement system in Kenya has undergone significant developments in the last decades. Over the years the system has evolved from Treasury guidelines and circulars, the Supplies Manual of 1978 to the current standardized system introduced by the Public Procurement and Disposal Act (PPDA) of 2005, and the Procurement Regulations of 2006 that created Public Procurement Oversight Authority (PPOA). Most recently the Public Procurement system has also a foundation in the new Constitution of Kenya from August 2010, which is devoted to the principles of Good Financial Governance.

The Public Procurement reform is not only required by provisions of the new Constitution but also part of the overall public sector reforms and transformation agenda as highlighted in Vision 2030 of the Kenyan Government. As a foundation for national transformation, Kenya seeks to build a public service that is efficient, citizen focused and results-oriented.

Section 227 of the Constitution of Kenya provides for the establishment of a system for procurement of goods and services that is fair, equitable, transparent, competitive and cost effective. It also envisages an Act of Parliament that will prescribe a framework within which policies relating to procurement and asset disposal will be implemented.

b) Integrated Financial Management and Information System (IFMIS)

In order to implement the principles of Good Financial Governance and in regard to public procurement the objectives of Section 227 of the Constitution the National

1) Mathias Muehle is Programme Leader of the GIZ "Support to Public Finance Reforms (SPFR) Programme at the National Treasury of Kenya

2) Jerome Ochieng is Acting Director of the IFMIS department of the National Treasury of Kenya

Treasury launched the re-engineering of the Integrated Financial Management and Information System in 2012. Part of the IFMIS re-engineering strategy is to introduce a Procure-to-Pay system which aims to develop an efficient and streamlined procurement and payment system by fully automating the procurement and payment process to increase control and visibility over the entire life-cycle of a procurement transaction, from procurement planning to payment.

c) Procure-to-Pay (P2P)

The objective of the P2P system is to automate the end to end procurement process that starts at the development of procurement plans to actual procurement of goods and services to payment of suppliers for the goods delivered or services performed for both low value and high value items. The envisioned P2P system also aims to implement effective ways of procuring to ensure compliance with legislation and regulations.

II. IFMIS e-Procurement

IFMIS Re-engineering has successfully launched a pilot Procure to Pay (P2P) Purchase Order (PO) approval hierarchy programme in the National Treasury. The four approval stages currently conducted through the IFMIS system include:

- Capturing the Local Purchase Order (LPO) by a Supply Chain Management Officer (SCMO)
- Verification by Head Supply Chain Management Officer (HSCMO)
- Approval by Authority to Incur Expenditure (AIE) Holder
- Final approval by the Chief Finance Officer (CFO)

This automated approval hierarchy will now be rolled out to Ministries, Departments, Agencies (MDAs) and Counties following its successful piloting at the National Treasury in the second half of 2013. The roll out to MDAs and Counties will take place in the second half of the current financial year (2013-2014). This is in line with the National Treasury's plan to have a fully automated P2P process in all MDAs and Counties.

The approval hierarchy is a major milestone towards the full implementation of the P2P system. It contains aspects of the approval stages from requisition, contract award and issuance of LPOs and Local Service Order (LSOs). Purchase Orders (PO) and Approval Processes (AP) normally take a longer time when conducted manually. However, it is now expected to take at most 15 minutes electronically once the P2P approval hierarchy is implemented.

The implementation of the P2P system development started in July 2012. This development is a collaborative effort between IFMIS Department and the Public Procurement Directorate (PPD) of the National Treasury and the Public Procurement Oversight Authority (PPOA). IFMIS Re-engineering recently concluded the second User Acceptance Testing (UAT) on the following procurement modules:

- Procurement Planning
- Requisition Management
- Quotation Management
- Tender Management
- Contract Management
- Purchase Order Management
- Receipt Management
- Invoice and Payment management.

IFMIS Re-engineering also fully tested procurement processes under the Quotation Management Module, namely:

- Preparation of the 7 Procurement Methods
- Invitation of Suppliers
- Approval of Sourcing Documents
- Capture Surrogate Response- Technical
- Preliminary Evaluation of quote
- Technical Evaluation of quote
- Capture Surrogate- Financial response
- Re-capture Surrogate- Financial response
- Resolution Surrogate- Financial response
- Approval, Award and Amend of Quote process

The IFMIS Department has also conducted a UAT on internal requisition of various processes to ensure they work properly. These include the creation and approval of internal requisitions. A Training of Trainers (TOT) on these procurement modules was also done to ensure adequate staff support for end users.

The Government of Kenya has adopted the United Nations Standard Product and Services Classification (UNSPSC) for all items to be used for Procurement of goods and services. UNSPSC is a system of classification for commodities cutting across all private and public sectors having a single version of cataloging for all known items to be used. Items defined on the system become a pivotal component to facilitate the procurement

process. Items which will be captured on the system then will follow the naming convention proposed by UNSPSC standards.

A training session on the UNSPSC targeting procurement officers was conducted in November 2013 to enhance awareness of this classification adoption by government and ease of understanding the benefits of UNSPSC.

III. Full activation and roll out of existing and additional modules and functionalities

The following functionalities within the procurement life cycle have been identified for activation and/or roll out within the next five (5) years:

a) Procurement Planning

A procurement plan is used to provide information about the purchase of goods and services, how vendors will be chosen, what type of contract(s) will be used, how vendors will be managed and who will be involved at each stage of the process. This document will be approved by appropriate individuals before the actual procurement process begins. Developing this plan in the system will ensure that all procuring entities within government buy the right products and or services at the right prices. The plan will help procuring entities to;

- Define all procurement requirements;
- Identify all of the items to be procured in any financial period;
- Create a sound financial justification for procuring;
- Identify all the tasks involved in procuring products and schedule those tasks by allocating timeframes and resources; and
- Create a robust project procurement process for the Government.

The plan will ensure that all procurement activities are planned for and are within the approved budget of the procuring entity. It will also help MDAs and Counties to forecast their needs for goods and services for the year and determine the appropriate procurement method depending on the selection criteria.

b) Supplier Management

Supplier management entails the process of registering suppliers, the goods and services they offer, qualification of the suppliers and managing this information throughout the procurement cycle. The envisioned supplier management module will be an internet based portal (i-supplier management) that will allow the following;

- Self-service registration of suppliers by departments (capturing of supplier information);
- Categorization of suppliers based on goods and services offered;
- Online supplier approvals;
- Online generation of statistics reports on suppliers like quotations submitted and awarded LPOs/LSOs and their status;
- Self-service supplier details change update; and
- Online collaboration on supplier inquiries.

c) Requisition Management

This process entails creation of purchase requisitions, identification of goods and services to be procured based on the procurement plan created by the users in the departments and approval of these requisitions by the appropriate officers. The envisioned process will make requisitions more efficient and enforce control by ensuring requisitions are done based on the procurement plan. This will be achieved by allowing self-service requisitions, automated approvals and provision of a web-based shopping system that will allow Government employees to create, manage and track their own orders while the procurement department retains central control.

d) Quotation Management

The Quotation management module will enable efficient management of vendor responses to Request for Quotations (RFQs). This includes uploading and management of quotations, bid and tender documents and the tracking of the selection process in the system.

This module will require development and implementation of a Document Management System (DMS) and interfacing the DMS with the Procure to Pay system. The DMS will facilitate the scanning of paper forms, imaging and upload documents leading to effective content and document management. This will provide a solution to effectively track hard copies of documents including include tenders/bids, requests for proposals (RFPs) as well as vendor contracts and store them in electronic format. The DMS will also ensure proper controls are in place and that the Government exposure to risks associated with data entry and lost documents is minimized. In addition, the process will reduce the contracting period and ensure measuring of compliance.

e) Purchase Order (PO) Management

PO management will involve automating the process of raising Purchase Orders after supplier selection has been done and the approval of these purchase orders. After the

LPOs have been approved, the supplier will be notified automatically through the i-supplier portal. The envisioned process will free procurement officers from raising POs and taking them round for approvals to focus on supplier relations and strategic sourcing.

f) Receipt Management

This process will automate all activities involved in receiving goods provided by the supplier, from the delivery and receipt of goods, inspection and acceptance process to recording the goods receipt in the system. It also supports the return of delivered goods to the supplier if they fail to meet the inspection criteria and specifications. The envisioned process will allow issuance of a temporary goods received note (GRN) for goods that have been received but have not yet been inspected and will only issue a receipt voucher (S13) for the goods once they have been inspected and accepted.

The envisioned module will support multiple deliveries against single LPO/LSO. After the goods have been successfully accepted in the store, the inventory levels will be updated in the system. Procured items coded as assets will be automatically updated in the fixed assets register. The supplier will then be automatically notified through the i-supplier portal to enable them to raise an invoice.

g) Invoicing and Payments Management

This process will focus on the matching of received invoices against Purchase Orders and processing of payments to suppliers. The envisioned process will allow paying officers to generate a payment schedule, which is a list of all suppliers to be paid, the amount and the payment method. This payment schedule will be transmitted to Central Bank where payments to suppliers will be effected. This will be achieved by integrating the core IFMIS system with the CBK T24 system. The module will allow for online approvals of the payment vouchers as well as tracking the examination and validation of the payment process.

The module will also allow inventory accounting and enable accounting entries associated with inventory items in real time as well as transfer of these entries to the General Ledger in both summary and detailed formats.

h) Inventory Management

Inventory management will involve the management of purchased goods once they have been accepted by the stores with an aim of improving inventory visibility, reducing inventory levels and controlling inventory operations.

The envisioned process will allow the following:

- Setting up and maintenance of item codes for all goods and services;
- Capturing of item prices per unit measure;
- Grouping of items into categories and sub-categories;
- Tracking of item issuance from the stores;
- Generation of ageing stock reports to track dead stock items; and
- Estimation of re-order levels to aid in future procurement planning.

i) Contract Management

The contract management module will facilitate the creation and negotiation of supplier contracts, formulation of service level agreements (SLAs) and a process of managing change to ensure that business rules are enforced and that the public entities get the best from the vendors in terms of rates and quality of service. The module will aim to simplify and streamline the management of vendor contracts and contract deliverables.

j) Reconciliations and Period End Close

This functionality will involve reconciliations and summary year reports related to P2P. The envisioned process will include all facets of reporting, classifying and managing financial transactions within IFMIS for month and year end close processes. It will involve finalizing the accounting records for one fiscal year and preparing the accounting records for the upcoming fiscal year.

It will also allow spend analysis to provide increased visibility into the complete procure to pay process including:

- Comprehensive spend and procurement analysis;
- Employee expenses analysis;
- Supplier performance analysis, and
- Supplier payables analysis.

This analysis will enable government to make more informed decisions to reduce costs and increase satisfaction to both employees and suppliers.

IV. Benefits of E- Procurement

There are a variety of benefits attributed to a shift from a manual P2P environment to a fully automated one. The National Treasury through IFMIS P2P expects to leverage on these benefits which contribute immensely to prudent public financial management. A

fully automated P2P system has financial, audit, technical, operational and logistical benefits to the government.

P2P automation:

- Allows government entities to better understand how they spend public funds
- Increases visibility of all financial activities related to procurement of goods and services. This ensures accurate financial statements and ease of compliance to audit requirements
- Enables the procuring entities to evaluate vendor and employee compliance to contracts and agreements
- Curtails risk of fraud and other errors like double payment created through manual purchasing environment.
- Reduces processing costs. In a manual environment, a single purchase requires a large number of manual steps involving many different people within an organization and each of these steps are time-consuming.

The following graphic illustrates the current work flow:

THE CURRENT PUBLIC PROCUREMENT PROCESS

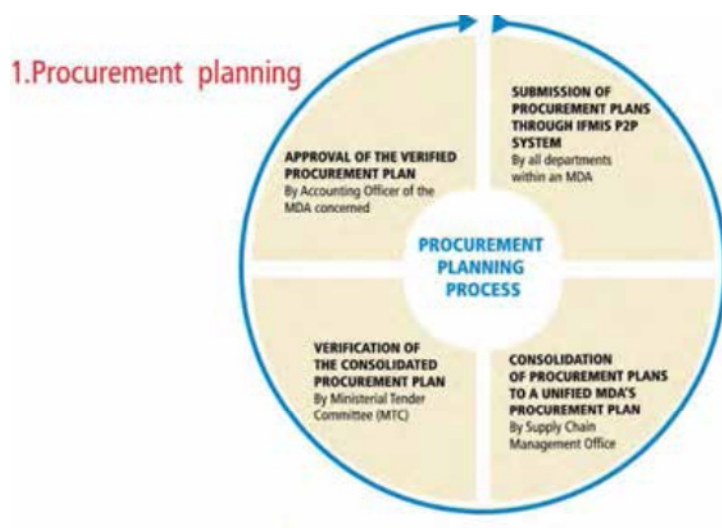
Most Purchase Order (PO) and Accounts Payable (AP) phases are manually handled pending full automation. The current PO and AP approval process in MDAs is as follows:



V. The Future of IFMIS P2P System

a) Procurement Planning

The end to end fully automated P2P system begins with procurement planning which entails submission of procurement plans, consolidation of those plans, verification of the consolidated plans and finally approval which is illustrated below.



b) Execution of the Procurement Plan

The PO approval stage entails initiation of a request approval, approval of the requisition, raising of RFQs, submission of technical and financial quotes by suppliers, opening tenders, evaluation, award and issuance of LPO to supplier. The AP stage entails delivery of goods by supplier, inspection, invoice delivery to the accounting unit, matching of invoice to LPO, payment authorization and EFT to supplier account.

THE FUTURE OF IFMIS P2P SYSTEM

2. Execution of the Procurement plan

a. Purchase Order (PO) Approval Hierarchy



b. Accounts Payable (AP) Approval Hierarchy



VI. Way forward

After the initial introduction and implementation of the P2P system in four key Ministries of the Kenyan Government, the system will be rolled to the all other remaining Ministries (about 20 to 22 Ministries in total). At the same time the P2P system has to be installed in 47 counties, since Kenya has according to the new Constitution two stages of Government since the last elections in March 2013. One on the central level of government and on the local levels in the newly established county Governments. Including trainings for users (procurement officers as well as potential bidders) this is a immense task for the IFMIS department of the National Treasury. It is envisaged to have the system fully implemented and all stakeholders trained by the end of 2016.

Apart from the practical implementation of the system the legal basis of the procurement system is under review, according to the provisions of the new Constitution. Until August 2014 Parliament has to have an amend Public Procurement and disposal Act adopted. The new Act on Procurement will be also have additional provisions on the new e-procurement system and especially regulations which will

encourage for all participants in the procurement process the use of the P2P system, for example with shorter deadlines and reduction of fees.

MULTILINGUAL E-PROCUREMENT SYSTEMS – CONTOURS AND RELATED CHALLENGES

Jitendra Kohli *

E-mail: jkohli@electronic tender.com

ABSTRACT. The phased changeover from manual-bidding to e-procurement/e-tendering by Government and public-sector entities is now an established trend globally, although most e-procurement systems still offer limited functionality and do not ‘equal or exceed’ Confidentiality, Transparency and Accountability requirements, as enshrined in well-established manual-processes. In countries/ organizations supporting multiple official languages, challenges of adopting e-procurement are even greater. Currently, such e-procurement systems would mostly be in the main business-language, such as English. To increase competition and in the interest of bidders not conversant with the main-language, there is a definite need for multilingual e-procurement systems. While as a first step, publishing bid-notice in additional languages may be useful, the final objective should certainly be comprehensive end-to-end multilingual e-procurement, covering all facets of public-procurement process, including secure bid-submission, transparent online-public-bid-opening-event, et al. The paper attempts to outline contours of such multilingual e-procurement systems, and related challenges from the perspectives of application-developers and purchasing-entities.

** Jitendra Kohli, B.Tech. (Electrical Engg) IIT Delhi (India), founder and Managing Director of ElectronicTender, has been researching in the area of e-procurement/ e-tendering/ e-auction with focus on public procurement for over 14-years now. Based on his pioneering work, his company, ElectronicTender has developed an innovative e-procurement/ e-tendering/ e-auction software product with comprehensive security and transparency related features required in government bidding process. This product can be licensed for being readily deployed in any country for setting up e-procurement/ e-tendering portals with ‘Nil’ gestation period. His work, ‘e-Procurement Integrity Matrix’ has been adopted and published by Transparency International India. The Government of India’s guidelines for e-procurement have taken inspiration from his writings on the security and transparency related aspects of e-procurement. In end-2011/ 2012, his services were commissioned by the Asian Development Bank for technical peer-review of the update of MDB’s ‘e-Procurement Toolkit’. At the IPPC5 held in August 2012 at Seattle, he presented a paper titled ‘Red Flags in e-Procurement/ e-Tendering for Public Procurement and some Remedial Measures’, which was found to be an eye-opener by delegates from many countries. He was invited to make a presentation on ‘e-procurement related security, confidentiality, transparency and accountability issues’ at the European Space Agency in Paris. In 2013, he co-authored ‘Manual for the Examination of Public Procurement Process’ (published by Transparency International India), which provides useful information on some important aspects of the conventional public procurement process, as well as, e-procurement, and the malpractices which should be checked.*

INTRODUCTION

Increasing Adoption of e-Procurement Globally

The changeover from the manual bidding process to e-procurement by Government and public-sector entities is now an established trend globally. The European Commission (EC) has declared its intention of switching over completely to e-procurement in a phased manner by 2016 for all member states constituting the European Union (EU). Some states and federal bodies in the USA have already taken initiatives in this direction. The Indian Government has made e-procurement mandatory with effect from 30th March 2012 for Government organizations and public-sector enterprises. In fact, it would be difficult to find a country today which has not taken at least some initial steps in this direction.

Challenges in the Emergent Technology of e-Procurement

While the switchover to e-procurement has already been initiated in many countries, there is a vast variation in the level and depth of implementation of the required functionalities. While on the lower end of the spectrum, e-procurement systems merely offer functionality for posting (i.e. advertising) of ‘tender notices for bidding opportunities’ on some website, at the other end of the spectrum there are e-tendering/ e-procurement systems which cover the gamut of activities constituting established manual procurement processes typically prescribed by

Government and public-sector entities. The latter category includes – online sealed-bid submission with advanced encryption methodologies to ensure ‘confidentiality of tenders’; use of digital signatures to ensure ‘authentication, non-repudiation and integrity’ of electronic documents such as bids, tender notice, corrigenda, tender documents, addenda etc; highly interactive ‘online public tender opening event(s)’ conducted by the authorized officers of a purchasing entity in the simultaneous online presence of bidders to ‘ensure the highest standards of transparency’, et al.

Needless to state, majority of e-tendering/ e-procurement systems in most countries (including advanced countries in Europe and North America) are betwixt and between in this spectrum of functionalities. Even where online bid submission has been implemented, the quality of implementation is still far from achieving the equivalent of functionality of established procedures of manual tendering/ bidding. In most cases, the currently deployed e-procurement systems have not been able to ‘equal or exceed’ the requirements of Confidentiality, Transparency and Accountability, as enshrined in the well-established manual bidding processes (i.e. traditional paper-based processes) of public-procurement. This is a matter of serious concern, as deficiencies in functionality can have significant impact on the integrity of public-procurement processes. Technology is a dual-edged sword. Under the garb of technology, manipulative practices in public-procurement can not only continue unabated, but can be perpetrated in a sophisticated manner with more serious implications than in the manual process. In fact, that was the subject of my presentation at the IPPC5 (International Public Procurement Conference held at Seattle, USA in August 2012). For details please see [1].

Therefore, achieving comprehensive functionality in e-procurement systems, with high degree of security, transparency and accountability is still a challenge in many countries. Furthermore, in countries and organizations [such as multi-lateral agencies like the United Nations (UN)] where documents in any of the multiple official languages are acceptable and recommended, the challenge of adopting e-procurement is even greater. Currently, e-procurement systems deployed in such entities are mostly in the main business language, such as English. However, to increase competition and in the interest of prospective bidders who are not familiar with English (or the main language), there is a definite need to develop comprehensive multilingual e-procurement systems.

MULTILINGUALISM

Global Linguistic Diversity

Of the world's 195 sovereign countries (including 193 UN member states), 178 have at least one official language. Many countries recognize more than one language. English is the most common official language, with some recognized status in 51 countries [2].

The United Nations (UN) has six official languages that are used in UN meetings, and in which official UN documents are written when budget allows. In alphabetical order, these are – Arabic, Chinese, English, French, Russian and Spanish. The working languages at the UN Secretariat are English and French. Originally English and French were established as working languages at the UN. Later, Arabic, Chinese, Russian and Spanish were added as working languages in the General Assembly and in the Economic and Social Council. Arabic, Chinese, English, French, Russian and Spanish are the working languages of the Security Council [3].

In India, the world's most populous democracy with a lot of diversity, individual mother tongues number several hundreds. The 1961 census recognized 1,652 languages. According to the Census of India of 2001, 21 scheduled languages are spoken by more than a million native speakers in India [4]. India is a federal union of states comprising twenty-eight states and seven union territories. The official languages of the Union Government of India are -- Hindi and English [5]. Some States legislate in their own official languages, depending on the linguistic demographics. After taking into cognizance the official regional languages, there are 23 official languages in India [2].

The European Union (EU) has 24 official languages along with a range of other languages used by people within the member states. The EU asserts that it is in favour of linguistic diversity and currently has a European Commissioner for Multilingualism [6]. Some other salient aspects are:

- Language policy is the responsibility of member states and EU does not have a common language policy.
- The EU encourages all its citizens to be multilingual; specifically, it encourages them to be able to speak two languages in addition to their mother tongue.
- The most widely spoken mother tongue in the EU is German, while 51% of adults can understand English (13% as first language and 38% as additional language).
- All 24 official languages of the EU are accepted as working languages, but in practice only three are used most often: English, German and French. Of these, English is the most common. [7]

- English is the default business language in the EU.

Challenges of Implementing Multilingualism

While most documents published by the United Nations are published in the six official languages, it is noteworthy that even after many decades of its existence, the UN felt it necessary to pass resolutions to encourage and implement multilingualism in all its conferences and websites.

Resolution no. 50/11 on ‘Multilingualism’ adopted by the General Assembly on 15th November 1995 during the 50th Anniversary of the United Nations, states:

“Recalling also, on the occasion of the commemoration of the fiftieth anniversary of the signing of the Charter of the United Nations, that the universality of the United Nations and its corollary, multilingualism, entail for each State Member of the Organization, irrespective of the official language in which it expresses itself, the right and the duty to make itself understood and to understand others,...

1. Requests the Secretary-General to ensure the strict implementation of the resolutions establishing language arrangements for both the official languages and the working languages of the Secretariat, and invites Member States to do likewise; ...” [8]

Similarly, Recommendation 12 of the report (2011) titled, ‘MULTILINGUALISM IN THE UNITED NATIONS SYSTEM ORGANIZATIONS: STATUS OF IMPLEMENTATION’ states:

“The legislative bodies of the organizations of the United Nations system should direct and approve the necessary support to the executive heads to develop multilingual websites in all their official or working languages, with due attention to the language specificities of the duty stations concerned...” [9]

E-Procurement Websites as distinct from General Websites

While English is the default language for developing and using computer applications in most countries, many non-English speaking countries have for many years been using computer applications with text displayed in the native non-English language of that country. Websites with mostly passive information displayed in more than one language through separate links are also commonplace. Here, information in multiple languages is posted by a common set of website administrators. In contrast, multilingual e-procurement systems (when developed with full functionality), will have multiple categories of users who will be posting/ analyzing information in a highly dynamic and interactive scenario, compounded with the requirements of confidentiality, security, transparency, accountability, and legal implications.

MULTILINGUAL E-PROCUREMENT SYSTEMS

Why Multilingual e-Procurement Systems

The oft-stated objectives of procurement policy of the Government in any country is to procure goods and services in a manner which begets the best value for the public money spent, as well as, providing ‘fair and equal opportunity to all’, at least within the country. With increasing power of multi-lateral agencies in influencing the domestic policies of sovereign states, the fair and equal opportunity to all has to transcend national barriers.

Is this ‘fair and equal opportunity to all’ practically achievable where substantive sections of potential bidders, domestic and international, are not conversant with the language required for understanding and responding to the bidding opportunity? For practical purposes, at times the answer would be ‘no’ even for large corporations, and especially where the potential bidders are small and medium enterprises (SMEs).

Language should not be a barrier to getting best value for money in terms of goods and services procured, and to providing fair and equal opportunity to all.

Importantly, in addition to the argument of ‘fair and equal opportunity to all’, multilingual e-procurement systems can lead to a ‘quantum jump in the competitiveness of bids’ resulting in further monetary savings.

Practical Difficulties in Implementing Multilingualism in Procurement through Manual Processes

There are practical difficulties in executing manually, in multiple languages, ‘end-to-end procurement processes’ of public-procurement. Even a high profile organization like the United Nations, in spite of its stated objective and

resolutions, has not been able to achieve this goal as can be seen from excerpts of United Nations Procurement Manual (Revision 7) given below.

“9.24 Language of Solicitation Documents

1. Solicitation Documents shall normally be prepared in English, unless there are special reasons to use another working language of the UN, and they shall state that Submissions shall also be submitted in English. If any document that forms part of a Submission is in a language other than English, it shall be accompanied by a certified translation, unless the Procurement Officer determines that the language requirement for a particular document can be waived without negative consequences for the Solicitation. However, in the case of local procurement for an OAH/Field Mission, the CPO may decide to issue Solicitation Documents in the local language, if he/she determines that it would be in the best interest of the UN to do so. In all cases, the Solicitation Documents shall clearly state the required language of the Submission and translation requirements, if any. When two documents are in a different language, the procurement staff will have to determine the original document which will govern the contract and the courtesy translation (if any).” [10]

The practical difficulties referred to above include inter alia – scarcity of qualified translators, cost of translation and related documentation, time involved in related activities, and the sheer logistics of manually managing massive documentation at various stages of the procurement cycle. While computer-assisted translation (CAT) tools can to some extent reduce the difficulty of scarcity of translators, the other factors remain. Also, CAT can at present not be fully relied upon for authentic, legally-binding translation. It is important to note that unless the translation is accurate, it can be misleading.

Mitigating Practical Difficulties through e-Procurement

CAT tools, supplemented with the ‘streamlined framework’ of a ‘well-designed multi-lingual e-procurement system’ can help in overcoming the practical difficulties outlined above to a reasonable extent. Needless to state, the output of CAT tools would have to be fine-tuned by human translators, where necessary, to have authentic, legally-binding translated content, i.e. authenticated translation.

Current Status of Multilingual e-Procurement

Presently, most e-procurement systems are operable only with a single language, mostly English, or in one of the official languages of the concerned country, such as German, or French, et al. In a few cases, ‘summary of the bidding or tendering opportunity’ may be given in another language, sometimes with riders that the summary is non-legally binding. In ‘Tenders Electronic Daily (TED)’, which is the online version of the ‘Supplement to the Official Journal of the European Union’ and is dedicated to European public procurement, translated version of a tender notice may only be a partial summary of the corresponding notice in the ‘original language’. There are cases where the tender notices are available in two languages, with part of the data being displayed only in English, even in the non-English version of that tender-notice. [11]

In fewer cases, some rudimentary form of online bid submission in two languages may be supported. For example, online bid submission may involve a simple file upload (in English or the non-English language which is supported) without any structured data-submission (i.e. electronic-forms). Based on available information, it can be inferred that comprehensive multi-lingual bid-submission with structured data-submission (i.e. electronic-forms), as well as, attendant detailed unstructured data-submission (i.e. detailed bid files) and other important features, does not exist currently.

Further, ‘bid-confidentiality through proper encryption’, and ‘integrity of bids and other electronic documents through digital signatures’ et al, which are important requirements for a reliable electronic public-procurement system [1, 12] are either missing, or are not robust enough in such rudimentary multilingual systems.

The Way Forward

As per a directive of the EU, notices such as -- Prior Information Notice, Contract Notice and Contract Award Notice shall be published in full in the official language(s) of the Union as chosen by the contracting authority (i.e. purchasing entity). “Notices referred to in Articles 48, 49 and 50 shall be published in full in the official language(s) of the institutions of the Union chosen by the contracting authority. That language version or those language versions shall constitute the sole authentic text(s). A summary of the important elements of each notice shall be published in the other official languages of the institutions of the Union.” [13]

Is it enough to merely publish Bid-Invitation Notice (i.e. Tender Notice, or Contract Notice) in English (or the main language), and one or more additional languages? As a first step towards multi-lingual e-procurement systems, the answer would possibly be ‘Yes’. Even here, it is important to emphasize that the translated content should be authentic, complete and legally binding. However, the final objective should certainly be to have comprehensive end-to-end multilingual e-procurement systems, which cover all facets of the established public-procurement process, including secure bid-submission, transparent online public bid-opening event, et al.

What should be the contours of such a comprehensive multi-lingual e-procurement system, and what are the multifarious challenges from the perspective of e-procurement application developers and purchasing-entities?

CONTOURS OF A COMPREHENSIVE MULTILINGUAL E-PROCUREMENT SYSTEM

Default Language of a Multilingual e-Procurement System

It can be inferred from the data related to linguistic diversity presented above that English is emerging as the ‘Highest Common Factor’ amongst various languages used for conducting business in different countries. So it would make sense to have English as the ‘Default Language’ while designing a ‘Comprehensive Multilingual e-Tendering/ e-Procurement System (CMLePS)’. The e-procurement application software should cater to the provision of one or more languages, as required. For example, if such a CMLePS is to be used for UN procurement to be conducted in all the official languages of the UN, it should support English and five additional languages.

Other Practical Issues to be addressed in Implementing Multilingualism through e-Procurement

While technology may solve some problems in a manual process, it can create a new set of technology-related problems during development, as well as, deployment of the technology-based solution.

Problems in Belling the Cat

Assuming that the readers are familiar with typical functionality and modules of a comprehensive English language-based e-procurement system with secure online bid-submission and online public bid-opening, some issues and practical difficulties which have to be addressed while planning the design, development and deployment of a multilingual e-procurement system are outlined below.

- What should be the scope or extent of multilingualism in an e-procurement system? If multilingual e-procurement systems are not to be limited to only posting summaries of a tender-notice in multiple languages, the following questions arise:
 - Should the complete tender-notice in proper format be made available in multiple languages?
 - Should tender-documents (i.e. bidding-documents) also be posted/ uploaded in multiple languages?
 - Should amendments to a tender-notice (i.e. corrigenda) and amendments to tender-documents (i.e. addenda) also be issued in multiple languages?
 - Should the process of seeking clarifications to tender-documents and corresponding response by the purchasing-entity also be allowed in multiple languages?
 - Should submission of bids with structured-data (i.e. electronic forms), as well as, unstructured-data (i.e. files) be allowed in multiple languages?
 - Should a full-fledged online public tender-opening-event in the simultaneous online presence of bidders be carried out in multiple languages?
 - Should online evaluation of bids be carried out in multiple languages?
 - et al.

The answer to all the above questions should presumably be ‘Yes’. In that case, from a practical perspective it may be prudent to make available in ‘phases’, the ‘functionality wish-list’ outlined above.

- The issues briefly described above essentially relate to the information exchanged between a purchasing-entity and the bidders in a tendering situation. In other words, we can call such information as ‘tender-specific’. However, there are other functionalities in an e-procurement system, which are ‘non-tender-specific’. Examples of such functionalities include – Registration on an e-procurement portal by bidders; configuring of an e-procurement system by a purchasing entity for organization-level administrative purposes; et al. Select information from such modules is automatically populated by the system in downstream modules and processes. Other than registration which is being discussed separately, if all such

functionalities are also made multilingual, there can be downstream chaos and ‘non-user-friendly mixing of information’ in more than one language. In addition, the complexity in the design of the e-procurement application, and the load on the database can become practically unmanageable.

Therefore, should we initially limit multilingualism to essentially ‘tender-specific information’ exchanged between a purchasing-entity and its bidders?

Further, for ‘overall user-friendliness’, should some common parameters only be in the default-business language, i.e. English?

- Opinions can differ on the above questions. My personal view is that the answers to both the questions should be ‘Yes’.

Phased Approach

A pragmatic approach may entail delivering the functionality of a comprehensive multilingual e-procurement system (CMLePS) in phases, as enumerated below.

(Phase-1): Publishing ‘Prior information Notices’ and ‘Tender Notices’ in English (assuming English as the ‘default language’), as well as, in ‘Additional Languages’, as required. Together, English and the Additional-Languages are referred to as ‘Allowed-Languages’. Preferably, all the tender-notices should be complete, and not mere partial summaries of corresponding tender-notices published in the original language or default language.

(Phase-2): Publish ‘Corrigenda, Tender Documents and Addenda’ in the allowed-languages.

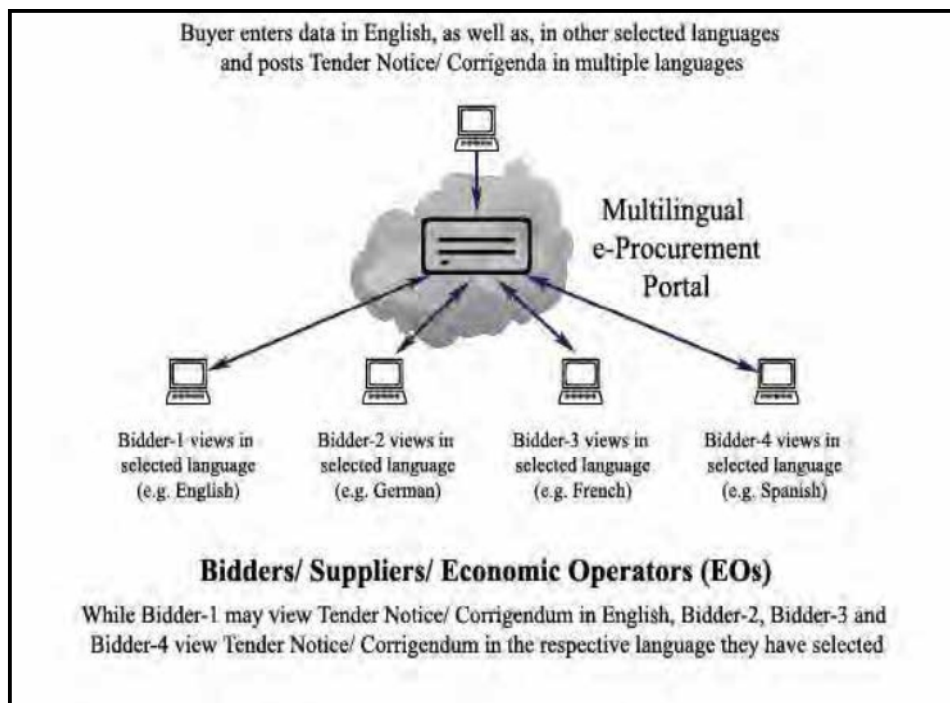


Figure 1: Conceptual Model for Tender Notice/ Corrigenda in Multiple Languages

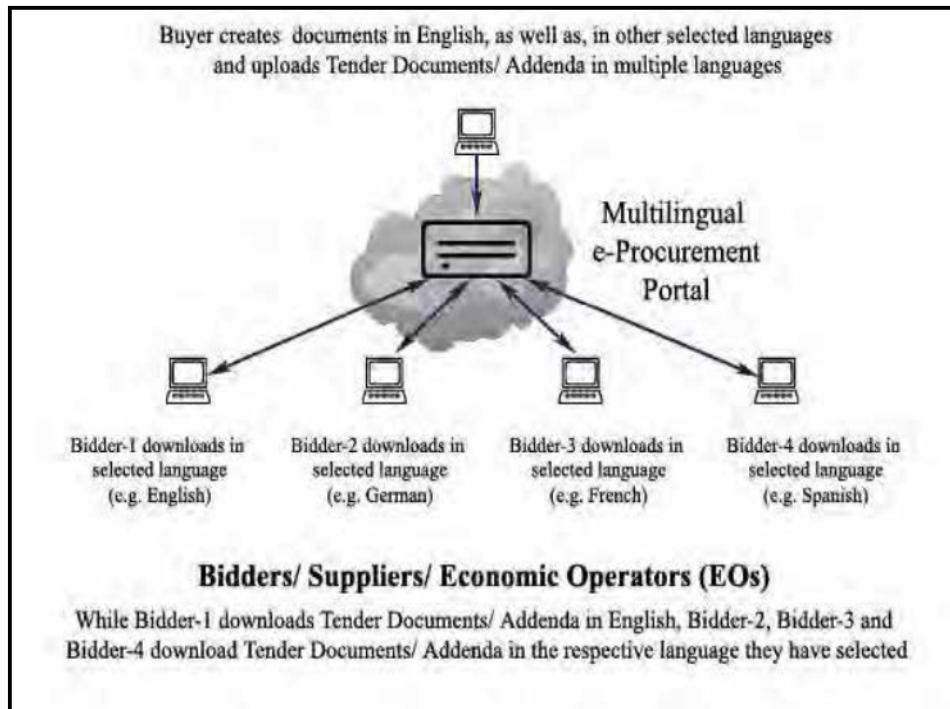


Figure 2: Conceptual Model for Tender Documents/ Addenda in Multiple Languages

(Phase-3): Facilitate Clarifications to Tender Documents and corresponding response, as well as, ‘Pre-Bid Meeting’ in the allowed-languages.

(Phase-4): Facilitate ‘Online Bid Submission’, as well as, ‘Online Public Tender Opening Event(s)’ in the allowed-languages.

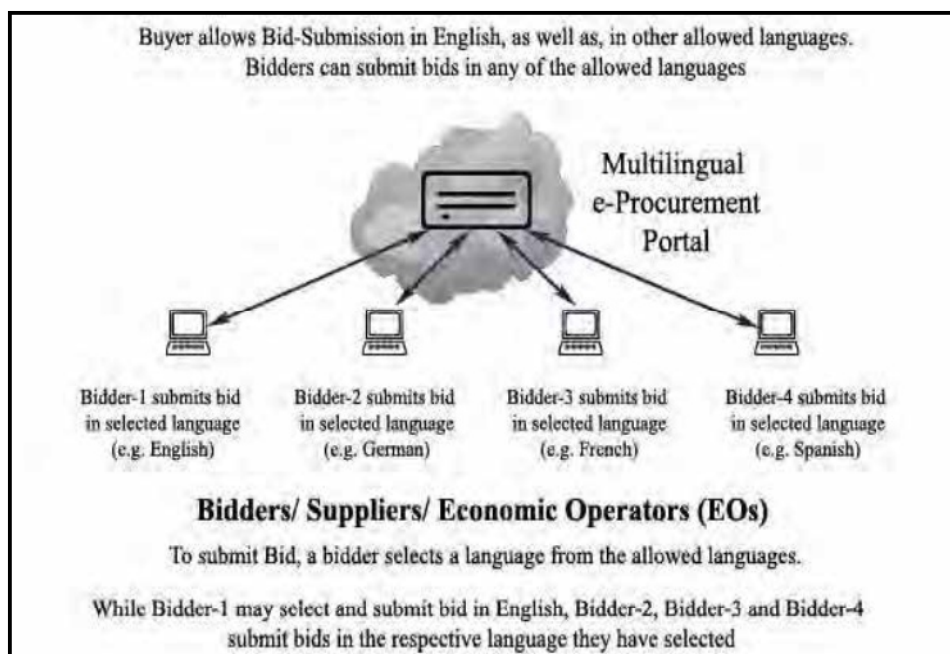


Figure 3: Conceptual Model for Bid Submission in Multiple Languages

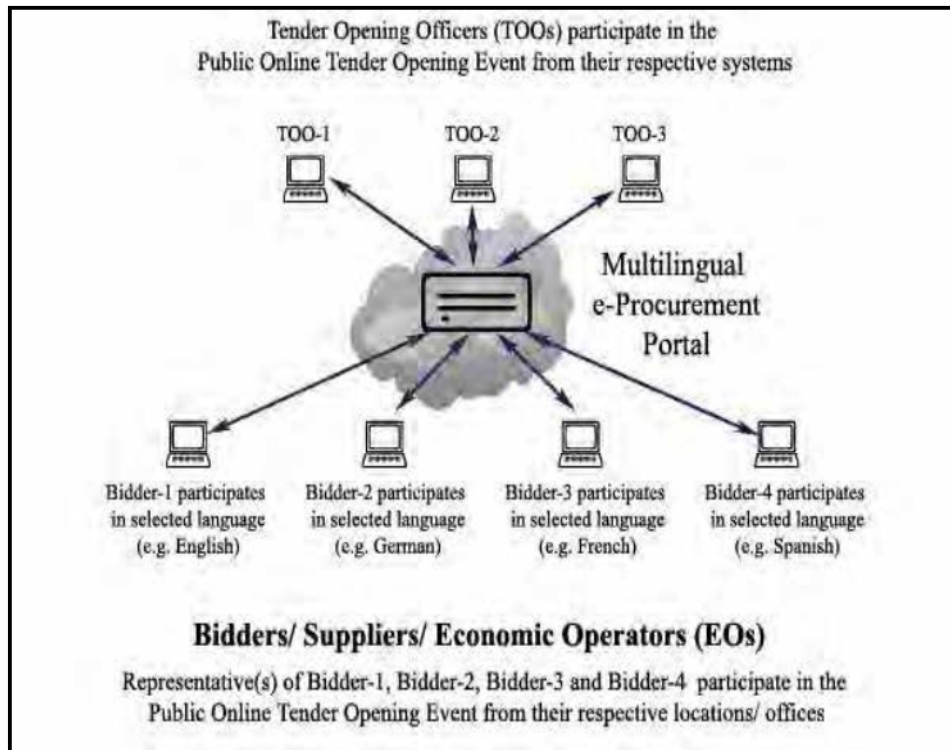


Figure 4: Conceptual Model for Public Online Tender Opening Event in Multiple Languages

(Phase-5): Facilitate 'Online Bid-Evaluation' and 'Online Award of Contract' and posting 'Contract Award Notices' in the allowed-languages.

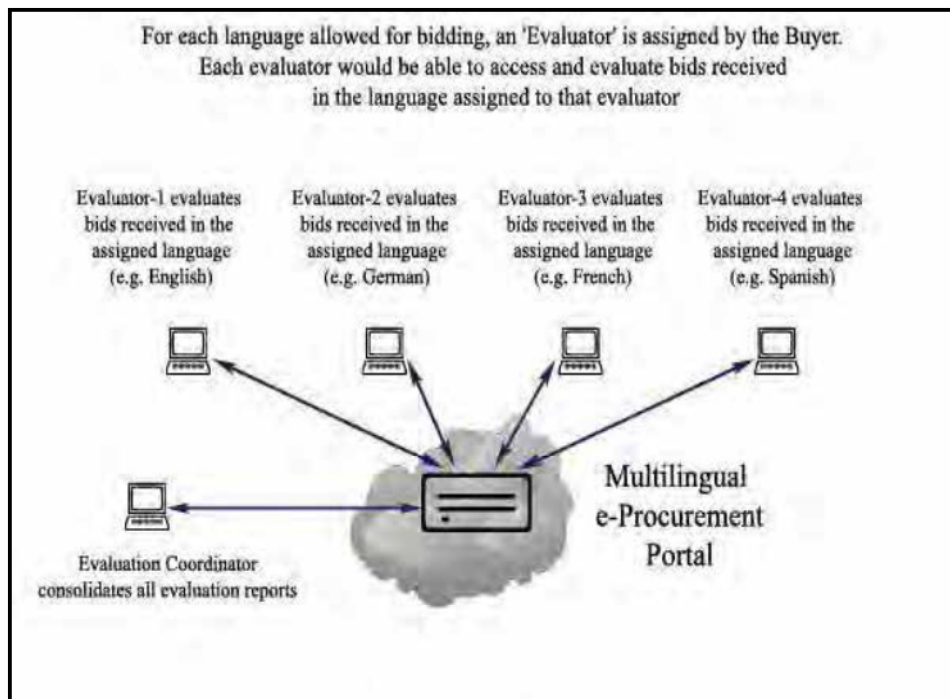


Figure 5: Conceptual Model for Bid Evaluation in Multiple Languages

Important Notes and Assumptions relating to Functionalities represented in the Figures

1. Functionality of a phase as outlined above is assumed to include functionalities outlined in all its preceding phases.
2. The postings in additional-languages should not be mere summaries, but authentic postings with complete content in the same format as the format of the default language.
3. As elaborated separately, translation at each stage should be ‘authenticated’ by the concerned entity.
4. To ensure authenticity and integrity, all electronic postings should be digitally signed by the concerned authorized users, with facility for verification of such signatures [1].
5. All the recommendations for ensuring high standards of ‘Confidentiality of bids before bid-opening’ and other ‘Transparency’ and ‘Accountability’ related functionalities as discussed in [1] and to some extent [12] should be implemented to ensure that the sanctity of the public-procurement process is not compromised in any manner.
6. While facilitating multilingualism in e-procurement systems, some aspects may continue to be done in a ‘common manner’, as well as, displayed in a ‘common format’ in all the user-interfaces irrespective of the language.
7. It is further assumed that where there is a need for publishing/ processing tenders in multiple languages, it is expected that the Buyer/ Purchasing-Entity will publish the tender in the multiple allowed languages and have the required translation capability in all such languages, which can be supplemented with CAT tools. The bidders are expected to be proficient in only one language (out of the allowed languages), and to some extent in the ‘default language’. If all the bidders are proficient in all the languages, there is no major need for multilingual systems.
8. Even on a multi-lingual e-procurement portal, all tenders may not be published/ processed in all the allowed languages. As decided by the concerned purchasing-entity, some tenders may be published/ processed only in English, some tenders may be published/ processed in English and some of the allowed languages, and some tenders may be published/ processed in all the allowed languages.

Other Challenges and Possible Solutions

- A. Numerals and Numbers should be as conventionally represented in English writing. Otherwise there can be utter confusion in a CMLePS.
- B. Dates should be as conventionally represented in English writing. Otherwise, as mentioned above, there can be utter confusion in a CMLePS. Even on the TED site of the EU, which is only for tender-notices, dates are in the English style of writing.
- C. Registration of end-users (e.g. Bidders/ Suppliers/ EOs) should preferably be in the default language, i.e. English. Registration data of a bidder is commonly used for all tenders for which that bidder participates on that portal. If registration is allowed in any of the allowed languages, then even in a tender for which bid-submission is allowed only in English, the name of a bidder who has registered in Arabic, will be displayed in Arabic in the electronic profile of that bidder. This would certainly not be user-friendly.

A possible solution could be to make registration in English language mandatory for Bidder/ Suppliers/ EOs. In addition, a supplier registering on the portal could be given an option to furnish select registration related information in one or more of the ‘allowed languages’ on that CMLePS. The advantage of such additional information would be that when the profile of such a supplier is displayed as a result of ‘search’, the viewer would be able to see that supplier’s information in English, as well as, in some additional languages.

- D. In view of the above suggestions, Master Tables such as – Country Master, State/ Province Master would certainly have to be in the default language, i.e. English. In addition, where feasible and manageable, some Master Tables could also be made available in the other ‘allowed languages’ of the CMLePS.
- E. Master Tables, e.g. for Goods and Services Classification Codes, such as UNSPSC, CPV, NIGP, ITC-HS codes, may be as conventionally represented in English, except where multi-lingual versions of such codes are available. For example, UNSPSC is available in ten languages. CPV is available in twenty-two official languages of the EU. [14, 15]
- F. E-mail Address should be as conventionally represented in English writing.
- G. User IDs, Passwords should be as conventionally represented in English writing.
- H. Complete configuring of a multi-lingual e-procurement software/ system would continue to be done in the ‘main language’/ ‘default language’ in which the administrator-level user-interfaces (UIs) of the e-procurement application software have been developed. As stated earlier, for the purpose of this paper the main language or the default language is assumed to be English.
- I. All ‘Reference Codes and IDs’ generated by the system should be in the ‘default language’ of the CMLePS, i.e. English.

- J. For consistency, name and address of the Buyer-organization in a tender-notice would be in the default language, English. In the translated versions of a tender-notice, the name and address of the Buyer-organization can additionally be in the selected language (i.e. the language used in that translated notice).

Common Technical Aspect

One technical aspect will be common in all multilingual websites irrespective of whether it is an e-procurement website, or a general website for information dissemination, and that is – the database tables have to be designed to accept ‘Unicode Data Types’ for accepting non-English characters. Stored procedures and functions in database have to be developed accordingly.

Responsibility for Translation

Changeover to e-procurement does not entail abdication of sensitive responsibilities of the concerned officers of a purchasing-entity (i.e. the buyer or contracting authority) to the e-procurement service-provider (or platform provider), although willy-nilly this may have happened in some cases [1].

In a sensitive application like e-procurement for Government and Public Sector organizations, manipulation and malpractices are rampant. Therefore, it is important that translations, where applicable, should be authentic and legally-binding. CAT tools can produce the first draft which can then be authenticated by qualified translators. Responsibility for translation should be of the concerned authorized users. Broadly, the distribution of responsibility for translation should be as presented below.

- [Translation of the ‘fixed’ descriptive content of the User-Interfaces (UIs) of CMLePS, such as – headings, field-labels, help-pages, etc.]:

Responsibility should be of the e-procurement application software developer.

- [Translation of all Buyer related content to be entered through the UIs (such as content of Tender Notice) , as well as, any documents to be uploaded (such as Tender Documents) by Buyer/ Contracting Authority]:

Responsibility should be of the concerned authorized users of the Buyer organization.

- [Content of all Bidder related content to be entered through the UIs (such as content of Bid in the selected language), as well as, any documents to be uploaded (such as Bid related files) by Bidder/ Supplier/ EO]:

Responsibility should be of the concerned authorized users of the Bidder organization.

CONCLUDING REMARKS

Currently available e-procurement systems are helping in overcoming physical barriers in terms of geographical reach and efficiency, and greater transparency and accountability where the systems are well-designed. Multilingual e-procurement systems will go further in overcoming barriers in another dimension, i.e. overcoming language related barriers -- both real and psychological, thereby bringing in a quantum jump in the ‘efficacy’ of e-procurement systems, as well as, empowering Governments of various countries in truly achieving their stated objective of fair and equal opportunity to all in the public-procurement process.

REFERENCES

- [1] J. Kohli. (2012): RED FLAGS IN E-PROCUREMENT/ E-TENDERING FOR PUBLIC PROCUREMENT AND SOME REMEDIAL MEASURES. Paper presented at the IPPC5 at Seattle, USA.
[Online]. Available at <http://www.ippa.org/IPPC5/Proceedings/Part2/PAPER2-6.pdf>
- [2] Wikipedia. (n.d.): Official language.
[Online]. Available at http://en.wikipedia.org/wiki/Official_language
- [3] United Nations. (2013): UN Official Languages.
[Online]. Available at <https://www.un.org/en/aboutun/languages.shtml>
- [4] Government of India. (2011): Census2001: Statement 4.
[Online]. Available at http://www.censusindia.gov.in/Census_Data_2001/Census_Data_Online/Language/Statement4.aspx

- [5] Department of Official Language, Government of India. (2011): The Official Language Policy of the Union.
[Online]. Available at <http://www.rajbhasha.nic.in/GOLPContent.aspx?t=endolpolicy>
- [6] Europa.eu. (n.d.): EU Administration: Languages.
[Online]. Available at http://europa.eu/about-eu/facts-figures/administration/index_en.htm
- [7] Wikipedia. (n.d.). Languages of the European Union.
[Online]. Available at http://en.wikipedia.org/wiki/Languages_of_the_European_Union
- [8] United Nations. (2000): Resolution adopted by the General Assembly - 50/11 Multilingualism.
[Online]. Available at <http://www.un.org/documents/ga/res/50/ares50-11.htm>
- [9] United Nations. (2011): MULTILINGUALISM IN THE UNITED NATIONS SYSTEM ORGANIZATIONS: STATUS OF IMPLEMENTATION.
[Online]. Available at https://www.unjui.org/en/reports-notes/JIU%20Products/JIU_REP_2011_4.pdf
- [10] United Nations. (2013): United Nations Procurement Manual Revision 7: The Solicitation Process (Chapter 9).
[Online]. Available at <http://www.un.org/depts/ptd/pdf/pm.pdf>
- [11] Europa.eu. (n.d.): TED (Tenders Electronic Daily) - 'Supplement to the Official Journal of the European Union'
[Online]. Available at <http://ted.europa.eu/TED/browse/browseByBO.do>
- [12] e-Tendering Expert Group (e-TEG) appointed by the European Commission. (2013): The e-Tendering Expert Group (e-TEG), Recommendations for effective public e-Procurement, Part II: Operational Recommendations.
[Online]. Available at http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/eteg/eteg_part2-operational_recommendations_en.pdf
- [13] European Parliament. (2014): European Parliament legislative resolution of 15 January 2014 on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))
[Online]. Available at <http://www.europarl.europa.eu/document/activities/cont/201401/20140121ATT77946/20140121ATT77946EN.pdf>
- [14] David Turner. (n.d.): Introduction and Overview UNSPSC
[Online]. Available at <https://www.unspsc.org/Portals/3/Documents/Introduction%20to%20UNSPSC.pdf>
- [15] European Commission. (2008) Guide to the Common Procurement Vocabulary (CPV)
[Online]. Available at http://simap.europa.eu/codes-and-nomenclatures/codes-cpv/cpv_2008_guide_en.pdf

(Jitendra Kohli can be contacted at: jkohli@electronictender.com)

Using spatial econometrics to detect collusive behavior in procurement auction data

Mats A. Bergman^a, Johan Lundberg^b, Sofia Lundberg^b and Johan Y. Stake^a

^aDepartment of Economics, Södertörn University, Sweden

^bDepartment of Economics, Umeå University, Sweden.

Preliminary version, please do not quote.

Abstract

In this paper we evaluate if spatial econometric techniques can be used to test for collusive bidder behavior in public procurement auctions. Using a unique dataset covering Swedish asphalt cartel, we find the simple Moran's I test for spatial correlation to be surprisingly accurate in detecting non-collusive bidding behavior and to be fairly accurate in detecting collusive bidding behavior.

JEL-codes: D44, H57, L10, L40

1. Introduction

In the dawns of October 24th and 25th 2001 and under the cover of darkness, the Swedish Competition Authority conducted unannounced raids to a number of companies in the Swedish asphalt paving industry. The purpose of the early morning raids was to find documents to support suspicions of collusive bidding behavior on public contracts. A large number of documents were collected and several hearings of key employees at these companies were undertaken. These two dramatic mornings was the start of the largest cartel investigation in Swedish history. The investigation material involved nearly ten meters of shelving. The trials at Stockholm District Court lasted just over 40 days and included hearings of more than 70 persons. On July 10th 2007, the court announced convictions for nine companies to pay a total of over 1.2 billion SEK in fines.¹

The rest of this paper relate to what happened on these two early mornings in 2001. In an admittedly less dramatic but hopefully as interesting manner, we present how spatial econometric tools can be used to detect collusive bidding behavior in procurement auctions used to assign public contracts. Using data from the Swedish asphalt cartel, the hypotheses to be tested is if bids placed by one cartel member i on contract c in procurement p correlate with bids placed by a cartel member j on contract c in procurement p or on other contracts within the same or other procurements. A spatial weights matrix is used to assign bids that are likely to be correlated with each other. The simple Moran's I test for spatial correlation is then used to test for collusive bidding behavior. If there is no collusive bidding behavior, the bid placed by a firm not associated with the cartel should be uncorrelated with bids placed by all other firms. The main purpose is to by the use of as little information as possible detect correlations between bids placed by cartel members. However, we are the first to admit and realize the results and methods described here needs accompanying evidence and other types of proofs to hold in court. Moreover, we do not claim to estimate causal effects, e.g. that one cartel members bid actually determines the other members bid. The main reason is that the direction of the casualty is not obvious. Still, the Moran's I is surprisingly accurate in detecting non-collusive bidding behavior and fairly accurate in detecting collusive bidding behavior. This is useful for, for example, competition authorities to, in a relatively simple way, scan a large number of different markets and procurements to detect signs of collusive bidding behavior in public procurement auctions.

The use of procurement auctions to assign public contracts is not an isolated Swedish phenomenon. In many countries such as the U.S. and other European countries use procurement auctions for assignments of different types of public contracts. For instance, since 1994 directives within the European Union (EU) stipulate sealed bid auctions in line with the first-price sealed bid auction to be used in public procurement auctions. The use of first-price sealed bid auctions are easily motivated by economic theory as the firm with the lowest marginal cost will be rewarded the contract. This result builds on the assumption of no collusive bidding behavior or cartels. Even though first-price sealed bid auctions are considered to be less vulnerable to collusive bidding behavior compared to the second-price sealed bid auction and the English auction,² and the fact that collusive bidding

¹ Another interesting feature of this cartel is that one of its members, the Swedish Road Administration, is also a production unit at the procuring entity.

² The reason is that under the first-price auction it is more difficult for cartel members to monitor each other (see e.g. Börgers and van Damme, 2004) and it involves stronger incentives for cartel members to deviate from the cartel agreement (Robinson, 1985).

behavior is prohibited by law, evidence of collusive bidding in public procurement auctions is found in numerous markets. Besides the so-called asphalt cartel, also analyzed by Jakobsson (2007), other examples of collusive bidding on public contracts are found in procurements of frozen seafood (Koyak and Werden, 1993), school milk (Pesendorfer, 1995; Porter and Zona, 1999), highway constructions (Porter and Zona, 1993), and highway repair (Bajari and Ye, 2003).

The development of empirical methods to detect collusive bidding behavior has gained increased attention, especially from economists. Many of these studies has been based on cases where the cartel members have been known beforehand and the challenge has been to econometrically confirm the cartel by a comparison of bids submitted by cartel and non-cartel members (e.g. Porter and Zona, 1993, 1999; Pesendorfer, 2000). In addition to these papers Bajari and Ye (2003) provides an approach where asymmetries among bidders is also accounted for. The analysis accounts for differences in observable characteristics of the firms in terms of location and production. Following Bajari and Ye, non-collusive bidding behavior suggests bids to be statistical independent. That is; bids should be found to fulfill two criteria; 1) conditional independency and 2) exchangeability. Conditional independence means that after controlling for all information about factors that affects productions costs, known to the firm when the bid is formulated, bids placed by different firms should be statistically independent. Exchangeability on the other hand means that after controlling for factors determining costs, bids placed by a bidder should be statistically independent on the identity of competing bidders. Hence, it should not matter what other firms firm i bid against. Other examples of empirical studies within this field is Cramton and Schwartz's (2002) study on spectrum auctions and Gupta (2001) on highway construction procurements in U.S.. Bajari et al. (2003) analyzes the use of auctions versus negotiations in construction works procurements in the U.S. and competition and bidder interaction in highway construction procurements is analyzed in Gupta (2002).

This paper contributes to the existing empirical literature by its econometric approach. At least to our knowledge, spatial econometric techniques have never been used in this way to analyze this type of data. It also serves as a complement to previous studies which for the most part is based on U.S. data. The rest of this paper is organized as follows. The Moran's I test for spatial correlation is described in Section 2 followed by a description of the dataset used in Section 3. Our results are presented and discussed in Section 4. Concluding remarks are given in Section 5.

2. Moran's I as a test for collusive bidding behavior

Consider two types of bidders, A and B , competing for a set of public contracts C . Assume all bids on a specific contract c to be equal in all relevant aspects besides price and contracts to be awarded the lowest bid. Bidders of type A form a cartel while type B is a set of independent bidders. Bidding strategies are non-independent among type A bidders, independent among type B bidders and independent across the two types. Type A bidders could form different strategies. For simplicity and to illustrate the empirical setup, denote by $b_{i,c}^A$ a bid placed by bidder i of type A on contract c . The strategy adopted among type A bidders is assumed to be the simplest possible; the group of type A bidders decides beforehand which of them to place a low bid on a specific contract, $\underline{b}_{l,c}^A$, while the other type A bidders place high bids, $\overline{b}_{j,c}^A$. With C contracts, $A + B$ bidders on each contract, define a $(C \times (A + B)) \times (C \times (A + B))$ matrix $\mathbf{W}$ with elements $w_{i,j}$ such as $w_{i,c,j,c}^A = 1$ for $i \neq j$, otherwise

$w = 0$. Note that $w_{i,i} = 0$ making the diagonal elements of $\mathbf{W}$ equal 0. A simple test for collusive bidding behavior among bidders of type A could be based on the Moran's I test for spatial correlation. The Moran's I could now be calculated for the bids b

$$(1) I = \frac{C \times (A+B)}{\sum_i \sum_j w_{ij}} \times \frac{\sum_i \sum_j w_{ij} (b_i - \bar{b})(b_j - \bar{b})}{\sum_i (b_i - \bar{b})^2}$$

This test is probably the most frequently used test for spatial correlation and builds on the work by Moran (1948). Its test statistic has been generalized by Cliff and Ord (1972) in order to derive a test for spatial correlation in linear regression models. Burridge (1980) demonstrated that the Moran's I test statistic is equivalent to a Lagrange multiplier test statistic derived from a linear regression model without a spatial lag. Its large sample properties and asymptotics have been analyzed by Pinkse (1999) and Keleijian and Prucha (2001).

The test statistic is compared with its theoretical mean, $E(I) = -1/(n-1)$, where $n = (C \times (A+B))$ and $E(I) \rightarrow 0$ as $n \rightarrow \infty$. The null hypothesis $H_0: I = -1/(n-1)$ is tested against the alternative $H_a: I \neq -1/(n-1)$. As the test statistic is to be compared to its theoretical mean, inferences is often based on the z -statistic

$$(2) z = [I - E(I)]/SD(I)$$

where $SD(I)$ is the theoretical standard deviation of I . If $z > |1.98|$, I is at the 95-percent level of significance different from $-1/(n-1)$ indicating either a negative or a positive spatial correlation.

3. Data

As data is often costly to collect and since data from public procurement auctions are scarce, it is useful to develop methods for detecting collusive bidding behavior using a minimum of information and/or information easily collected by the researcher. Crucial information is of course the bids placed by different firms. Here, b_i is measured as the bid per cubic meter of asphalt, b_i . To illustrate the procurements, we have also collected information on the number of bidders per contract as a measure of competition, $comp_c$, the size of the contract in cubic meters of asphalt, $size_c$. Descriptive statistics of b_i , $comp_c$, and $size_c$ are displayed in Table 1 below.

Table 1: Descriptive statistics

	Mean	Std. dev.	Min	Max
Bid per square meter (b_i)	9.69	91.10	0.003	3,358.77
Competition ($comp_c$)	9.93	13.59	1	67
Size ($size_c$)	45,444.62	69,638.47	5	788,600
Observations	2,478			
Number of procurements	430			

In total, we have information on 2,478 bids placed by 83 single firms on 430 contracts. The average number of bidders on each contract is 5.76 with a minimum of 1 bidder and a maximum of 67 bidders. From the court judgment we also know which 6 firms that were convicted with collusive bidding behavior on these contracts.

4. Results

As we are interested in a tool to scan a large number of procurements for collusive bidding behavior using a minimum of information and given the fact that competition authorities don't have any prior information on which firms or how many firms that are collaborating, our research strategy goes as follows. First, we test for correlation between bids, b_i , and not residuals, ε_i , as this requires less information. Then, using our pre information regarding which firms that were convicted, we calculate Moran's I for 2 of the convicted firms. This is then done for all combinations of convicted firms. Here, we expect to find a significant Moran's I estimate (e.g. $z > |1.96|$). Then do the same for the 6 largest firms in terms of number of bids who were not convicted. Now, we expect to get a non-significant Moran's I test for these firms. Finally, we make different combinations of more than 2 firms, both for cartel members and for non-cartel members. When only cartel members are included we do of course expect a significant test statistic, while when only non-cartel members are included we expect an insignificant test statistic. Results are presented in Table 2 and 3 below.

Table 2: Results Moran's I

	Moran's I			z-value		
	Mean	Min	Max	Mean	Min	Max
<i>Cartel members, 2 and 2</i>	0.221	0.008	2.232	6.80	0.20	72.09
<i>Non-cartel members, 2 and 2</i>	0.010	0.008	0.011	0.29	0.21	0.38

Starting with different combinations of 2 cartel members, the total number of different combinations is 15.³ From table 2, the average test statistic is 0.221 with a maximum value of 2.232 and a minimum value of 0.008. More interesting is the fact that the average z-value from these 15 different combinations is 6.80 which is significant. However, the lowest z-value is 0.20 which suggest that the Moran's I is not significant for all combinations of collaborating firms. In fact, the Moran's I is significant for 10 out of 15 different combinations of collaborating firms which suggest that the test statistics correctly estimate a significant test statistic in 67% of the different combinations.

Equally or even more interesting is how accurate the test is to predict non-collusive bidding behavior. The results presented in Table 2 suggest that when pairing different combinations of two non-collaborating firms, the Moran's I actually reject the hypothesis of collusive bidding behavior in all cases. That is, the average z-value is 0.29 with a maximum value of 0.38, which is far from significant at the 95% level. Hence, the Moran's I correctly indicate either a collusive or non-collusive bidding behavior in 83% of the cases.

5. Conclusions

In this paper we have used the simple Moran's I test for spatial correlation to test for collusive bidding behavior in public procurement auctions. Based on a dataset on Swedish asphalt procurements covering 2,478 bids placed by 83 single firms on 430 contracts, the Moran's I test correctly predict collusive or non-collusive bidding behavior 83% of the cases. Given the simplicity of

³ The number of combinations is calculated as $\binom{n}{r} = \frac{n!}{r!(n-r)!}$ where n is the number of elements to choose from and r is the number of chosen elements.

the Moran's I test and the fact that the only information used is the bids and the size of the contract, this is quite remarkable.

References

- Bajari, P., and L. Ye, (2003): Deciding Between Competition and Collusion. *The Review of Economics and Statistics*, 85(4), pp. 971-989.
- Burridge, P. (1980): On the Cliff-Ord Test for Spatial Correlation. *Journal of the Royal Statistical Society B* 42, 107-108.
- Börgers, T. and E. van Damme (2004): Auction Theory and Auction Design. In Janssen, M.C.W. (ed.) *Auction Public Assets: Analyses and Alternatives*, Cambridge, UK, Cambridge University Press, 19-63.
- Cliff, A. and J.K. Ord (1972): Testing for Spatial Autocorrelation Among Regression Residuals. *Geographical Analysis* 4, 267-284.
- Cramton, P. and J.A. Schwartz (2002): Collusive Bidding in the FCC Spectrum Auctions. *Contributions to Economic Analysis & Policy* 1(1), 1-18.
- Gupta, S. (2001): The Effect of Bid Rigging on Prices: A Study of the Highway Construction Industry. *Review of Industrial Organization* 19, 453-467.
- Gupta, S. (2002): Competition and Collusion in a Government Procurement Auction Market. *Atlantic Economic Journal* 30(1), 13-25.
- Jakobsson, M. (2007): Bid Rigging in Swedish Procurement Auctions. Mimeo, Department of Economics, Stockholm University, Sweden.
- Kelejian H.H. and I. Prucha (2001): On the Asymptotic Distribution of the Moran I Test Statistic with Applications. *Journal of Econometrics* 104, 219-257.
- Koyak, R. A., and G. J. Werden, (1993): What is the Effect of Bid-rigging on Prices? *Economic Letters* 42, 419-423.
- Moran, P. (1948): The Interpretation on Statistical Maps. *Journal of the Royal Statistical Society B*, 10, 243-251.
- Pesendorfer, M. (1995): *Essays in Industrial Organization* (PhD Dissertation, Northwestern University).
- Pesendorfer, M. (2000): A Study of Collusion in First-Price Auctions. *Review of Economic Studies* 67, 381-411.
- Pinkse, J. (1999): Asymptotic Properties of Moran I and Related Tests and Testing for Spatial Correlation in Probit Models. Department of Economics, University of British Columbia and University College London.
- Porter, R. H., and J. D., Zona, (1993). Detection of Bid Rigging in Procurement Auctions. *Journal of Political Economy*, 101, 518-538.
- Porter, R. H., and J. D., Zona, (1999). Ohio School Milk Markets: An Analysis of Bidding. *RAND Journal of Economics*, 30, 263-288.
- Robinson, M. (1985): Collusion and the Choice of Auction. *RAND Journal of Economics*, 16, 141-145.

Ex-ante Contracts and ex-post Performance in Public Procurement: Theory and Evidence from Sweden

or

Contract Design, Awarding Rules, Bidding Behavior and Contract Enforcement: Explorative Evidence from Swedish Elderly Care Procurement

16 January 2014

Mats A. Bergman, Södertörn University

Sofia Lundberg, Umeå University

Giancarlo Spagnolo, SITE/Stockholm School of Economics

Short abstract

[To be written]

Extended abstract

Given the importance of public procurement, efficiency in bidder selection, contract design and contract enforcement is essential. This is even more so for those key public services where quality is difficult to define and measure, including welfare services like schooling and health care but also other professional services. The efficiency with which these services are provided, e.g., the price/quality ratio, is of enormous importance. In this paper we pay special attention to bidder selection criteria and contract design in procurements of nursing home care. The provision of this public services is costly, accounting for 3 percent of GDP in Sweden (SOU 2007:103), while the per-elderly cost varies between municipalities by, according to some statistics, a factor of three (The National Board of Health and Welfare, hereafter NBHW, 2007).

This paper explores a unique dataset of 317 contracts for nursing-home care between Swedish municipalities and private providers in detail. The contracts were entered into between 2002 and 2013 by 76 municipalities and 58 successful bidders, out of the 154 who submitted at least one bid. Our dataset comprises most of the public procurements for nursing home care of the elderly in Sweden since 2002.

We analyze the service requirements specified in the tendering documents, the award criteria/scoring rules and the contractual arrangements used to safeguard quality, such as the right to inspect premises and to impose penalties on providers that fail to meet quality targets specified in the contract. We use mainly explorative methods, but will also test hypotheses concerning the link between buyer characteristics, award criteria and contractual arrangements. We will also survey the municipalities concerning their use of inspection, survey directed to the users, penalties for non-performing providers, termination and renewal of contracts etc.

The contract data will be linked to data, collected by the NBHW, that measures quality indicators at the nursing home level, including staff density (for various staff categories) at nursing homes, the use of certain best practices and the outcomes from surveys to nursing home residents. Municipal characteristics are also available from Statistics Sweden, including per capita costs for all municipalities.

Introduction

Contract design has attracted increasing attention from economists, following theoretical advances in the incomplete-contracts and property-rights literatures in the 1980s and 90s.¹ More recently, empirical studies have applied these theories to venture-capital contracts (Kaplan and Strömberg, 2003) and to research agreements (Lerner and Malmendier, 2010).

In a series of papers, Patrick Bajari and Steve Tadelis have explored contract design when the object of the contract is subject to ex post changes.² When there is a high probability that extensive changes will have to be made, a cost-plus contract is preferred over a fixed-price contract, even though the latter gives stronger incentives. The reason is that renegotiation will be easier under cost-plus contracting.

McAfee and McMillan, 1986, and Baron and Besanko, 1987, study procurement contracting when there is both adverse selection and moral hazard, when the agent is risk averse and when imperfect monitoring is possible. The latter paper ends with the observation that “[t]he interactions among these four considerations are complex [so that] the properties of optimal contracts [...] can differ substantially from contracts that ignore one or more of these problems.” We note that relatively little quantitative empirical research has addressed the issue of how moral hazard affects quality-of-service in public procurement – and what actions the principal can take to ameliorate those concerns.

Watson et al, 2013, survey the existing literature on trust in procurement. Many academics from the public sector management literature advocate trust as a mechanism that can prompt the suppliers to maintain quality, while others, including many economists, believe that the private providers must be held in tight reins, if opportunistic behaviour is to be avoided. Watson et al also report findings from a survey directed to public and private procurers. In particular, they find that moral hazard is more commonly perceived as a problem than other detrimental effects of asymmetric information, that opportunistic behaviour is more common in “complex” situations (i.e., when sunk costs are large and when there is high uncertainty and task complexity), that in particular reputational mechanisms can be effective against opportunism, but that *less* such mechanisms are used in complex situations.

[Additional references + a summary of our findings]

¹ Grossman and Hart, 1986; Hart and Holmstrom, 1986; Hart and Moore, 1990; and Holmstrom and Milgrom, 1994.

² Bajari, Houghton and Tadelis, 2010; Bajari, McMillan and Tadelis, 2009; and Bajari and Tadelis, 2001.

The Swedish market for elder care and the legislative framework

Since 1992 elder care is the responsibility of the municipalities. Close to 100,000 persons live permanently in elder care units (or nursing homes), while more than 150,000 receive assistance in their homes. The total cost of elder care was approximately SEK 90 billion in 2012, or close to 3 percent of GDP.³

Elderly living at nursing homes constitute 7 percent of the population aged 65 or more – less than in Norway and the Netherlands, more than in Germany and about the same as in France (Larsson et al., 2008). People aged 80 or more make up 80 percent of the residents; in this age group 16 percent of the population lives permanently in care units. For those above 95 years of age, the fraction rises to about 50 percent.⁴

Procurement has become an important mechanism for organizing elderly care in Sweden since the early 1990s, when it became clear that the municipalities had the right to tender the management of nursing homes and following the introduction, in 1994, of a procurement act that conformed to the EU's public procurement directives. Public procurement regulation was, however, rather liberal prior to the revised 2008 Procurement Act, in the sense that the buyer had relatively large freedom to select the winner.

There are about 2,600 nursing homes in Sweden. In 2012 private firms operated homes that together housed about 20 percent of all residents.⁵ Almost all of these are owned by for-profit corporations and many of the owners are private-equity firms. However, the admittance decision is made by the municipality. A private provider cannot decide whom to accept and nor does it have the right to decline, given that it has capacity (free beds). Income-dependent fees cover on averages 4 percent of the cost, with the municipalities paying the rest. Although a unit is privately operated, the facility itself is often owned by the municipality.

Up until 2009 the legal status of voucher systems for elder care remained unclear, so only a tiny fraction of the private provision has been organized as a consumer-choice system, but there has been a strong growth in the privately provided share since the early 1990s. Simultaneously, there has been a shift from nursing homes to home care: Larsson et al. (2008) report that among people aged 80 or more, the fraction living in permanent care fell by about a quarter between 1995 and 2004, due to better health and because of the policy that encouraged home assistance in order to delay entry into nursing homes.

³ NBHW, 2009.

⁴ SALAR, 2007; NBHW, 2009.

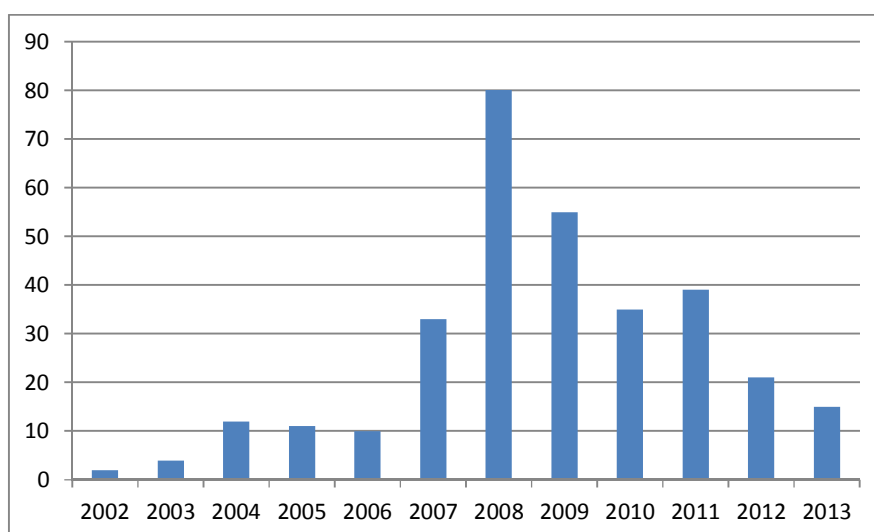
⁵ NBHW, 2008. In addition, there are about 150 transitory (short-stay) nursing homes, with another 11 000 residents. The fraction of private provision has risen rapidly since, to almost 20 percent in 2011.

Data collection and descriptive statistics

We have data on 208 public procurements of the management of nursing homes. In those procurements, 317 separate contracts were tendered and those contracts attracted 1669 bids. The procurements were arranged by 76 (out of the 290 existing) Swedish municipalities – mainly the larger ones. We observe approximately 30 nursing homes that were subject to at least two consecutive procurements and two of those were procured three times.

The data were collected through keyword-based searches in the two dominant publicly available databases for public tenders, e-Avrop and Opic/Visma. Figure 1 illustrates the distribution of the procurement dates.

Figure 1. Number of contracts per year.

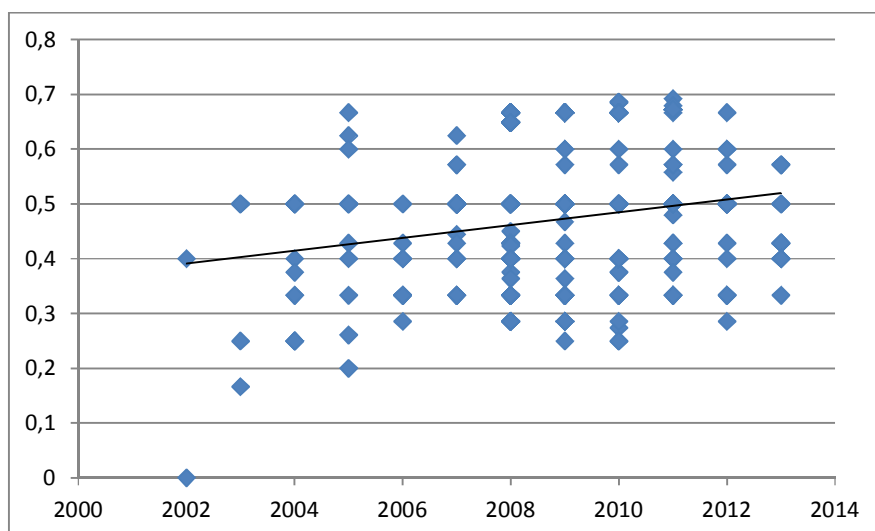


On average there were 1.5 contracts per procurement, ranging from 1 to 14, with the majority consisting of one contract only. Almost 100 % of the contracts were procured under the simplified procedure. The average number of flats (beds or elderly) per contract is 50 (and slightly decreasing over time). For those contracts where we have information, over 50 % of the elderly have dementia.

In most cases the contracts consisted of two periods: an initial period and an optional extension period. Under the Swedish Procurement Act, the buyer has the exclusive and discretionary right to choose whether or not use the extension period. The average length of the initial period was close to 3.5 years and the length of the extension period was, on average, just over 3 years. The length of the initial period has decreased somewhat over the observed period, while the length of the extension period has moved in the opposite direction. All contracts except one used at least one extension period. The ratio of the length of the extension period to the total contract length is

illustrated in the Figure 2, which confirms that the relative length of the option period has increased with time.

Figur 2. Length of extension period as a fraction of total contract length



Contractual regulation of quality

We measure 18 (mainly dummy) variables of the quality demanded or the type of services that should be included in the price. Examples include minimum staff-density requirements and requirements that palliative care, dental care, rehabilitation and/or interpreter services should be provided. Most of the services were required in 75-99 % of the contracts.

The average number of staff per elderly is around 0.75. In comparison, the NBHW measure the instantaneous average staff density during weekdays (daytime at weekends) to be 0.30 (0.25), as reported in Äldreguiden, based on an almost comprehensive survey study of work schedules at nursing homes in 2012. Assuming an average density of 0.1 during evenings and nights and an average of 1750 hours worked per full-time employee, this translates into approximately 0.8 full-time employees per resident, i.e., very close to the average staffing requirement in our data.

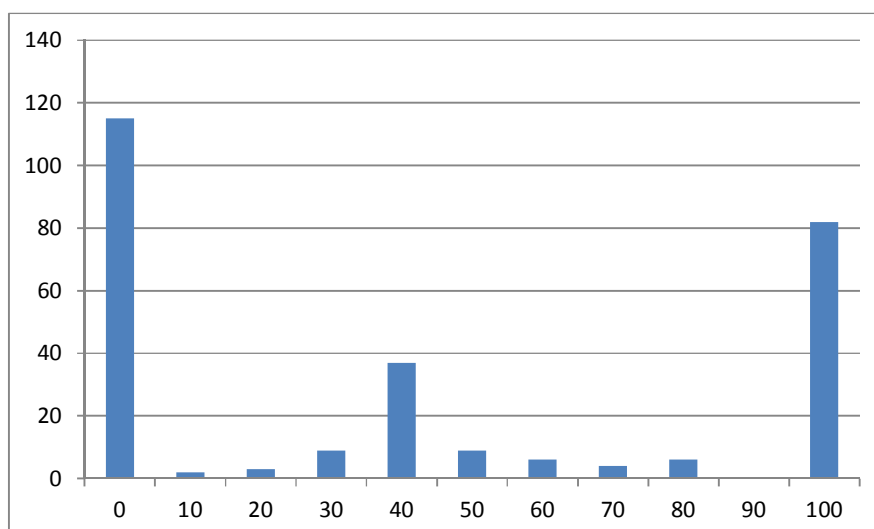
Bid scoring

We have 17 variables that measure different aspects of the scoring rule. First, we classify the scoring model into 12 different types (lowest price, highest quality and different versions of price-to-score and quality-to-price models). The other variables mainly measure the weight given to different criteria.

For most of the contracts we can observe the weight given to price in the scoring rule. The main exceptions are those procurements where quality is given a monetary value that is added to or subtracted from the price, as appropriate, in order to calculate an evaluation price. Such models are used for 16 % of the contracts.

The distribution of price weights among those contracts where we can observe the weight is shown in Figure 3. As can be seen, 42 % of those contracts, or 37 % of all contracts, were awarded in beauty contests. Lowest price was used for about a quarter of all contracts. Maximum-quality procurements (beauty contests) have become more frequent over time, accounting for 46 % during the second half of the period, up from about 30% during the first half.

Figure 3. Distribution of price weights in the sample. N = 273.



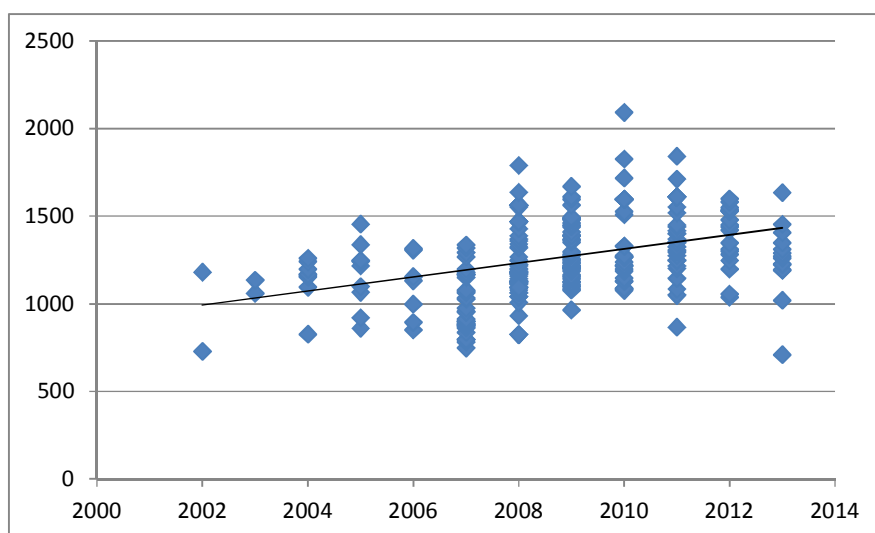
Bidders, bidding and price

There are 27 variables that describe different aspects of the bids: the identity of the bidder, the number of bidders, the winner, the scores in different dimensions (including overall price score and quality score, respectively), the total value of the contract, the price per day and apartment etc.

The price per day ranges from about 700 to just over 2000 SEK (€80-230). There has been an increasing trend, as seen in the Figure 4. During the first half of the period, the price averaged around 1180 SEK; during the second half the average price was around 1350 SEK. While a trend

has been plotted into the diagram, it seems more appropriate to say that there was a marked increase in the price in 2008.

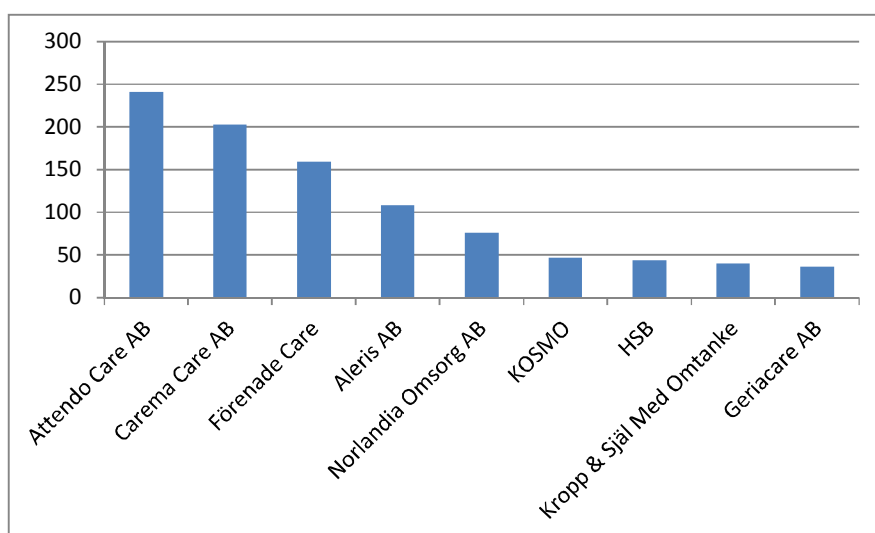
Figure 4. Price per day



On average, there were 5.3 bidders. The number of bidders increased over time, from around 4 in the beginning of the sample period to around 6 towards the end. There is a positive association between price and number of bidders.

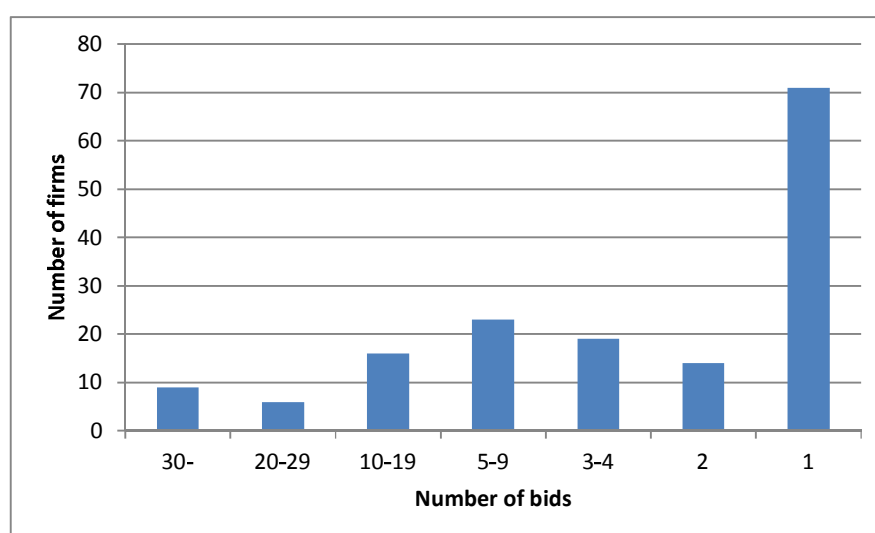
There were 154 bidders who submitted at least one bid, but only 58 of those secured one or more contracts. The nine largest, those which submitted at least 30 bids, are shown in Figure 5. These numbers should be compared against the number of contracts, 317.

Figure 5. Large bidders; number of bids



The number of firms in number-of-bid categories is shown in Figure 6. Again, there were nine firms that submitted at least 30 bids each, six firms submitted between 20 and 29 bids each, 16 firms submitted between 10 and 19 bids each etc. About half of all firms that appear in the dataset submitted only one bid. Of the bids, 70 were submitted by one of the 15 obviously bidding municipalities; other municipalities may have submitted a bid through a municipal company with a name that did not give the municipality away.

Figure 6. Number of firms in number-of-bids categories



Overall, almost one bid out of five was a winning bid (19%) and about 38 % of all bidders won at least one bid. The largest firms (those submitting many bids) were more successful. Among the five most frequent bidders the average success rate was 23 %; among the other 26 firms that submitted at least 10 bids the average success rate was 18 %; while the remaining less frequent bidders won, on average, only 12 % of the time. (Weighted averages.) However, a handful of the large firms (bidding at least ten times) were notably unsuccessful and won *no* contract; another five large firms won only 2-10 % of the times they bid.

Contract enforcement

In our dataset there are 24 variables that measure the existence of possible penalties, although many of these were never used in the sample. A few variables measure the ability of the buyer to terminate the contract; for almost all procurements this is possible if the supplier does not meet the contractual obligations. In contrast, no contract will automatically be broken just because an objectively measureable state is reached.

In 43 % of the contracts, the buyer will bill the supplier the cost of actions necessitated by the supplier's negligence (or deduct a corresponding sum from the payment); in 88 % of the contracts the buyer will have to pay a sum corresponding to damages awarded to third parties by a court and payable by the municipality, if the cause of the damage is supplier negligence.

In 60 % of the contracts there are fixed monetary penalties for at least some specified outcome, such as instances of serious mistreatments. The use of this instrument has increased sharply with time, from around 40 % during the first half to 80 % during the second half. On average, those municipalities that have any monetary penalty have about 2.5 different types of penalty scores in our coding.

The most common type of fine clause, used by almost all municipalities that had any such clause, stipulates that the supplier will have to pay damages awarded by a court for not fulfilling the contract. The second most common clause, used by about 2/3 of those using any clause, stipulates that they will have to pay a specified amount "for not fulfilling the contract". The third most common clause, used by close to half of those municipalities, is to have a specified penalty for the non-presence of certain staff categories or staff numbers. Here, the level of the fine range roughly between 1 and 30 % of the payment during the period of violation. (Although the methods of calculations vary and are difficult to compare.) The fourth most common clause, used by one quarter, sets a specified penalty on some well-specified and measureable quality deficiency.

Only one municipality uses a fixed fine for occurrences of pressure wounds (Västerås), no municipality automatically fines fall fractures or serious criticism from the medically responsible nurse ("MAS"). In a few cases there are automatic fines for using illicit staff, for delays in commencing the provision of nursing services at the start of the contract period, for not having anti-discrimination plans etc.

There are six variables that measure incentives. No contract uses bonuses for high quality. However, in some contracts the supplier will have to bear the risk of empty apartments.

There are 24 variables that measure what control mechanisms are used by the municipality to ensure proper delivery. In 37 % of the contracts, it is explicitly stated that the procurer has the right to make surprise inspections. In 30 % of the contracts, it is explicitly stated that there will be pre-announced inspections. The use of inspections clauses has become more frequent over time. The right to inspect the premises is stated in more than 90 % of the contracts.

In more than 80 % of the contracts it is stated that surveys will be sent to the elderly. In 40 % of the contracts it is stipulated that surveys will be sent to relatives; 17 % of the contracts provide for the right to send surveys to, or hold interviews with, the staff. However, surveys are mentioned less often in the recent contracts.

Different forms of self-assessments are mandated in between one and two thirds of the contracts. This has become more common in recent years.

Analysis

We analyze the determinants of contracting characteristics. We explore changes over time and differences between large and small municipalities.

[The following is a preliminary analysis, which will be made more thorough.]

Tough contract clauses and procurement practices that from theory can be expected to help sustain non-contractible quality have become more common over time and are more prevalent in big municipalities. E.g., long option periods, penalties and low scoring weight for price. These are also associated with higher average prices. I.e., small municipalities - and in the past all municipalities - can get away with lowest-price procurement, short option periods, few formal sanction mechanisms, because they can sustain a reputational equilibrium with informal threats. And are then able to pay low prices. Large municipalities and most municipalities in recent years have to be more formal - and will then pay a higher price. Small municipalities also get better customer satisfaction. Of course, costs may be somewhat lower in small towns.

There seems to be quite small differences between large and small municipalities. Large municipalities have slightly shorter initial contract periods, slightly longer extension periods, put less weight on price and use quality-only procurement more often. Large municipalities less often specify the right to inspect premises but more often regulate that surveys should be used. They attract more bidders; Stockholm on average attracts 7 bidders while small municipalities attract five. Large municipalities have a higher staffing density.

We will control for clustering, since three large municipalities account for close to a third of all contracts.

Our data on contracts can be matched with data from the NBHW on staff density for various categories of staff, staff education and on the existence of a number of routines, such as a residents' council, having a particular contact person, providing food at times according to the NBHW's recommendations, having a current medication plan etc. These observations are at the nursing-home level.

At the municipal level this dataset contains additional variables. For example, the number of elderly with home care or living in a nursing home and the number of elderly that receives municipal assistance (home care or in a nursing home) per staff member in the central elderly care administration. Also, what fraction of the elderly that has recently undergone an assessment for incontinence treatment etc and some other variables.

Finally, the NBHW is planning to release data on customer satisfaction at individual homes starting this year (2014). Which will then likely be from the 2013 survey.

Conclusions

[To be written]

References

Baron, David P. and David Besanko, 1987, Monitoring, Moral Hazard, Asymmetric Information, and Risk Sharing in Procurement Contracting, *The RAND Journal of Economics*, 18(4): 509-532.

Bajari, Patrick, Stephanie Houghton and Steven Tadelis, 2010, Bidding for Incomplete Contracts: An Empirical Analysis of Adaptation Costs, working paper.

Bajari, Patrick, Robert McMillan, and Steve Tadelis, 2009, Auctions versus Negotiations in Procurement: An Empirical Analysis. *Journal of Law, Economics, and Organization*, 25(2): 372-399.

Bajari, Patrick, and Steve Tadelis, 2001. Incentives Versus Transaction Costs: A Theory of Procurement Contracts. *RAND Journal of Economics*, 32(3): 287-307.

Larsson, Kristina, Ingemar Kåreholt and Mats Thorslund, 2008, Care Utilisation in the Last Years of Life in Relation to Age and Time to Death: Results from a Swedish Urban Population of the Oldest Old, *European Journal of Ageing*, 5(4): 349–357.

McAfee, R.P. and J. McMillan, 1986, Bidding for Contracts: A Principal-Agent Analysis. *RAND Journal of Economics*, 17: 326-338.

NBHW, 2007

SOU 2007:103

Watson, Glyn, Chris Lonsdale, Fei Peng and Joe Sanderson, 2013, Lessons for Procurement and Contract Management Practice in the Public Sector: Evidence from a Quantitative Study. MPRA Paper No. 47686, Munich.

[More references will be added, including our own study on mortality in nursing homes.]

The Economics of Public Procurement on Infrastructure Projects Delivery in Developing countries: A case study of Central Bank of Nigeria

¹Muhammad Rabiu Shuaib and ²Alhassan Dahiru

Quantity Surveying Programme, School of Environmental Technology, Abubakar Tafawa Balewa University Bauchi, Nigeria. Email: ¹rshuaib73@gmail.com & ²dalhassan@atbu.edu.ng

Abstract: Central Bank of Nigeria (CBN) can be seen as one of the biggest construction clients in Nigeria. Today, the total construction cost of CBN's projects currently ongoing is not less than N180 billion (about 1.1 billion USD). This paper investigates the economics of public procurement on CBN's Office Projects. It determines the efficiency of project managers', clients' and contractors' roles with a view to evaluate the operational techniques that are used in executing public infrastructure projects in developing countries. The construction projects procurement process of the CBN under the national public procurement Act 2007 provides quality, timeliness, suitability and affordability of those procured inputs that largely determine whether the public investment will succeed or fail. Qualitative data obtained from ensued discussions with projects stakeholders were critically analyzed to establish success or failure of the projects in relation to the procurement process adopted.

It was observed that technical assistance services can exceed their direct costs. It argues that even though CBN's office buildings procurement costs are largely substantial, but they usually consume scarce resources of tightly constrained time and budget.

The paper submits that both projects have not realized their objectives so also the BPP core objective of the PPA 2007. The chosen procurement method and the implementation process of its guidelines provided a level playing ground for all strata of bidders who tender for the job, but yet value for money has not been achieved because both projects have not been completed by the agreed completion dates and cost. Indeed a situation which cast so much doubt on the competence of the contractors to deliver the project within its contract period. The Paper finally argue that the tendering process might have been manipulated (perhaps in accordance with the BPP (2012) chain of corruption chat) to suit a pre-arranged outcome.

The paper concludes that public procurement process in developing countries consumes scarce skilled resource to efficiently plan and implement the production process. It takes time, not merely for project delivery and satisfaction, but also for transparent/unbiased procurement planning, contracting and supervision. Much of these procurement processes are highly visible, as well as controversial; exposing public sector to scrutiny and second-guessing for procurement choices that are deferred or delayed.

Key words: Public procurement, Central Bank of Nigeria, Economics.

1. Introduction

Decision as to the choice among procurement method has always remained critical to many clients in the construction industry. (Latham (1994) notes that “basic decision on the procurement route (is difficult).....inexperienced clients need advices”. Indeed, procurement stage is described as a sensitive stage to the eventual project success and a significant component in project failure” Morledge, Smith and Kashiwagi (2006). This position however is not unconnected with the fair of adverse consequences in the event of choosing a wrong system. But in the case CBN and any other Government agency in Nigeria, choice of procurement method to deliver capital project is not an alarming issue, especially when looking at the necessary need to comply with the provisions of the Public Procurement Acts 2007.

Study reveals that conventional procurement analysis has long recognised that many building contracts provide the machinery to adequately control two out of the three parameters of time, cost and quality, but that an employer must often accept that the third parameter is somewhat compromised (Forward, 2002). This clearly draws our attention as to the performance expectation of different procurement options in view of the given circumstances.

The purpose of this paper is to observe and explore the efficacy of CBN’s traditional procurement success on capital projects based on the provision of procurement Act of 2007.

This paper seeks to address the success or otherwise of traditional procurement on two Central Bank’s capital projects namely: CBN Branch Office Project Katsina and Abakiliki, Nigeria. Could the success or otherwise of these projects be associated with the choice of the procurement system used? Or are there other factors that could be tied to the achievement or otherwise of the projects objectives? Is there efficiency in the implementation process of the traditional system of procurement as prescribed by the Royal Institute of British Architects (RIBA)?

2. Traditional Method of Procurement

The principle of contractual arrangement is to identify the right strategy and appoint the appropriate skilled contractor to deliver the project within some predetermine objectives. Different procurement options make different decision in relation to allocation risk and other forms of contractual responsibilities.

In traditional procurement method, the client normally appoints two consultants; one for design and the other for cost control. A main contractor is appointed to carry out the construction work after the design has been fully or substantially completed (Nahapiet and Nahapiet 1985). The major advantage of this method of procurement is that the design can be controlled by the client and that the client can vary works during the course of the construction. Chiniyio (2009) suggests that the use of traditional system of procurement is on the increase with many clients perceiving it as being well tested method in both practice and law and with client being in full control of design and variations. Although many believe that negotiation and partnering could largely enhance value for money, there are increasing evidences that where traditional

system of procurement is in use success could still be achieved if the process is efficiently implemented (Frank 1998).

Indeed, the traditional contracting approach is professed to have problems of variations and the production of late design information (Latham, 1994 in Abrahams and Farrels 2003). There is also a wide belief that the system offers a balanced tender for contractors to compete on same footing with equitable fluctuation clauses. Also the system creates an opportunity for the client to enjoy contributions of specialist subcontractors in the design and drafting of specifications.

Traditional system of procurement is perceived as Design Precedes Construction Method where the design is fully or substantially completed before contractor is appointed. This concept unarguably entails splitting of responsibilities which unavoidably prolong the start and completion of the project. Unlike in other forms of procurement like Design and Build where client pass to contractors the risk of late project completion due to late receipt of information (Abrahams and Farrels 2003).

3. Public Procurement Act 2007

The Nigerian Public procurement Act 2007 (PPA 2007) was essentially provided to establish the regulatory agencies responsible for the monitoring and oversight of public procurement, harmonizing the existing government policies and practice by regulating and developing the legal framework and professional capacity for public procurement and other related matters. Since then, Nigeria has been among the countries in the world with legislative guide on how public funds are expended. This brings about the establishment of the National Council on Public Procurement and the Bureau of Public Procurement.

Section No. 14 of the PPA 2007 highlights in some details, how contracts that are related to physical works on site should be executed. Also Section 17, 18 and 21 (Page B592) of the same documents (PPA 2007) spell out clearly that for each financial year, every procurement entity or contract shall establish a procurement planning based on the following:

All procurement shall be undertaken within the approved budget of the procuring entity (P.E) and be based on a meticulously prepared procurement plan. This should be done by:

- a. Closely coordinating with the budget department to ensure that expenditure is provided for in the budget.
- b. Indicate the appropriate procurement methods for each project and ensure that no contract splitting is carried out
- c. Detail the procurement steps and associated expenditure outlays for not less than the first 18 months thereof for projects sufficiently developed and conclude
- d. Details indicating the procurement steps and associated expenditure outlays for the remaining period of the contract
- e. Provide for grouping of contracts to obtain economies of scale and reduce procurement cost
- f. Be continuously updated as the process progresses or new projects are developed in accordance with budgetary provisions.

The public procurement Act (2007) according to the BPP is set to establish regulatory functions to achieve the following core objectives:

- a. Economy and Efficiency
- b. Competition – providing level playing ground for all strata of bidders
- c. Achieve Value for Money
- d. Enhance Transparency

4. RESEARCH DESIGN AND ADMINISTRATION

The research paper commenced with in-depth literature search in the relevant international Journal papers, text books, e-textbooks, government and academic articles, published MSc and Ph.D. theses, and other published and unpublished documents. This enabled the research to identify key issues relating to construction project procurement and established the fundamental requirement of the Nigerian public procurement Act 2007 as it relates to procurement of capital projects.

A quite number of papers on the nature and principles of traditional method of procurement were studied. This is because all CBN projects (including the on-going ones) are procured using the traditional system of procurement. This also include CBN project Katsina and Abakaliki where this research paper concentrated its study. The study also looked at the Nigerian public procurement Act 2007 as it applies to procurement of capital projects in Nigeria. This provided the foundation upon which this research paper was built. It also established good bases for understanding its operational guidelines and established where (in principles and objectives) has any correlation or otherwise with the traditional system of procurement.

The method used in this research paper was Focused Group Discussions (FGDs) where data was collected and analysed using funnel approach starting from the general to specific.

The level of confidence was determined as one from the discussions held amongst CBN project managers and construction experts. The locations used in conducting this research paper work were Katsina and Abakaliki. While CBN Katsina is already a completed project, Abakaliki is still on-going. These two project sites were randomly chosen, because there are currently many on-going CBN Branch Office projects that are taking place in Nigeria. Random sampling was used in selecting the project locations. This research paper limits itself to these two project sites, because it cannot cover the entire projects being executed by CBN in Nigeria.

5. DATA PRESENTATION AND ANALYSIS

Twenty (20) numbers of respondents were engaged in general discussion on the CBN traditional procurement method, before it was narrowed to the specific discussions. Ten (10) respondents from each project site were sat down and discussions ensued on their understanding of why CBN projects are not delivered on time and within the stipulated 2007 procurement Act provision as enshrined in the Nigeria's Bureau for Public Procurement rules and guidelines.

6. THE CASE STUDY OF CBN BRANCH OFFICE KATSINA

CBN Branch Office building Katsina is among the development branch buildings and currency centres in all state capitals in Nigeria. The projects according CBN report (2009) is to provide quality banking structure and easy access to banking services nationwide. The project which was awarded in 2006 set to achieve the following set objectives; to be completed within 24 months i.e. (commenced on 9th of February 2006, and to be completed by 9th of March, 2008), at a total contract sum of N4.409 billion and in accordance with the specified quality and functions described in the contract documents.

The discussion/interview on this project involved stakeholders from the consultants team, contractors, specialist subcontractors and the client team who had been involved(in one way or the other) in the project since from the beginning and participated in the preparation of the contract documents, tender process and execution/supervision of the project during construction.

Response revealed that although Katsina CBN Project has been completed and handed over to the client, there were some recorded impediments in attaining the objectives of the project. The project suffers completion delay of 12 months with cost overruns of about N1billion.

Based on the pre-contract stage the following were observed by the respondents:

- Adequate documentation including complete design before tender
- There was advertisement, prequalification and tender.

However, based on post-contract stage, the following problems were identified as major setbacks to Katsina State CBN's Office project.

- Delay in all clients supply items (spiral reinforcements, cashier cubicles and security doors/installation)
- Programme of work submitted by the contractor is not prepared based on any form of resources allocation hence could not be applied to track progress or measure delayed activity on site.

7. THE CASE STUDY OF CBN BRANCH OFFICE ABAKILIKI

This is among the Nine (9) New CBN Prototype branch office projects which were awarded in November 2010. As mentioned earlier in this paper, the projects according CBN report (2009) is to provide quality banking structure and easy access to banking services nationwide. The completion period of the project is 24 months, commencement date was November 2010, and the project is to be delivered in accordance with the specified quality and functions described in the contract documents at a contract sum of N 7,157,416,177.50 billion. To date the project is still on-going. The initial contract period had expired since November. 2012 and the overall progress of work to date is at about 60% only.

Nonetheless, the discussion/interview on this project involved stakeholders from the consultants team, contractors, specialist subcontractors and the client team who had

been involved(in one way or the other) in the project since from the beginning and participated in the preparation of the contract documents, tender process and execution/supervision of the project during construction.

Response revealed that CBN Project Abakiliki has already suffered time overruns of 2 years to date. Although the project is still on going, the respondents lamented on some pre and post contract issues considered as their experience on the project.

At the pre-contract stage:

- Inadequate time in preparation of pre-contract documents. Architectural and structural drawings were all complete before tender but many issues on mechanical and electrical services were not detailed.
- There was adequate cost plan and budget estimate as required by the PPA 2007 before going to tender.
- The scope of work in terms of quality, and function were adequately defined at the pre-contract stage (except the Mechanical and Electrical (M&E) services)
- The contract duration was estimated to last 24 months before tender. But the respondents revealed that 2 years completion period for the project is grossly inadequate.
- There was strict adherence to procurement guidelines in selecting the contractor for the job. There was advertisement, prequalification exercise and tender before finally selecting the contractor for award.

However, at the post-contract stage, the following issues were identified as major setbacks to CBN Abakiliki Office project.

- Delay in all clients supply items (spiral, casheir cubicles, security doors/installation)
- Inability of the contractor to work according to the designed programme of work (PoW). All the PoW (initial and revised) submitted by the contractor was not prepared in consideration of any sort of resources allocation hence could not be applied to track progress or measure delayed activity on site.
- Incomplete services drawings even upon engagement of the PC Items subcontractors.
- Most of the specialist subcontractors lack requisite knowledge, skills and experience to deliver the project within its predetermine objective of time and quality.
- Despite late engagement of PC items subcontractors on the projects, the entire selection process was not subjected to any forms of tendering process as enshrine in the PPA 2007 hence incompetent subcontractors scaled through.
- Interruptions due to ground water on site.

8. DISCUSSION OF RESULTS

From the foregoing, it can be seen that none of the two CBN projects achieved its set objectives. To date, the ongoing Abakiliki project had already suffers time overruns of about 13 months. The completed Katsina project incurred both time and cost overruns of 12 months and about 1.0 billion Naira respectively.

It can also be seen that although the procurement process of both projects were subjected to the principle of the procurement guidelines as enshrine in the PPA 2007 and RIBA traditional method of procurement, there is strong evidence as revealed by the respondents that the procurement principles have not been efficiently implemented. The respondents believed that with efficient implementation of the principles of the traditional system of procurement as used on these projects, (which is also in conformity with the principle of the Nigerian PPA 2007) success could have been unavoidably achieved.

On CBN Katsina project, the study revealed that prior to award of contract, the procurement rules guidelines with respect to adequate planning, proper documentations and tendering process was strictly adhere to. There was advertisement, prequalification exercise and tender before finally selecting the contractor for award. This means that documentations were properly completed at agreed time and all contractors were given equal opportunity to tender for the contract. The post contract exercises were equally not in deviation from the requirement of the procurement Act 2007. Few of the major project challenges obtained from the respondents include late delivery of the client's supply items to site. These include spiral reinforcement, cashier cubicle and security doors/installation.

The CBN project Abakiliki though still on-going is not much different from CBN Katsina in terms of pre-contract planning and documentation. The only clear difference is that while in the case of Katsina, drawings and cost plan for M&E services were completed before tender, same items in the case of CBN Abakiliki were allowed as prime cost sums (PC) items for specialist subcontractors to execute.

This research paper revealed that proper procedure was followed in, advertisement, prequalification and tendering process for the job. The contract duration was estimated to last 24 months. Although the respondents revealed that 2 years completion period for the project is grossly inadequate, this argument however, cannot be accepted, because CBN Katsina and Abakiliki have the same volume of work, and from the findings above, CBN Katsina would have been completed in 2 years if not because of the incurred delay in the delivery of the client's supply items to site. However, in addition to late delivery of the client's supply items to site, few of the major project challenges obtained from the respondents include: failure of the contractor to work according to the prepared programme of work for the project. This could be due to the difficulty faced in coordinating the builders work with the diversified M&E specialist activities on site. As highlighted by the respondents, both the initial and revised programme of works submitted by the contractor were not prepared based on any form of resources allocation hence could not be applied to track progress or measure delayed activity on site. This situation cast so much doubt on the competence of the contractor to deliver the project within its contract period. Perhaps, the process was manipulated (in accordance with the BPP chain of

corruption chat) to suit a pre-arranged outcome. In other word, not most economical tender was selected for the job. The paper also revealed that most of the specialist subcontractors on the project lack the requisite knowledge, skills and experience to deliver the project within its predetermined objective of time and quality. Despite late engagement of these subcontractors, the entire selection process was not subjected to any form of tendering process as enshrine in the PPA 2007 rules and guidelines, hence incompetent subcontractors scaled through.

The paper further submits that the PC items subcontractors for M&E services were engaged around July 2012 about 4 Months to the end of the project. This duration appeared inadequate for documentation, procurement and delivery and installation of Security Equipment, Lift, BMS, ICT and AC and Ventilation System for the project. Most of these items are outsourced from their place of production to project site.

9. Conclusion

On the whole, it can be seen that the core objective of the public procurement Act 2007 was only partially achieved in both projects. The paper submits that both projects were not able to be completed by the agreed completion dates and cost.

However, In the case of CBN Katsina project, late delivery of client's supplied items (such as spiral reinforcement, security doors etc.) to site was seen as being responsible for the delay in completion. This mean that the failure of the project in Katsina was not in any way to do with the choice of the procurement method by the client (CBN) neither the implementation process of the traditional system of procurement or the PPA 2007 rules and guidelines.

The paper further submits that on CBN Abakiliki, evidence revealed that there was complete adherence to the PPA guidelines and the principles of traditional method of procurement at the pre-contract stage of the project. But at the post contract stage, the process by which the PC items subcontractors were engaged was completely different. No prequalification exercises, no tender process, no consultants were involved. What was there was a system which produced 6 different subcontractors to execute the M&E services. Their obligation was to outsource the equipment (pay and order for manufacturing process to commence), deliver to site before installation, all within 4 months.

On the whole, both projects have not realized their objectives so also the BPP core objective of the PPA 2007. The chosen procurement method and the implementation process of its guidelines provided a level playing ground for all strata of bidders who tender for the job, but yet value for money has not been achieved. Perhaps because there were no valid programme of work guiding the operations on site hence delay is incurred. Indeed a situation which cast so much doubt on the competence of the contractor to deliver the project within its contract period. As lamented by the respondents , the process might have been manipulated (perhaps in accordance with the BPP (2012) chain of corruption chat) to suit a pre-arranged outcome.

10. References

Abraham K., and Farrell P (2003). "An investigation into the influence of D&B procurement method on client value for money", COBRA 2003.

BPP (2007). 'Public Procurement Act 2007, (Act 14 No. of 2007. *Public Procurement Regulations for Consultancy Services*) Bureau of public procurement, Abuja.

BPP (2012). 'Public Procurement Act 2007 as it affects the Contractors and Consultants. Bureau of public procurement, Abuja.

Central Bank of Nigeria Annual Report (2009). "CBN Annual Report and Statement of Account for the year Ended 31st December, 2009, Part One: *Activities of the Central Bank of Nigeria*," Federal Republic of Nigeria: 1 -32

Chiniyio E., (2009). 'Construction Procurement Module note' *University of Wolverhaston, United Kingdom*.

Forward F (ed) (2002). "The NEC compared and contrasted", Thomas Telford, London.

Frank, J. (1998). "*Building procurement system: A client's guide*", 3 Ed, Longman, Essex

Latham, M. (1994). "*Constructing the Team*", HMSO

Morledge, R., Smith, A., Kashiwagi, D. T. (2006). "*Building procurement*", Blackwell Publishing limited, Oxford, U.K.

Nahapiet J and Nahapiet H (1985). "The management of construction projects. Case studies from the USA and U.K. Chartered Institute of Building.

EFFICIENT PURE PROJECT ALLIANCE IN THE PUBLIC SECTOR

Saïd Boukendour
University of Quebec, Canada

ABSTRACT

Although the single or pure project alliance has credited with outstanding achievements in the private sector, its relevance in the public sector is doubted. While in the private sector, a project is undertaken only if it meets the required level of expected return, the usual position in public sector application is that the project is almost always sure to proceed. Thus, the alliance partners do not have the same pressure for reducing the target outturn cost (TOC). The recommended solution, which is to introduce competition in the selection process by recruiting two or more proponents in the first phase, and then to pick the one that offers the best value-for money is very expensive and can damage trust and collaborative relationships. I propose a new risk and rewards sharing formula that encourages the alliance partners to submit truthfully the lowest possible TOC, which makes needless the use of competition in the selection process. The most significant advantages of the formula are in saving a substantial amount of cost and time and in fostering trust and better cooperation. The formula can be extended to any non-competitive negotiated contract.

INTRODUCTION

Since the early nineties, partnering has very strongly been advocated as the best way for preventing claims and disputes in large and complex construction projects. In the literature, a distinction is usually made between, on the one hand, strategic partnering for sustaining long-term collaborative business relationships, and on the other hand, project partnering and project alliancing, which refer to a single and non-repeated transaction.

Project partnering stands on the argument that, despite their conflicting interests, the contractual parties also share sufficient common goals to warrant a more collaborative relationship by settling their differences through joint problem-solving rather than recourse to litigation (Benett and Jayes, 1995; Larson, 1997). However, a real tension remains between the need for the development of trust between the contractual partners and surrounding economic conditions that predispose them to act in more exploitative ways (Bresnan and Marshall, 2000). Hence, it falls short of guaranteeing that each party will equally benefit from the relationship (Walker et al., 2002).

Project alliancing, instead, involves a legally enforceable agreement between the owner and the non-owner's partners, which include designers, service providers and contractors, that undertake to work cooperatively, on the basis of a sharing of project risk and reward (e.g., Ross, 2003; Sakal, 2005). The owner selects the partners on the basis of their expertise, skills and capabilities. Once selected, they cooperatively develop the

conceptual design of the project and the target outturn cost (TOC) with agreed risk and reward sharing arrangements. More specifically, they agree on a target cost (TOC), a target profit and a sharing formula of any difference between the actual cost and the target cost (TOC), a.k.a pain-share/gain-share.

Although this so-called pure project alliance has been credited with the achievement of outstanding results in the private sector, especially in oil and gas industry, its relevance in the public sector is doubted (Cowan and Davies, 2005). The argument is that, in the private sector, the owner would not proceed with the project unless the identified corporate business case hurdles were met while the usual situation in public sector application is that the project is almost always certain to proceed.

As a remedy, the introduction of competition in the selection process of alliance partners is recommended. Typically, the owner selects two or more proponents in the first instance with no regard to price, as under a pure alliance. Then, with the owner's input and support, each proponent-team develops the concept design and associated TOC as well as a signed project alliance agreement. Finally, the owner selects and appoints the proponent with the "best value" offer.

Aside from the obvious additional costs involved in establishing the alliance, the introduction of price competition into the selection process alters the fundamental nature of the bargain and changes the very "DNA" of the eventual alliance. The focus of the competing teams is shifted away from developing a high-performance team focused on meeting or exceeding the owner's objectives to a more traditional design and build bid approach looking for ways to win the job (Ross, 2008).

Consistent with this, Love et al. (2010) reported that when the alliance partners are forecasting a loss, different attitudes start to emerge and trust is lost. Conversely, delivering under the TOC may suggest that the partners have overcharged, which can also destroy the trust that has been established. When trust is absent, confidence in decision-making may be jeopardized and opportunities for innovation can be missed.

By its very nature, the linear sharing formula, which is currently used in target cost contracting, gives the contractors the opportunity to increase profit either by reducing cost, which is intended by the owner or, contrarily, by artificially inflating their target cost. Actually, the alignment of interests after the signing of the contract conceals a "win-lose" game in setting the target cost beforehand. Say it another way, the risk-reward sharing mechanism may work like a "money laundering," which is to pass off as fair compensation of a cost reduction effort something that actually was a false gain secured by an ex-ante cheating.

The aim of this paper is to propose a new risk sharing formula that, in contrast to previous approaches, incentivizes the alliance's partners to submit the target cost estimate truthfully. In other words, the partners maximize profit when they submit the lowest but realistic target cost. Before presenting an illustrative example, we begin with providing the logical reasoning behind the formula instead of its complex mathematical development in order to make it understandable for practitioners.

RISK SHARING AS AN EXCHANGE OF CONTINGENT CLAIMS

In its simplest form, the sharing profile of the target cost contract consists of a constant share fraction that splits any cost over- or under-run relative to the target between the contracting parties. Formally, the contractor's profit can be expressed as follows:

$$P = f + \alpha (K - X) \quad (1)$$

Where:

- f : the target profit or fee,
- K : the target cost (TOC)
- X : the actual cost (unknown until the end of the project)
- α : the contractor's share of cost under- and over-run.

The cost-plus and fixed price contracts represent the extreme cases where the risk is entirely shifted to the owner ($\alpha = 0$) or the contractor ($\alpha = 1$). Under these two polarized contracts, the party that bears the obligation to assume cost overruns is entitled by the same token to benefit alone from cost under-runs. These rights and obligations can be considered as contingent claims in that sense that their value depends upon an uncertain outcome, which is the actual cost.

Actually, target cost contracts have no observable market price as they are not standardized contracts but mutual agreements concluded for creating a specified asset. Nonetheless, for illustrative purpose, we can consider a target-cost contract for delivering a commodity that is traded in an organized market instead of a specific asset. In this way, we shall show how the target cost contract can be replicated using an options strategy (Boukendour, 2012; Boukendour and Hughes, 2014).

Let us consider a target cost contract, which is concluded between the owner and the contractor for delivering a given quantity of a traded commodity. For instance, let us assume that the parties commit for delivering 100 units of the commodity at \$50 per unit in six months from now. Further, the parties agree on sharing equally any positive or negative difference that would result from price changes on the spot market at maturity. For example, if the price of the commodity rises to \$60, the contractor will be obliged to deliver the commodity for the price specified in the contract, that is \$50 per unit. This will result in a loss of \$1,000, which will be shared on an equal basis between the owner and the contractor, or \$500 each. If the price falls to \$40, the total gain is \$1,000, which will also be shared equally between the parties.

Now, suppose that the owner and the contractor conclude a standard firm fixed-price contract for delivering 100 units of the commodity at \$50 per unit in six months. The fixed-price contract has all the characteristics of a forward or futures contract. Hence, the parties can design the same pain-gain sharing mechanism through trading options on a futures contract, which mimics the fixed-price contract. Specifically, the owner can buy a half of a put option on a futures contract of 100 units of the commodity, at \$50 per unit as

the exercise price, and expiring at the same date, in six months. The contractor can buy a half of a call option on the same futures contract. Further, the options are of the so-called European style, which means that they must only be exercised on the expiry date.

Alternatively, the parties can exchange these options over the counter. Thus, the owner writes a half of call option on a futures contract, which is identical to the fixed price contract, to the contractor who in return, writes a half of a put option on the same futures contract to the owner. This transaction involves zero cash, for the options premiums are equal since they are at parity, i.e.: their exercise price is set equal to the price of the underlying commodity at the conclusion date of the contract.

Later, we will lift this restriction to consider any strike price of the options. The beneficiary gets the right, but not the obligation, to exercise the option while the writer commits to abide by the beneficiary's decision. Hence, at maturity, the put option is exercised only if the spot price is lower than the exercise price. Conversely, the call option is only exercised if the spot price is higher than the exercise price.

Their value at maturity is equal to the difference between their exercise price and the market spot price. For instance, if the price remains stable at \$50, the value of the options will be equal to zero. But, if the price goes up to \$60, the half of a call option will be worth \$500 and will be exercised by the contractor against the owner. The put option will not be exercised by the owner who will end up with a total expenditure of \$5,500 while the contractor with a reduced loss of \$500. If the price drops to \$40 unit, the put option will be worth \$500 and the call option will expire worthless. The owner will end up with a net expense of \$4,500, and the contractor with a reduced profit of \$500.

As we have mentioned above, the premiums of the options are equal only if they are at parity. Otherwise, the premiums will differ, and they must be adjusted to make the exchange fair, i.e.: the amount of what is given by one side is equal to the amount of what is given back by the other side. More generally, let p , be the pain share, and g , be the gain-share, and "Call" and "Put", be the options premiums. The fair exchange involves:

$$g \times Call = p \times Put \quad (1)$$

Using the futures options pricing model (Black, 1979), and Taylor's expansions, we get the approximation function (Boukendour, 2012):

$$\frac{g}{p} = \frac{Call}{Put} = \left(\frac{F}{K} \right) \sqrt{2\pi} / \sigma \quad (2)$$

Then

$$g = p \left(\frac{F}{K} \right) \sqrt{2\pi} / \sigma \quad (3)$$

or

$$p = g \left(\frac{K}{F} \right) \sqrt{2\pi} / \sigma \quad (4)$$

Where: F stands for the price of the futures contract at date 0, K, for the strike price, and σ , for the futures cumulated price volatility. The futures price F denotes the price of the commodity at the future specified date of the delivery, which is beforehand forecasted by the market at the conclusion date of the contract. This corresponds to the project cost estimate made by an independent estimator, with σ as the range of its accuracy expressed in percentage, i.e.: the percentage by which the actual costs are likely to deviate from the estimate. The strike price K is the price at which the option can be exercised which corresponds to the target cost (TOC), i.e.: the threshold against which the actual cost is compared in order to determine the amount of gain and loss that should be shared between the owner and the contractor.

To sum up, the gain-share (g) depends on the following parameters: the pain-share (p), the project cost estimate (F), the cost uncertainty (σ), and the target cost (K). The key of the formula is that the gain share (g) decreases exponentially as the target cost (K) increases in comparison to the owner's estimate (F), which penalizes the potential inflation of the target cost.

The objective of the contractor or the alliance partners is to maximize total expected profit $E(P)$, which is made of the fixed profit (f) and the profit resulting from the gain-share (g).

$$E(P) = f + g(K - E(X)) \quad (5)$$

Where $E(X)$ stands for the expected project cost by the alliance partners or the contractor. It is worth emphasizing that the fixed fee (f) must be determined as a percentage calculated on the basis of the owner's estimate (F) but not on the basis of the target cost (K) submitted by the contractor. Otherwise, the contractor or the alliance partners will be encouraged to inflate the cost target to secure a high fixed profit.

Substituting (3) for g in equation (5), and differentiating for the logarithm of P in respect of K, we get the optimal target cost:

$$K^* = \frac{\sqrt{2\pi}}{\sqrt{2\pi} - \sigma} E(X) \quad (6)$$

Note that the optimal target cost estimate K^* depends only on the contractor's cost estimate $E(X)$ and the relative standard deviation of the independent cost estimate.

STYLIZED EXAMPLE

To demonstrate the practical interest of this formula, and how it may work, let us take a very simple example. First, the owner hires an independent estimator to estimate the cost of the project. Then, this estimate with its range of accuracy₁ is communicated to the alliance partners who freely choose the pain-share rate p (share in the cost overrun) and the target cost K . The gain-sharing rate g (share of cost under-runs) is then derived using formula (3). Similarly, if the alliance partners submit g , p is derived using formula (4).

Suppose a project be estimated to cost \$100 million with 20% as a range of accuracy. Assume for the purpose of the demonstration that the alliance partners know the project final cost $E(X)$ with certainty, say \$105 million. Using equation (6), the optimal target cost K^* that maximize their profit is \$114.1 million.

When the alliance partners submit their TOC, the owner can know their expected cost by inverse calculation.

For simplicity, let us assume that the alliance partners submit $p=100\%$, and $K=\$114.1\text{m}$. Using formula (3), we get $g=19.14\%$. Using formula (5), and assuming $f=0$, we get: $E(P) = 0.1914(\$114.1\text{m}-\$105\text{m}) = \$1.74\text{m}$.

If the alliance partners inflate their target cost to \$120 million, for example, they will get: $g = 10.17\%$, and $E(P) = 0.1017(\$120\text{m}-\$105\text{m}) = \$1.52\text{m}$

Table 1 below shows the evolution of the gain-share and the profit of the partners as a function of their submitted TOC with $F=100$, and $p=100\%$.

The range of accuracy can be determined using a standard classification of cost estimation

Table 1. Gain share (g) and expected profit $E(P)$ in respect of TOC (million of \$)

CONCLUSION

The use of competitive TOC alliance is expensive, time consuming, and damageable for trust and very valuable collaborative relationships. The new formula discourages the alliance partners from inflating their TOC. The significant advantages are twofold.

It make unnecessary to hire a second proponent alliance partners, and it fosters the development of trust and collaboration for achieving better performance. The formula is not limited to project alliancing but it can be extended to any non-competitive negotiated contract.

REFERENCES

Bennett, J. and Jayes, S. (1995) *Trusting the Team: The Best Practice Guide to Partnering in Construction*, Thomas Telford: London.

Bresnen, M. and Marshall N. (2000) Partnering in construction: a critical review of issues, problems and dilemmas. *Construction Management and Economics*, **18**, 229-237.

Boukendour, S. (2012) A New Risk Sharing Formula for Target Cost Contracts. *AACE International Transactions*, PM.1002, 1-11.

Boukendour, S. and Hughes, W (2014). Collaborative incentive contracts: stimulating competitive behavior without competition. *Construction Management and Economics*, **32** (3): 279-289.

Cowan, B., and Davis, J. (2005) Development of the Competitive TOC Alliance – A Client Initiative, Southern Pacific Alliance Network.

Larson, E. (1997) Partnering on Construction Projects: A Study of the Relationship Between Partnering Activities and Project Success. *IEEE Transactions on Engineering Management*, **4**(2), 188-193.

Love, P.E.D., Davis, P.R., Chevis, R. and Edwards, D.J. (2011) Risk/Reward Compensation Model for Civil Engineering Infrastructure Alliance Projects. *Journal of Construction Management and Engineering*, **137**(2), 127-137.

Ross, J. (2003) Introduction to Project Alliancing (on engineering & construction projects). Alliance Contracting Conference, Sydney, 30 April 2003, <http://www.pci.d2g.com> (retrieved 5/11/2013).

Ross, J. (2008) Price competition in the alliance selection process: 9 reasons why I favour the single DCT approach-a personal perspective. Pre-reading for Infrastructure Deliveryalliance Forum, Perth, 9 April, 2008. Main Roads Western Australia, East Perth.

Sakal, M. (2005) Project alliancing: A relational contracting mechanism for dynamic projects. *Lean Construction Journal*, **2**(1), 67-79.

Walker, D.H.T, Hampson, K. and Renaye, P. (2002) Project alliancing vs project partnering: a case study of the Australian National Museum Project. *Supply Chain Management: An International Journal*, **7**(2), 83 - 91

Evaluation of Process and Goal Achievement for Transportation Public Private Partnerships: Implications for Public Procurement

Wendell C. Lawther¹ and Lawrence Martin²

1 School of Public Administration
University of Central Florida
Orlando, FL

Email: Wendell.Lawther@ucf.edu

2 PhD Program in Public Affairs
University of Central Florida
Orlando, FL

Email: Lawrence.Martin@ucf.edu

I. Introduction

Many have noted the declining infrastructure in the United States (e.g. [1]) and the extent to which traditional funding sources such as the Federal Highway Trust Fund have increasingly provided insufficient funds to repair structurally deficient infrastructure and build new roadways and bridges [2]. Identifying the source of funds to repair or build this infrastructure has led many state and local governments to consider adopting a Public Private Partnership (P3) approach.

P3s may take a variety of forms or approaches, including the Design-Build-Finance-Operate-Maintain type, also known as the Concessionaire form [3]. This is the most complex form, in which the role of the private partner has the most impact, as almost all of the efforts needed to build or repair new infrastructure are performed by the private partners. Many of these efforts, especially those associated with financing a project and performing operations such as collecting tolls, are unfamiliar to public procurement officials. The complexity of P3s, the lack of familiarity with appropriate processes, analyses, and procurement approaches, and the greater risk of inadequate expertise should lead public procurement officials to consider the optimal process and goal achievement for P3s prior to initiating a P3 approach.

The following analysis suggests criteria and standards which may be used to evaluate a P3 project after it has completed construction and entered into the operations phase—in a summative manner; or could be used prior to embarking on a P3 contract to ensure that all appropriate steps or phases are in place—a formative evaluation.

Not only can outcomes or goal achievement be measured or assessed, the processes relevant to P3 relationships can provide evaluative criteria as well. Generally, the P3 creation process can be divided into three phases:

- 1) Planning efforts, in which decisions are made to support a given roadway project and a P3 is chosen as the preferred approach to complete the project;

- 2) Pre contract award steps, in which the private partner is chosen; and
- 3) Post contract award relationships, those most relevant to contract administration or contract management, including:
 - a. Construction; and
 - b. Operations and Maintenance

What makes the evaluation process challenging is the larger time frame or scope of the P3 process, with pre-award time periods taking up to six years, for example, and post-award contracts existing for up to 99 years. The results of any evaluation, then, must be interpreted as applicable to the time period within the process that is relevant. Results of evaluations of a given project, for example, may vary, as measurements and standards chosen during the pre-contract award period may differ from those chosen *ex post*.

P3 process criteria can include assessing the degree to which specific efforts outlined in each of the three phases has effectively occurred, meeting standards proscribed in government publications and policies as well as generally accepted practices. Ideally, assessment should occur throughout the process. For example, VfM analysis could occur more than once during the planning process, as well as during the post award phase.

Evaluation must also review and recognize the extent to which decisions made in one phase affect decisions made in subsequent phases. Ideally, a well-conceived business case completed during the planning phase will result in a stronger P3 agreement, one less prone to errors; and better performance during the operations and maintenance phases. The lack of such analysis can contribute to resulting problems during the procurement phase and throughout the remainder of the P3 contractual relationship.

Evaluation of P3s should include a variety of criteria and standards. Evaluative criteria should be measureable, leading to an assessment of the extent to which the criteria have been met. Evaluative standards should identify the bases on which these assessments are made. Evaluative criteria include:

- 1) P3 specific project goals, such as relieving congestion along a specific roadway or corridor—assessing the benefits of the project; should be in line with those identified during the planning stage, especially if a benefit cost analysis is performed.
- 2) Larger societal or regional goals such as improving safety for travelers;
- 3) Specific stakeholder goals such as for those using the roadway and those living in communities located near the roadway; and
- 4) More conceptual goals such as maintaining or adhering to the public interest, assessing the degree to which the interests of non-travelers and those who would represent the relevant community or society benefit from the P3 roadway.

Evaluations of goal achievement have been to a large degree inadequate. Many assessments of P3 projects have focused on the roadway completion, indicating that projects have delivered cost and time savings, been completed under budget and prior to stated deadlines [4-6]. What is lacking is assessment of 1) specific project goals and 2) the operations and maintenance (O&M) performance of the P3 project. Even if many projects are only a few years into O & M, performance data should be forthcoming and disclosed as part of usual public sector contract management efforts. Evaluations of the extent to which performance-based contracts have met stated contractual goals are therefore largely missing from the literature (one exception: [7]).

The following sections first assesses the three phases of the P3 agreement process—planning, pre contract award and post contract award—identifying those practices deemed to be optimal or ideal throughout. The intent is not to review specific steps in how to perform parts of the process, but to offer guidance that enable optimal levels of accountability and maximize goal achievement.

II. Phase One: The Planning Phase

The start of the P3 process is a planning phase that includes reaching the decision to choose a P3 as a means of building a roadway or other infrastructure as preferable compared to traditional or alternative means of doing so. It consists of all efforts and decisions made prior to the procurement phase, the start of which is marked by the issuance of a Request for Qualifications or Request for Information.

There are at least four processes or research efforts that should occur during this planning phase:

- A. Review and documentation of the need for a given greenway road project;
- B. Benefit-cost analysis;
- C. Value for Money Analysis;
- D. Business Case Development.

To maximize accountability and transparency, all research performed during this phase should be released to relevant stakeholders including the general public.

A. Need for the Roadway Project

A variety of sources support the need for the agencies and relevant stakeholders to determine the need for the infrastructure. The Australian National Guidelines, for example, state that the choice of proceeding with a specific capital project should result from a determination that existing infrastructure is insufficient to achieve government or agency goals [8].

The decision to build a new roadway or expand/repair an existing roadway should result from an analysis made as part of the review process associated with Metropolitan Planning Organizations (MPO's). State Departments of Transportation should contribute to this review as part of the planning relevant to their future work plans.

As part of the normal review process for all transportation planning initiatives, committee reviews such as those made by Technical Advisory and Citizen Advisory Committees provide a means by which experts and professionals throughout a given region can contribute to a prioritizing process. Consultants may be charged with providing more detailed analyses.

MPO staff guides both a long term visioning process as well as a short term programming process. These processes result in a 20 year long term plan and a Five year short term plan. The long term plan may contain technical advisory reports, including those that reflect sources of revenue. Ideally, these discussions should include P3s as one alternative source of funds.

In other countries, a similar process occurs. In Australia, a scoping study is the first step in identifying infrastructure related projects that may be completed using the P3 approach.

B. Benefit Cost Analysis

To validly assess the value of a P3 contract, benefits and costs (B/C) beyond that identified by a value for money (VfM) analysis should be performed. This B/C analysis identifies benefits, termed non-financial because they are separate from revenue collection or the financial aspects of VfM, that can add to the value of a P3 project. A new roadway can allow travelers to reach their destinations sooner. A rebuilt roadway can relieve congestion, lessening the commute time of travelers on a daily basis. If the roadway can be built sooner by using a P3 approach instead of alternatives, then these non-financial benefits (NFB's) should be recognized, even if the VfM analysis does not conclude that a P3 project will produced a net financial benefit.

Three NFB's are possible:

- Accelerated delivery (services delivered sooner)
- Enhanced delivery (delivering services to a higher standard)
- Wider Social Impacts (greater benefits to society as a whole)[9]

Accelerated Delivery: the roadway can be built sooner than expected, because the private financing contributed as part of the P3 allows the work schedule or overall capital investment program to be advanced. In addition, given the risk transfer and incentives that are part of the P3 contract, the likelihood that the roadway will be built on-time is much greater.

To the extent possible, these benefits should be quantified. For example, the Sea to Sky Highway P3 project (British Columbia) identified specific user benefits, resulting from upgrades to the existing 81.5 mile highway. These upgrades included:

- Additional Passing Lanes
- Wider medians
- Additional highly reflective pavement markings
- Additional shoulder and center lane rumble strips
- Improved lighting and earthquake resistance construction
- Safer and more effective intersections [10: 21]

These upgrades have led to two types of benefits: increased safety and reduced travel times, resulting in travel time savings. Over the life of the P3 contract, from 2009 to 2030, savings from fewer accidents were estimated at \$222M, while travel time savings were estimated at \$327M. [10]. These savings reflect all three types of NFB's, as calculations estimating savings if the project had been completed later than 2009 would reflect lower amounts.

A useful example of the accelerated delivery analysis is relevant to the Port of Miami Tunnel P3 project (<http://www.portofmiamitunnel.com/>). Poole (2007) estimated time savings of trucks traveling through a Port of Miami Tunnel once the project is completed. Once the tunnel is completed, trucks could avoid traveling on the downtown streets of Miami, thereby able to travel at much higher speeds to reach their destinations. Trucks embarked on drayage trips—short hauls to area distribution centers—could add one additional roundtrip for each eight hour shift. Since the gross revenue received for each trip adds an estimated \$147, this amount would constitute added income for each truck driver [11].

C. Value for Money Analysis

Value for Money (VfM) analysis can be defined as:

The optimum combination of life-cycle costs and quality (or fitness of purpose) of a good or service to meet the user's requirement [12]

Its purpose is to enable policy planners to determine if a P3 approach to building a roadway, for example, will result in a cost savings compared to the design bid build traditional approach. If the VfM is not performed correctly, especially containing poorly devised risk assessment based on assumptions that bias the result in favor of a P3 contract, a higher than anticipated cost for the project is likely. [8]. Furthermore, accountability of public officials who have approved the project suffers.

Several aspects of VfM can contribute to faulty analysis. Two of the most prominent are the:

- Risk determination; and
- Choice of Discount Rate

1. Risk Analysis

To the extent that risk analysis is less than optimal, there is a greater chance that private sector bankruptcy will occur and higher public cost is likely.

As cited by many sources, including Infrastructure Australia (2008), optimal risk analysis

seeks to assign project risks to the party in the best position to control them and therefore minimize both project costs and risks. The party with greatest control of a particular risk has the best opportunity to reduce the likelihood of the risk eventuating and to control the consequences if it does. [8]

Risk analysis can be considered less than optimal if:

- 1) risks are assessed incorrectly;
- 2) risks are not assigned to the partner best able to control them; and/or
- 3) risk must be assumed by the public partners at some point in the life of the P3 contract.

All three of these factors or aspects are interrelated.

A discussion of risk categories and the process of assessing risks in each of these categories can be found elsewhere [for example, 13]. Similarly, there are many descriptions of risk typically assigned to private and public partners, including those that may be shared. Conceptually, optimal risk occurs when there is a balance between risk and reward. To the extent that risks are seriously underestimated, as has been the case with overly optimistic forecasts of travel on a greenway roadway, higher than anticipated public costs are likely and the P3 project must be judged as less than successful.

If all of the risk has been assigned to one partner, and evidence suggests that sharing should have occurred because the partner is not able to effectively manage the risk, then optimal risk is less likely to occur. To the extent that risks cannot be correctly assigned because there is too much uncertainty to assess them correctly, public and private partners should agree to share the risk. For example, traffic revenue risk sharing can occur via a number of methods, including establishing a minimum revenue guarantee as well as a toll revenue cap [14]. If traffic revenues fall below 90% of projected revenue, for example, the public partner could reimburse the private partner a specified amount. This amount may vary, with a lower amount occurring after the first years of operations. Likewise, if revenue exceeds a specified amount, e.g., 110% of forecasted traffic revenue, a portion of this revenue would be returned to the public partner (see [15]).

2. Discount Rate Choice

The choice of the discount rate (DR) chosen as part of the VfM is a crucial determinant of the final analysis. The higher the discount rate chosen, the greater the risk that concluding analysis will bias a P3 option over the Public Service Comparator or alternative means of building a roadway. To the extent that there is no one accepted or “correct” discount rate (see [16] for a review of various approaches to determine an acceptable discount rate, including those by Australia and Partnerships British Columbia), there is a greater need to apply sensitivity analysis to the VfM calculations, applying a range of discount rates to identify a range of VfM conclusions.

Moreover, the more the DR is above the current inflation rate, or the current cost of borrowing money, the greater the likelihood that the public will perceive that the VfM analysis is invalid, and that any decision to proceed with a P3 approach may reflect a lack of accountability to the public interest. As discussed by the California legislative analysis of the Presidio Parkway Business Case that included applying a discount rate of 8.5%, accepting the legislature’s recommendation of a 5% DR would have resulted in the choice of a DBB or DB option over the DBFOM option that was chosen [17].

Discount rate can be defined as:

a percentage by which a cash flow element in the future is reduced per year, applied exponentially. It is used to estimate how much money would have to be invested currently, as a rate of return equal to the discount rate, to yield the cash flow in the future [18]

Analyzing various factors should contribute to the choice of a discount rate. A riskier project requires a higher internal rate of return (IRR) than a lower risk project, as the interest paid to obtain funding from equity investors and banks would be higher than if the project were less risky. Ideally, the cost of obtaining this capital should constitute a significant determinant of the discount rate choice.

As a result, the appropriate discount rate should vary for each potential P3 project. As indicated by Infrastructure Australia guidelines, for example, systematic risk, present in almost all P3 contracts, should be separated from specific project risk. The determination of systematic risk includes factors such as demand risk related to the level of “general economic activity”; unexpected inflation, and increased risk of economic downturns. An assessment the amount of systematic risk that is transferred to the private partner is made, and this amount determines the discount rate [8].

Also, since the cost of capital will vary at different time periods throughout the P3 contract, as such borrowing costs may vary during each year of the construction phase, as well as throughout operations and maintenance phases. As indicated by Partnerships BC, the most valid, accurate discount rate must recognize these varying costs, resulting in what is called a Weighted Average Capital Cost (WACC).

The key issue is to what degree the cost of obtaining the capital should be separated from the cost of using the capital when determining the discount rate. Some sources suggest that part of the discount rate calculation should include some risks with using capital, as there are limitations to usual risk analysis, including the choice of the probability percentile that the identified risk will occur, the potential correlation or interaction among risk types, and the “unknown unknowns”, those risks omitted from the initial risk analysis because they are completely unanticipated [8].

On the other hand, some sources suggest that the cost of using capital will be reflected in the choice of risk premiums attached by bidders when determining costs of a project for each risk type, depending on their analysis of to what degree different risk types will occur. To choose a higher discount rate that reflects these risk premiums is “double counting” the risks, and will have the impact of further biasing the resulting decision in favor of the P3 alternative [18].

For example, in the I-595 VfM analysis, FDOT assumed that the base construction costs proposed by the bidders would include a 5% cost overrun risk premium. This was chosen as a “medium to conservative” estimate given that the proposed project was not considered highly risky, and it was based on past experience with DB projects ([19]: 23). The final 2009 revised VfM analyzed various scenarios, including one that did not assume any adjustment in the cost made by bidders for risk, and one that included a 10% adjustment in the cost for risk. In the former case, the resulting VfM was a minus \$13M (-.07%), whereas assuming the 10% risk adjustment, the resulting VfM for the DBFOM P3 option was \$244 M or 12% better than alternatives [19].

Although the WACC approach does recognize that risks will vary throughout the life of a P3 project, and that the cost of borrowing capital will also vary, choosing a higher discount rate a portion of which reflects risk has drawbacks. Choosing a discount rate that only reflects the cost of borrowing capital, and not reflecting the use of that capital for construction or operations costs is preferred. Estimations of the risk premium added by bidders for construction overruns, for example, can be made separately from the choice of a discount rate. Overall, given the complexity of risk assessment, the best approach is to run a sensitivity analysis using a variety of risk assumptions and discount rates, and report the results in the overall business case analysis.

D. Business Case Analysis

There are a variety of names that are given to business case analysis, including scoping study and feasibility analysis. The business case can also contain a variety of analyses, including different combinations of benefit cost assessment and VfM (Canada). The business case can reflect in large part a summary of these analyses, the results of MPO processes and decisions, and a proposal to proceed with a P3 approach to build a roadway. The benefit of requiring a business case to be crafted includes making sure that the public partners have performed sufficient “due diligence”, resulting in furthering public support, increasing accountability, and avoiding perceptions of making decisions that are not in the public interest. To the extent that the above mentioned aspects of the planning phase have already occurred, the business case analysis may largely consist of a summary of these efforts. To the extent that previous steps have omitted key information or data, these can be captured in the business case analysis.

Commonly found in business case analyses are the following components (adapted from [20]):

A. Planning Future Service Delivery

This component contains analysis that specifies the need for the project, including both present and future demand. For transportation projects, current and future travelers, level of service roadway analysis, as well as reference to planned economic development could be considered in this component. Any review process and previous analysis, such as those resulting from MPO deliberations, should be placed here.

B. Service Delivery Options

Analysis that specifies in more detail the objectives and scope of the project, and reviews all service delivery options, identifying and supporting the one that is preferable. For a new roadway project, alternative routes could be identified. To meet area or corridor mobility goals, consideration of bus transit, light rail, and other means of moving travelers could be considered.

C. Procurement Options

All options for choosing the private partners or contractors to deliver the service are described and evaluated. Benefit cost and VfM analysis should be performed, resulting in support for a specific P3 option [21].

D. Accounting and Funding Analysis

Projected payments and sources of revenue should be presented in the form of an “affordability” analysis, along with identifying the financial system and relevant accounting procedures

The planning phase should be as complete as possible, with all aspects and documents shared with legislators, citizens, and other stakeholders. Maximizing transparency is critical to gain support for the specific project, with documents released in a timely fashion. The documents created during this phase identify goals, objectives, and optimal decisions which can guide efforts in the remaining life of the P3 agreement. These become formal criteria by which to judge accountability in subsequent periods

III. Phase Two: the Procurement Process—Pre Award

After a roadway project has completed the planning phase and the P3 approach is deemed to be preferable, then the procurement process begins. It ends when the private partners have been chosen and the contract is awarded. Goals of this process include:

1. Choosing the private partners who will provide the most benefits compared with costs and the best value for money
2. Choosing private partners who are estimated to provide the highest or most project goal achievement
3. Maximizing the flexibility necessary to arrive at the most optimal means to build the roadway, allowing for suggestions of innovation and creativity by bidders.

4. Lowering the time and cost needed to complete the procurement process, i.e., lowering transaction costs.
5. Avoiding power imbalances among public and potential private partners while negotiating, known as “Deal Drift”.
6. Maximizing adherence to the public interest over the 30-50 year life of the contract or partnership.

To some extent efforts to achieve these goals will conflict, as for example lowering transaction costs may lead to choosing less than optimal private partners. Choosing the most flexible procurement process, involving negotiation among more than one bidder teams, could result in less amount of time spent during pre-award as well as better VfM. The optional procurement process must result from achieving as much as possible a balance among competing goal achievement efforts.

Usual or standard procurement approaches such as the Invitation to Bid or Request for Proposal are insufficient when creating a P3. Negotiation among top rated bidders, in essence inviting bidders to help solve the problem or meet the need, should be maximized. Competitive Dialogue, one example of this approach, is practiced in European nations.

Competitive Dialogue

Competitive Dialogue (CD), created in 2004 by the European Union, is designed specifically to address “particularly complex contracts” and is explicitly linked to the creation of infrastructure P3s [22]. Complexity is defined as relevant to one or both of two instances, when contracting authorities:

- are not objectively able to define the technical means...capable of satisfying their needs or objectives; and/or
- are not objectively able to specify the legal and/or financial make up of a project [23]

Technical complexity includes the lack of ability to ascertain which of several possible solutions may be best. The financial complexity of a project includes the willingness of a contracting authority, e.g., a transportation agency, to build a roadway at the least cost possible by allowing the bidders to suggest the means of doing so. CD provides the flexibility to negotiate the lowest cost approach as supported by financial markets, including changing the contract from a DBFOM to an alternative approach if appropriate [23].

Other relevant aspects of CD include:

- Contracting authorities can discuss all aspects of the contract with bidders (minimum of three)
- Discussions or negotiations can occur in stages
- It ends when the contracting agency determines its needs have been met; each bidder issues a last and best final offer
- After the final offer, the evaluation of all bidders’ proposals occurs; there is no additional negotiation allowed with the preferred bidder.

The benefits of the CD approach include:

- Allows public officials to remain open to innovative/creative ideas coming from the proposer; alternative procurement means do not [22].
- Allows for more complete information to be gathered about each bidder, avoiding the risk that insufficient information will be collected.
- Avoids “Deal Drift” in which the preferred bidder, if identified by an alternative procurement means, can prolong the procurement process and bargain from a position of strength.
- Less risk of a challenge
- Clearer audit trail for subsequent VfM analysis [24]

A common procurement alternative, often present in a RFP process, results in a scaled listing of bidder proposals, with one achieving the highest evaluation score and others ranked below it. Typically negotiation occurs with the preferred bidder, with the potential for negotiations to occur with the second ranked bidder if those with the highest ranked are deemed unsuccessful. This process can lead to protracted negotiations with the preferred bidder, as no real competition exists: the likelihood of negotiating with the second preferred bidder is slight [25].

One factor in ensuring that the CD process is effective and efficient is the extent to which there is flexibility in the design of the roadway at the start of the process. In one case study, the Coen Tunnel project (the Netherlands), alternative solutions, such as building an entirely new tunnel instead of rebuilding and expanding the existing tunnel, were deemed too drastic a change to the design proposed by the government and were not permitted. Innovative alternative solutions were not accepted. In other instances, such as the LBJ Express lanes (Texas), the original design required dual tunnels to expand managed lanes. Although CD was not the procurement approach applied, the flexibility of the procurement approach permitted Cintra, the winning bidder, to suggest alternatives to using this roadway approach, leading to savings of over \$250M [26].

IV. Phase Two: Key Contract Issues

An evaluation of a P3 project must include some analysis of contract components that may be considered essential to a successful project. Some of these can be found in other recommended documents, while others have evolved as the result of “bad outcomes” or analysis made in hindsight. The following is not intended to be a complete list.

The elements of an optimal P3 contract should build upon the analysis made in the planning stage, and should contain those aspects that provide a framework for the relationships among all partners during the post contract award period. The results of Benefit Cost Analysis, as well as the VfM analysis—especially dealing with risk transfer—should strongly influence the content and design of the P3 contract. As such, it should be as clear and as certain as possible, outlining the roles and responsibilities of the public and private partners as much as possible.

The most significant elements or aspects relevant to the design of a P3 contract are those relevant to performance requirements and payment mechanisms [27]. It is anticipated that all of the contract design elements will be subject to negotiation. The discussion below reflects key issues that may appear and provides guidelines or solutions.

Performance Requirements and Payment Mechanisms

The contract should specify

- the measures by which the performance of the private partner will be measured;
- the mechanisms or processes by which performance data will be collected and evaluated;
- the standards by which the measures will be assessed and penalties and/or incentives applied; and
- the payment amount and mechanism resulting from the performance, including penalties for not meeting identified standards.

The context within which to best assess the effectiveness or success of a performance management system can be best viewed in terms of the payment mechanism associated with the performance. Two contexts can be identified:

- User Fees payment mechanism
- Availability payment mechanism with performance measures and standards [28].

With the user fee payment type of P3, the private partner or concessionaire performs design, build finance, operate and maintain functions (DBFOM) over a long term contract, and collects all fees or tolls to pay for incurred costs, including financing and profit. In doing so, all demand risk is assumed, along with the technical and construction

risks associated with road building—for a greenway project. It is assumed that the acquisition of this risk is a sufficient incentive to maximize efficiencies during operations and maintenance periods, as well as throughout construction. Although measures such as safety and road smoothness may exist, penalties for not meeting standards may not exist, as no payments from the public partners are provided.³

In contrast, the public partners assume all demand risk using the availability payment approach. Given that there is no link between usage and payment, without the implementation of a much more formal performance measurement system, there is a lack of incentives for the private partners to operate as efficiently and effectively as possible.

An alternative to these two approaches involves sharing of risk between public and private partners, as well as employing performance measures to ensure maximum efficiency. Demand risk and relevant revenue sharing is discussed in the following section, followed by a more in-depth analysis of availability payments and performance management system characteristic and issues.

1. User Fee Issues and Contract Alternatives

a. Sharing Demand Risk

Demand risk should be allocated to the partner most able to control it. In many cases, this is the private partner. The greater the uncertainty of the demand risk, however, the more this risk should be shared by public and private partners. If all of the risk is transferred to the private partners, the risk premium demanded may result in the project cost being much higher than if the risk is shared. Sharing the risk caps the amount of risk absorbed by the private sector [29]. The more risk is shared, however, the lower the incentive to the private partner to provide efficient and effective service quality.

Revenue sharing could occur instead of or in addition to demand risk sharing. Public partners can subsidize part of construction costs, providing payments to meet construction milestones. These may not be recoverable if the project receives less revenue than expected, as senior debt would be paid first after operations have begun [30]. In order to reduce tolls to more publically acceptable levels, a subsidy for operating costs could be provided in lieu of the projected toll shortfall. Similarly, grants or subsidies can occur, identifying either a fixed or variable amount to support operating costs.

Revenue guarantees, which may occur to lessen the potential for private partner bankruptcy or the need for renegotiation, must be chosen carefully. If the public sector were willing to guarantee 100% of what is needed to cover operating costs and pay debt and equity investors, the availability payment approach may be preferable. The guarantee, then, should be less than 100% of what is needed to cover all expenses and profit. Guarantees can take the form of a fixed amount, a percentage of expected revenues, or a sliding scale, with a higher percentage during the ramp up period than in later years of operations [30].

b. User Charge Rates and Changes

If demand risk is fully assumed by the private partners, or is shared by public partners, key contract issues include rate setting and adjustment of user fees. Options range from the private partners having full control over rate setting to full government regulation, with rates dictated by the public partners. The key issue is identifying under what circumstances the user fees will be allowed to change, either at the rate of inflation, for example, or due to increase in costs or other reasons [27].

Optimal user fees and change rates are difficult to determine, as the unknown factor is the traveling public's "willingness to pay". If rates are too high, then ridership is likely to fall; if rates are too low, then insufficient revenue results and nearby non-tolled highways suffer greater congestion. The history of the Dulles Greenway P3 reflects a series of changes in fees over time, as the private partners attempted to identify rates that maximized usage [31]. When SanDag took over the South Bay expressway after the private partner declared bankruptcy, rates were lowered significantly to encourage more ridership [32].

³ East Link P3 contract is one exception, as penalties are assessed by not meeting proscribed standards, resulting in refunds to travelers who have paid tolls

If public partners are sharing demand risk, then allowing private partners maximum control over rate setting would risk rates that diminish ridership, requiring higher revenues to be paid by public partners. In contrast, allowing public partners complete control over rate setting risks no rate increases, as illustrated by the situation faced by the Indiana Turnpike prior to leasing the roadway to the Indiana Toll Road Concession Company [33].

Removing some control over rate setting from any partners in a P3 project lessens the risks of decisions made that do not result in optimal revenue collection. State statutes that support and require rates to rise at least by the rate of inflation provide some public interest protection. One example is found in State of Florida Statutes:

Notwithstanding any other provision of law, the department, including the turnpike enterprise, shall index toll rates on existing toll facilities to the annual Consumer Price Index or similar inflation indicators. Toll rate adjustments for inflation under this subsection may be made no more frequently than once a year and must be made no less frequently than once every 5 years as necessary to accommodate cash toll rate schedules. Toll rates may be increased beyond these limits as directed by bond documents, covenants, or governing body authorization or pursuant to department administrative rule. (338.165)

Some flexibility is inherent in this section, as tolls do not have to be raised annually. The advantage of doing so, however, is that the percentage increase is smaller and less noticed by the traveling public. With the advent of electronic tolling, it is administratively easy to charge and collect small percentage increases.

c. Shadow Tolls or Public Partner Usage Fees

Sharing demand risk can be based solely on user charges or “shadow tolls”, in which the public partner pays a per vehicle or per vehicle mile traveled amount. It is an approach that allows all demand risk to be transferred to the public partner, or, if appropriate, some risk sharing can occur. The choice of bands and amounts for each can still depend on forecasted demand, providing similar incentives to private partners during O&M.

According to Yescombe (2007), in part based on the experience of Portugal, four travel bands can be identified. The first band reflects the most conservative traffic estimate and results in an amount intended to cover operating costs and debt service. The second band produces an amount that covers the investors’ base case—or minimum acceptable amount—in terms of producing an acceptable internal rate of return. The third band provides an incentive, increasing profit or return for investors, and the fourth band identifies the limit beyond which no public payment will be forthcoming [30].

A different four band design is offered by Gatti (2008). The first band covers fixed O&M costs and senior debt service; the second band includes estimates of variable operating costs and subordinated debt service; the third band provides dividends for investors; and the fourth band identifies no public payment [34].

Advantages to the public partners of shadow tolling include:

- Incentives exist for the private partner to complete construction as soon as possible and management the resulting roadway/facilities efficiently
- Private equity investment may be increased, as a more consistent revenue stream is attractive and the overall demand risk may be lowered
- Public financial contributions are capped, along with the IRR for private investors, removing the existence of “windfall” profits [34].

When demand risk is shared, a significant challenge is to ensure sufficient incentives exist for private partners to operate as efficiently and effectively as possible while encouraging usage. If revenue bands are used as described, analysis of optimal bands should reflect the extent to which rates proposed by the bidders actually reflect projected operational costs—plus any risk premium that is deemed appropriate. The more demand risk is shared, that is, retained by the public partners, the greater the emphasis on and importance placed on the performance measures and standards—as discussed in the next section. The challenge is to provide sufficient incentives to maintain optimal operational performance.

d. Preventing Windfall Profits

News that private partners have made “windfall profits” will likely erode public support for an on-going P3 project and for future projects. As much as possible, contract language should prevent windfall profits from occurring. Public partner sharing of such profits is one approach that would limit criticism.

Two scenarios are relevant:

- 1) Demand risk is entirely assumed by the private partner, and demand is higher than expected, leading to larger than predicted private partner profits.
- 2) Refinancing occurs, allowing for greater private partner profits.

Refinancing is likely to occur no matter how much demand risk is shared.

Revenue Sharing

Bands can be created that specify the percentage of profit in reference to the base case IRR. A banded revenue sharing arrangement can be identified, with the public partner receiving a greater share of toll revenue as revenue increases and the subsequent rate of return for the private partner increases. For example, in the original P3 contract for the Pocahontas Parkway, public partners were to receive:

- 40% of real net cash flow after IRR on total investment = 6.5%;
- 80% of real net cash flow after IRR=8.0%
- 4.65% of gross revenue until IRR on equity = 11%
- 9.3% of next band of gross until IRR = 15%
- 50% of all further gross revenue [35]

Sharing of Refinancing Gains

There are at least three sources of such profits:

- Initial high returns on equity investment—occurring before P3 contract award
- Refinancing of debt
- Sale of equity holdings—occurring at any time after P3 contract award, most likely after construction is completed

There are several challenges with understanding and defining profit, and communicating the appropriate message to the public. There must be the recognition that the amount of risk for a P3 project lessens over time for a successful P3 project, as once construction is completed the risk associated with the ramp up period is less. At a later time period, operations and maintenance risk will be less. Equity investors at these time periods should be expected to achieve different internal rates of return (IRR). Since private investors are taking risk that the project will succeed, any gain they can obtain due to market forces, some may state, is deserved and should be outside the control of public partners.

If equity investors enter into a P3 contract at different time periods before the contract is signed, and those entering later receive a lower IRR than those who first agreed, then requiring the later investors to pay a premium for shares in the SPV limits the difference in IRRs between these groups of investors [30]. This may occur, for example, if another investor commits to provide the balance of equity needed at the time of financial close. If the resulting IRR is not viewed as excessive, then this may be viewed as necessary to reach agreement to fund the P3 project.

Refinancing debt results in higher equity IRR because increased cash flows can occur earlier in the project, even if the overall amount of cash paid out to the investors decreases over the life of the contract. However, the degree of success of the project must be taken into account, that is, to what extent is revenue collected by the private partners is the same as originally projected in the original P3 agreement. If it is higher than expected, then public partners

should share in the refinancing. If less than expected, then any refinancing gains that result in the original IRR being met should not be shared.

The considerations and issues relevant to sale of equity holdings are similar to those for refinancing debt. Sales of initial equity investments, made during construction, are often made to secondary equity investors, who are willing to accept a lower IRR over the remainder of the P3 project.

Elements of Appropriate Contract Language

Refinancing language should contain the following elements:

1. The private partners must ask permission from the public partners to engage in any activities that can be considered refinancing.
2. The reasons for the refinancing, associated processes and appropriate data must be conveyed to the public partners.
3. Sharing of refinancing gains among private and public partners must be identified, e.g., 50% of all refinancing gains
4. Refinancing language should include gains from resale of equity as well as the refinancing of debt.

Contract language should contain sufficient detail to ensure private partners do not engage in actions leading to hidden or windfall profits.

However, given the various reasons and methods associated with refinancing, as well as the complexity of the relevant financial transactions, it may be best to not emphasize specific refinancing issues but to identify a process by which public and private partners can share appropriate information in a timely manner.

2. Availability Payments and Performance Measurement Issues

Availability payments (APs) are periodic payments, made over the life of a P3 contract, that respond to specific efforts made by the private partner. These efforts can occur during the time periods devoted to operations or maintenance. In its simplest form, during the operations period, if a roadway remains open for a specified time period, then a corresponding AP will be made. If lanes on a roadway are closed for any reason, such as for maintenance purposes, incident management or snow removal, then the AP will be reduced according to a specified formula. This situation may reflect conditions of “pure availability”: unobstructed travel by motorists on the roadway [36].

Another category of AP’s refers to “constructive availability”: the use of

...performance, safety and quality criteria—specified in the contract, often providing the public owner with stronger metrics and management tools to assure a high quality service than it may be able to apply to services it self-performs [36].

These could include, for example, level-of-service performance measures, used as the primary payment measure involving the implementation of managed lanes.

APs are similar to payments that would be made for traditional design bid build roadway contracts. They act as incentives in the same manner as bonuses paid to a contractor to meet early completion deadlines for a greenway roadway. The earlier a roadway is available for travel, the sooner the private partner will be paid.

From the perspective of the private partner, AP’s have the benefit of limiting or removing entirely the traffic demand risk, as either no tolls are collected on the roadway or the public partner assumes all of the traffic demand risk by collecting the toll revenue. Another variation of APs would be similar to other forms of government subsidies. The

private partner could collect tolls; with the public partner providing APs if toll revenue falls below a prescribed amount, making up the difference.

During the operations and maintenance periods, APs are tied to performance measures or Key Performance Indicators (KPI's). Data must be collected and monitored relevant to the KPI's, with corresponding levels of APs related to the KPI's achieved. If the data is not collected, or if monitoring of KPI's does not occur, then the use of AP's are simply another way of the public sector borrowing funds [28].

a. Benefits of Availability Payments

If demand is highly uncertain, and revenue from user charges is difficult to predict, then using an AP approach can include the following potential benefits:

- The use of Key Performance Indicators (KPI's) ensures that private partner performance will remain at high, specified levels
- Private partners are more attracted to P3 projects, as there is less risk
- The potential for private partner bankruptcy is likely reduced.
- Public contributions to the overall cost of the P3 are capped
- Private profit is also capped, eliminating the likelihood of "windfall" profits.
- Financing costs are less, since public bonds and other debt mechanisms can be accessed at a lower cost.
- The cost of debt is lower, as debt service coverage ratios would be lower.
- Greater transparency and public support for the P3 project can be more easily achieved because payment amounts are known.
- Maintenance and future capital renewal costs are fully funded.
- If demand is deemed to be more highly certain, and revenues projected to be very positive, then the AP approach provides a new revenue stream for the public partners.

b. Challenges/Potential Problems with Availability Payments

Availability risk does not disappear, and may increase. Availability risk can be defined as:

an underperformance linked to the state of the PPP assets [that] results in services being partially or wholly unavailable, or where these services fail to meet the quality standards specified in the PPP contract [9].

By removing the demand risk from the P3 contract, there is a potential disincentive for the developer during construction to use resources in ways that optimize asset usage. During operations, the private partner may meet minimum performance standards to limit availability risk, but will have no incentive to go beyond these standards as the payment received remains constant. Furthermore, if more travelers are using the road, operations and maintenance costs may increase, further reducing profit [37].

Additional related challenges refer to the KPIs chosen and the resulting enforcement or contract management system created. Optimal KPI choice results in measures that reflect achievement of project and societal goals. The choice of penalties and enforcement of them by public partners must be an ongoing, accepted part of the relationship among partners after contract award.

In addition, the benefit of assigning all demand risks to the private partners must be captured in a different way if demand risk is retained by the public partners.

The single most important reason for allocating demand risk to the private sector is so that the private sector can act as a reasonability

and feasibility check for government agencies... By allocating demand risk to the private sector, the public sector eliminates the risk of overestimating or underestimating project scope [37].

The risk is that with an AP P3 approach that a true partnership will not occur, and the relationship among the public agencies and private contractors reflect more than found in privatization contracts and not P3s (for more discussion, see [38]).

V. Phase Three: Post Contract Award

The optimal relationships and actions during the post contract award time period should be characterized by all partners effectively working toward the P3 project and relevant societal goals while maintaining high levels of transparency and accountability. To the extent that these are governed by efforts made during the previous phases, the greater the likelihood of success in implementing the remaining years of the P3 agreement.

Identifying appropriate roles, problem solving processes, and policies and procedures may be challenging if past experience is minimal, especially if the individuals involved have not participated in past P3 efforts. The risk is that relationships will regress into those associated with traditional privatization or outsourcing contracts, in which the contractor works for the government.

Traditionally, the public sector retains a great deal of control over both the service delivery process and the resulting outputs and outcomes. The nature of the relationship between government and contractors, then, can be characterized as vertical, as the private contractor role is to follow the direction of the government or agency representative. In contrast, a public private partnership by definition encompasses a more significant decision making role for private partners, one more horizontal, in which all partners should be considered as equals, all working collaboratively toward stated goals. A P3 contract is less likely to succeed if relationships are not cooperative and may become adversarial, with public partner perceptions, for example, that private partners are not achieving stated performance standards and are resisting making changes to improve performance.

The following suggests characteristics of the post contract award process. Each aspect should be formalized as much as possible. For example, a Contract Management Plan (CMP) could formalize all aspects, containing information about:

- the organization structure for all stakeholders, their responsibilities for the management of the contract, their governance arrangements and the resources necessary to effectively manage the contract;
- the risks, opportunities and benefits that contract management activities and resources are intended to manage;
- the method of managing the delivery of the contractual outputs, monitoring the contractor's performance and compliance with the requirements of the contract and its terms;
- the approach to partnering with the contractor and how it will be measured and managed; and
- how the plans for the management of the contract will be developed and implemented [39].

Ideally, the CMP could be written at earlier stages of the P3 contractual process, ideally before the contract has been awarded. Doing so would clarify the roles and relationships among all partners during the post contract award period. If a formal CMP is not adopted, the listed information should be identified as much as possible.

The post contract award process can be divided into two periods:

- Construction (years 1-5)
- Operations and Maintenance (years 6-30)

The relationships that are created during construction can be carried over into the O&M period. In a performance based contract, as well as in a Design Build contract, the public partners monitor results, allowing private partners to choose the processes by which the roadway is built. As long as deadlines are met, and predetermined construction quality standards are met, the public partner role is one of review and certification. If changes must occur, if initiated by the public partner, then change order procedures identified in the contract govern

A. Construction

Optimal procedures and management approaches relevant to building a roadway are beyond the scope of this analysis. Several studies have reported that P3 agreements lead to a higher percentage of projects meeting construction deadlines and are completed “on time”. Furthermore, whatever decisions made during the construction period will affect efforts exhibited during the operations phase that follows. To the extent that problems and issues that arise during construction impact future performance, they will be evaluated and resolved during the operations phase.

Several assumptions are made about the P3 process that impact the construction phase. First, it is assumed that the ability of the private partners to build a road using innovative, value engineering and other management approaches that maximize efficiency and resulting construction value will be reviewed during procurement. A review of all potential bidders that respond to a Request for Qualifications will lead to a short listing of top rated private partners. Given that the combination of contractors and sub-contractors will be unique to each P3 project, it must be assumed that the evaluation of bidder proposals—not matter what procurement approach is employed—will identify those who will build a roadway according to the needs of the traveling public.

Second, to the extent that the planning phase has involved studies that have not only identified the need for a roadway but have contributed some information about design alternatives, enough information should be available for the design build approach to facilitate subsequent private partner decisions concerning design and resulting construction. Third, since much if not all of construction risk has been transferred to the private partners, how unexpected problems and issues are resolved by private partners is not relevant to an evaluation of the P3 process.

Two aspects are relevant: public partner initiated change orders, and continued risk management and monitoring. If change orders are necessary, it is assumed that standard contractual provisions for review, discussion and additional payment will be followed. In addition, continual risk management and monitoring should occur, identifying the extent to which the transfer of specific risks have actually occurred and/or need to be passed back to the public partners [40].

B. Operations and Maintenance

The O&M period should be characterized by:

- A specified governance structure and process, reflecting an ongoing positive relationship among all partners
- Implementation of the Operating Management System established during the pre-award period
- Continued, periodic interaction with stakeholders

To the extent that the same individuals representing the public and private partners can continue their role into the O&M period, the less conflict is likely. Optimally, the Operating Maintenance system identified and discussed during the pre-contract award phase can add structure to the O&M period relationships among all partners.

1. Governance Issues: Structure and Process

Characteristics of an optimal O&M governance structure and process include:

- Identification of appropriate roles and role expectations of all partners
- Formal, periodic meeting times of P3 Team
- Consistent agenda and review processes
- Decision-making processes identified
- Creation of an “organizational culture, one that is flexible, innovative, and evolutionary

Role expectations for public partners include those aspects traditionally identified as contract monitoring, management or administration [41]. Public partner representatives must review private partner efforts, assess them according to performance specifications, and issue incentives or penalties. Additional expectations, not necessarily found in traditional contract administration, include the adoption of issue resolution and problem solving decision making processes.

The creation of the team that represents the public partners must be properly resourced and adequately trained. Ideally this should be determined during the pre-contract award phase [28]. It can be anticipated that the private sector will bring substantial resources to the table. The goal for the public partners is to balance the contribution of the public partners to avoid being overwhelmed by the scale of the resources contributed by the private partners.

A useful approach to this need for resource balancing would be the publication of both the public and private sector proposed organizational charts for the project. This would reveal any resource imbalance and also empower the private sector to have a detailed understanding of points of contact and approval on the public sector side. If a project partnering meeting was held soon after contract award, the understanding of both public and private sector organizational arrangements could be reinforced through the establishment of personal relationships between the relevant parties [42].

Depending on the scope of the P3 project, the public partner team could consist of time contributed by a variety of staff members, not all of which may be devoted full time to the project. The risk in choosing the number of staff and the amount of time devoted to a P3 project, though, is that the public side will underestimate what is needed. As a result, review of private partner performance, for example, may not be as sufficient as needed [43].

The availability payment approach involves greater involvement of the government partner management team than if demand risk is transferred totally to the private partners. It is preferable to involve the public partners team in later stages of procurement process to ensure familiarity with the contract, easing both construction and O&M time periods

Private partners will be required to provide performance reports as specified by the performance management system identified in the P3 Contract. These can be assessed in terms of the timeliness of these reports and the accuracy of the data. Also, the public partners can review the Quality Management system established as part of O&M.

The process by which the private partners identify problems and solve them must be a key aspect of optimal O&M. The creation of a QM system can include, for example, an internal identification of problems and solutions by the private partners, followed by a review and further assistance in problem resolution by the public partners. If the system is deemed inadequate, additional dialogue and negotiations can occur to resolve outstanding issue [44].

A process must be established to link performance reviews with payments. This process should be formalized and documented to enable appropriate audit findings, with a specific review of each performance report by the

designated contract management team member and a subsequent interaction with the team member in charge of approving payments. If this process does not exist, the risk is that payments will be issued without collection of performance data and/or formal review and assessment of what data is provided [7].

Also, there is a need to review the risk sharing or allocation and determine if it is appropriate as the O&M time period progresses. Ideally this should reflect a continuation of processes begun during the construction phase.

Overall, the optimal partnership creates a culture that allows for some flexibility to enable sensible approaches to be taken to problems and unforeseen issues [28]. The very best partnerships are based on a positive, deliberate and structured approach to establishing and maintaining the partnership. The approach should be based on a simple philosophy – magnets work better than handcuffs. The establishment of an effective partnership requires a detailed understanding of the common and the uncommon ground between both partners. It is also required to both partners understand each other in some detail with respect to motivation and preferences. The whole objective here is to avoid an “us and them” situation and instead develop a situation of mutual respect and cooperative actions towards success on both sides [42].

2. Stakeholder Involvement

Traditional public involvement in infrastructure development has occurred during the planning stages of projects. Metropolitan Planning Organizations (MPO's) have employed a variety of techniques to engage citizens during the planning process. What has been missing, however, is public involvement in the post contract award or O&M time period. As stated by Duvall in 2007:

The current policy framework largely disconnects highway users from the ownership, operation and management of highway assets despite the fact that users depend on these facilities and indirectly finance their existence. This disconnect weakens the facility owner's incentive to provide superior customer service, as well as reduces opportunities for customers to voice complaints [45].

There is a need to ensure continued public support throughout all stages of the P3 process. During the O&M phase, efforts change to include a greater focus on uses of the roadway, as well as key stakeholders. These efforts should build upon public education and outreach efforts that had previously occurred, allowing all partners to manage expectations about the outcome of the project [40].

What is not recognized is the appropriate role of citizens and clients/travelers—as well as other stakeholders--throughout the life of the P3 agreement. Issues to be resolved include:

- Mechanisms by which stakeholder input is obtained
- Content of interaction among public and private partners and relevant stakeholders
- Frequency of interaction

The framework proposed by the National Audit Office, United Kingdom, recommends that user satisfaction surveys be implemented periodically, obtaining views on the performance of the private partners. Past and present concerns or complaints should be elicited, along with views on how well past concerns have been resolved. Overall, some measure of on-going satisfaction with the private partners should be noted [40].

Along with user satisfaction surveys, a customer or traveler complaint system can be established. Complaints could be added to the data submitted along with performance reports required as part of the operating or performance measurement system established during the pre-contract award process and further refined after contract award. A process by which complaints are logged, notice sent to the appropriate staff member to resolve them, and follow up efforts to ensure the complaint is resolved or responded to could be part of period public and private partner meetings. This information could be considered during any review and potential changes of performance measurements, standards, and data collection.

In addition to surveys, interaction with specific monitoring groups of relevant stakeholders can occur [28]. The challenge is to determine to what degree these groups are formalized, and to what extent input can be obtained in addition to complaints or concerns. One option is a formalized, citizen advisory board structure, such as the Indiana Toll Road Oversight Board, as discussed below.

Possible functions of a citizen advisory board include:

- 1) The existing or proposed standards could be reviewed. This could occur begin during the initial review process dealing with operational standards, for example, as well as throughout the multi-year P3 agreement time period. For example, standards dealing with the cleanliness of the restrooms at roadway rest stops could be established.
- 2) Serve as the body that would process any customer complaints and oversee resolutions of these complaints.
- 3) Assist with other public partner duties, including: 1) reviewing periodic reports provided by private contractor; and 2) assisting in physically monitoring maintenance problems [46] e.g., abandoned cars along side of roadway;
- 4) Check on contract milestones and progress toward meeting those milestones, e.g., contractor has agreed to implement electronic tolling; contractor has agreed to widen and/or refurbish roadways; contractor has agreed to build new connector roadway.
- 5) Acting as a conduit for new issues and problems—those unanticipated in the contract language—that may occur during the extended time period of the lease.

a. Indiana Toll Road Oversight Board

On July 26, 2006, Indiana Governor Mitch E. Daniels, by executive order, established the Indiana Toll Road Oversight Board. Members are appointed by the Governor for a two year term. The Board's function is to advise the Governor and the Indiana Finance Authority—the public agency overseeing the P3 contract—on matters relevant to the relating to the “lease, maintenance, financing, planning, tolling, construction and operation of the Toll Road.” It is to devise metrics that assess contractor performance; meet at least quarterly; and produce semiannual reports. Four Indiana residents “with knowledge, experience or education in economic and business development, or highway engineering, construction, planning or operation” will serve along with the Governor, the Director of INDOT (private partner organization) and the Commissioner of the IFA (or their representatives) [47].

The initially appointed Board Members were:

Aaron Carlberg, Hobart, Indiana political director, Indiana/Kentucky Regional Council of Carpenters
Kevin Kelly, South Bend, president of Walsh & Kelly Paving Contractors
Leigh Morris, mayor of the city of LaPorte
Kristin Sine, Angola, principal of Hendry Park Elementary School
Tom Sharp, INDOT commissioner
Charles Schalliol, IFA chairman and executive director of the state Office of Budget and Management
Earl Goode, deputy chief of staff to Governor Daniels. He served as board chairman.

The Board reviews a wide range of topics. An agenda for the September 24, 2008 meeting included a discussion of suggested metrics for the private partner. Complaints made by citizens such as higher prices for gasoline at stations along the toll road, line lines at the toll booths and potholes are examples of those that could be considered by the Board [48].

Almost five years later, at the April 24, 2013 meeting, topics for discussion include the continued review of the Fourth Quarter Reports from the private partner as required under the lease, along with a review of economic development efforts along the Toll Road corridor.

Creation of a formal oversight or citizens advisory board offers challenges. If not required by state statute, as is the case in Indiana, a procedure for choosing who would serve on the board would need to be identified, along with length of terms, compensation for travel, etc.. Representatives from stakeholder groups and community leaders from

those most impacted by a new roadway would be likely candidates. Functions and responsibilities of the Board would have to be identified. Some training and education about P3s and performance reporting will be necessary.

VI. Evaluation: Goal Achievement

As indicated by the previous discussion, evaluation entails a review of all aspects of the P3 agreement process. Throughout the optimal P3 process, a variety of goals and objectives should have been identified, including those found in the planning phase, especially the benefit/cost analysis. The performance management system established during the pre-contract award stage and implemented during O&M also identifies specific goals and links them to performance measures and standards.

An optimal evaluation of goal achievement could include:

- Statewide Transportation Goals: safety, public transportation
- Regional or Corridor Transportation Goals: travel times
- P3 Project Goals: travel time savings, customer satisfaction
- Individual Stakeholder Goals: ensuring public support

Without systematic evaluation of goal achievement, the risk is that performance may diminish. In cases where evaluation only occurs if made by an auditor general or other audit function [49], the threat of disclosure may prevent the most extreme violations of performance standards, but not permit the timely resolution of issues to the satisfaction of customers or users.

Goal achievement evaluated should include regional and statewide goals, as only focusing on project goals may overlook other impacts. During O&M, private partners may not consider their tolled roadway as part of a larger roadway network, one that includes, for example, non-tolled roadways. This “system distortion risk” [45] may not take into account the impact on nearby roadways of accidents, other long term roadway construction delays, or the raising of tolls. If congestion were to increase greatly on neighboring community roadways, [50] or if there were changed traffic patterns on the toll roads, there may be no contractual incentives or means to produce a quick resolution.

The incentives available for the private partner to maintain the roadway in an acceptable condition to the traveling public and to maintain safety include attract users and avoid liability—as well as adhering to legally binding contract language [51]. The strength of these incentives, however, depends on the viability of alternative travel routes as well as the timeliness of response to identified problems and enforceability of the contract. In at least one case, the 407 Highway in Toronto, the private partner has been cited for failing to maintain at least minimal highway safety standards [52]. Furthermore, the performance standards that should be part of maintenance and operations contract language may not be able to fully anticipate that new technological changes to roadway materials and/or increased safety measures [53].

Evaluations of P3 agreement goal achievements internationally as well as US larger regional and statewide impacts are non-existent [54]. Data to support such evaluations may not be available, as performance data for specific projects is not disclosed, or it may be available but not used for evaluation of P3 agreement purposes. The following analysis only suggests approaches that ultimately will require more research and refinement before implementation.

A. Statewide Goals

Because statewide transportation goals are broadly stated, several challenges exist in evaluating the extent to which specific P3 project efforts impact achieving these goals. Yet these goals cannot be ignored, as the extent to which they guide or can be aligned with regional and project goals helps to provide overall evaluation.

Two goals from the Florida 2060 Transportation Plan can serve as examples:

- Improve mobility and connectivity for people and freight efficiently and reliably; especially between Florida's economic centers and regions.
- Strengthen coordination of transportation, land use, and development decisions to reduce trip lengths, increase motor vehicle occupancies, and increase public transportation.
(<http://www.2060ftp.org/>)

To the extent that both reflect increased mobility, regional or project goals stressing reduced congestion can be identified. Also, these are examples of goals that could be assessed, judging the impact of a specific P3 project on a given region or geographical area.

The Florida 2012 Safety and Security Performance Report [55] offers additional examples of statewide goals that could be also adopted by P3 projects. The stated objective to reduce highway fatalities and injuries by 5% annually could be adopted by a specific roadway. The reasons for the success in meeting this objective can also indicate efforts that can be adopted by private and public partners to help achieve this goal: "This downward trend in fatalities is attributed to safety programs and initiatives such as enforcement of safety belt use and crackdowns on drunk driving..." [55]

This statement suggests that private partners ensure that agreements with relevant law enforcement personnel maximize relevant safety programs and initiatives as stated.

B. Regional and Project Goals

The M25 P3 Project in the United Kingdom provides one example of identifying regional and project goals and using them as the basis on which performance measures and standards are chosen. For safety, there is an identified portion of the national casualty reducing goals relevant to the M25 roadway. A reliability goal is also identified, with corresponding measures related to lane availability and route performance.

Lane availability reflects traffic flow and the availability of traffic lanes. The incentive here is to minimize road closures for roadway maintenance, indicating that lanes should be closed at times to minimize impact on travelers. Reliability reflects the reliability of travel times and the impact of incidents [56]

One common goal of a new roadway is to relieve congestion in a given region or roadway corridor. To adequately assess goal achievement, travel times on competing roadways must be measured before and after the new roadway is built, or upgrades to existing roadways have been completed. The 2012 Indiana Mobility Report, reflecting collected data on Interstate Highways within the State, provides one example of measures reflecting congestion relief that could be used on any highway [57].

Table One

Performance measure	Definition
Congestion hours	The number of hours during which an interstate segment or series of segments has an average speed of less than 45 mph. This binary performance measure provides performance measure graphics for identifying locations along the interstate with substantial congestion.

Distance-weighted congestion hours	The number of congestion hours multiplied by the segment length in miles. This performance measure provides summary statistics for the interstate system.
Congestion index	The total number of congestion hours along an interstate divided by the total length of the interstate, yielding an average congestion hour per mile for the entire roadway.

C. Challenges

Given the often 30+ year life of a P3 relationship, the evaluation of P3s is a challenging, multi-faceted, complex task that must contain several components that reflect various aspects of the P3 project. These include assessing the extent to which: overall statewide goals have been met; overall project goals have been met; goals of individual partners have been met; as well as aspects of the P3 process already discussed.

Challenges include availability of data. Recent technological advances in data collection as represented by INRIX (www.INRIX.com) and Golden River (<http://www.clearviewtraffic.com/golden-river>) have provided a wealth of data that is useful on roadways that employ transponders and collect tolls. For less traveled roads, however, such data may not be available. Judging the extent to which a newly built roadway impacts local roads may not be feasible.

The value of identifying goal achievement is that management systems put into place by private partners during O&M are deemed sufficient to lead to validly judge to what extent they contribute to measures collected and standards reviewed. If the goals are identified as part of the P3 contract, then efforts leading to greater collaboration among public and private partners may more easily occur.

The dynamics of determining public accountability are made more difficult by the often conflicting efforts made to be accountable to stakeholders. These stakeholders include:

regular toll road users, commercial truck and bus drivers, emergency response vehicles, toll road employees, and members of the public who may be affected by ancillary effects of a highway public-private partnership, including users of nearby roads, land owners, special interest groups and taxpayers, in general.[43]

Being more accountable to one group, such as commercial truck drivers, may conflict with accountability to users of nearby roads, for example, as higher tolls or user charges may result in commercial truck drivers choosing local roads without tolls.

VII. Conclusion

Future growth of P3s seems likely. Success or effectiveness greatly depends on evaluation of both process and goal achievement. The omission of reports/analysis, and the incomplete or ill-timed release of such information will not contribute to success. Future efforts may rely more on benefit cost analysis, de-emphasizing the importance of determining value for money. If revenue is not easily available in sufficient amounts to build or repair roadways using traditional means, as long as benefits outweigh costs, it may be appropriate to proceed with P3 agreements even if value for money is not demonstrated. Releasing all data and analysis related to VfM calculations is essential to avoid the perception that biases exist favoring adoption of a P3 approach.

If availability payments, in which the public partners assume all demand risk become more accepted and more the norm, then it is crucial that performance or operating management systems are implemented with a strong commitment to identifying standards, celebrating success, and sanctioning poor performance. Without an extensive

review of performance, availability payments become just another way of borrowing money, and do not lead to an effective partnership. To the extent that performance measures and standards can be aligned with goals identified for a project, the availability payment approach is strengthened.

The role of the public procurement official is to ensure that an optimal procurement process is undertaken, recognizing that many of the needed efforts may be unfamiliar to process participants. Throughout, the public interest must be safeguarded. Relationships among all partners during the O&M phase of the P3 agreement must be flexible and innovative, recognizing the evolutionary nature of the partnership over the length of the agreement. Essential to maintaining sufficient public support are efforts to elicit and welcome inquiries and feedback, establishing mechanisms to resolve problems as they occur.

The long term nature of the P3 leases and contracts raises a variety of issues that are relevant to accountability and the maintenance of the public interest over this timeframe. In one sense the issues represent risks since they are relevant to instances or situations that may or may not occur. The danger is that without appropriate public involvement or input in a timely enough fashion problems that occur will not be dealt with sufficiently by usual means and mechanisms. Given that P3 contracts by their very nature must be considered incomplete, it is difficult to claim that all future public needs can be anticipated and met by considerations discussed prior to contract award.

Acknowledgements

The research for this paper was funded in part by a grant from the Florida Department of Transportation

References

- [1] R. Puentes. (2008) A bridge to somewhere: Rethinking American transportation for the 21st century. Washington, DC: the Brookings Institution, Metropolitan Policy Program
- [2] American Association of State Highway and Transportation Officials (AASHTO). (2008) The forum on funding and financing for surface transportation in the coming decade: Conference report. Center for Excellence in Project Finance.
- [3] L. Martin, W. Lawther, G. Hodge, & C. Greve. (2013). Internationally recommended best practices in transportation financing public-private partnerships (P3s). *Public Administration Research* 2 (2):15-25.
- [4] M. Iacobacci. (2010). Dispelling the myths: a pan Canadian assessment of private public partnerships for infrastructure investments. Canada: The Conference Board of Canada. Retrieved from http://www.conferenceboard.ca/temp/d7811629-3c97-42b5-aab9-39cab1c9fb1a/dispellingthemythsrt_web.pdf
- [5] M. MacDonald. (2002). Review of large public procurement in the UK. London: HM Treasury. Retrieved from <http://webarchive.nationalarchives.gov.uk/20090417191429/http://www.hm-treasury.gov.uk/d/7%283%29.pdf>
- [6] M. Pollitt. (2005). Learning from the UK private finance initiative experience, in *The challenge of public-private partnerships: Learning from international experience*, edited by Hodge, G. and Greve, C. (pp. 207-30). Cheltenham: Edward Elgar.
- [7] Office of the Auditor General, British Columbia. (2012). Audits of two p3 projects in the sea to sky corridor. Vancouver, British Columbia. Retrieved from <http://www.bcauditor.com/pubs/2012/report4/audits-two-p3-projects-sea-sky-corridor>
- [8] Infrastructure Australia. (2008). National Public Private Partnership Guidelines: Overview. Commonwealth of Australia. Retrieved from: http://www.infrastructureaustralia.gov.au/public_private/files/National_PPP_Guidelines_Overview_Dec_08.pdf
- [9] European PPP Expertise Centre. (2011). The Non financial benefits of PPPs: A review of concepts and methodology. Luxembourg. Retrieved from: <http://www.eib.org/epcc/resources/epcc-non-financial-benefits-of-ppps-public.pdf>
- [10] Partnerships British Columbia. (2005). Project report: achieving value for money: The Sea to Sky highway improvement project. Retrieved from <http://www.partnershipsbcc.ca/pdf/SeatoSkyFinal.pdf>
- [11] R. Poole. (2007). Miami toll truckway: a preliminary study. Los Angeles: The Reason Foundation, Report 365. Retrieved from <http://reason.org/files/2fe311245d30f86dae86997b95211b88.pdf>
- [12] U.S. Department of Transportation (2012). Value for money: assessment for private public partnerships: a primer. Federal Highway Administration, Office of Innovative Program Delivery. Retrieved from http://www.fhwa.dot.gov/ipd/pdfs/p3/p3_value_for_money_primer_122612.pdf
- [13] A. Akintoye, M. Beck and C. Hardcastle. (2003) *Public Private public partnerships: managing risks and opportunities*. London: Blackwell Science
- [14] B. Ashuri, H. Kashani, and J. Lu. (2010, November) Financial valuation of risk and revenue sharing options in Build Operate-transfer (BOT) highway projects. Working Paper Proceedings, Engineering Project Organizations Conference, South Lake Tahoe, NV. Retrieved from http://www.academiceventplanner.com/EPOC2010/Papers/EPOC_2010_AshuriKashaniLu.pdf
- [15] Macquarie Korea Infrastructure Fund. (n.d.) Minimum Revenue Guarantee Summary. Retrieved from <http://www.macquarie.com/mgl/mkif/en/mkif-assets/minimum-revenue-guarantee-summary>
- [16] Federal Highway Administration. (2013) P-3 value: shadow bid user manual. Washington, D.C: Innovative Program Delivery: April 19.

- [17] M. Taylor. (2012). Maximizing state benefits from public private partnerships. Legislative Analyst's Office, State of California. Retrieved from http://www.lao.ca.gov/reports/2012/trns/partnerships/P3_110712.pdf
- [18] P. DeCorla-Souza. (2013). Value for money analysis: Constructing the public sector comparator and the shadow bid. P3-Value Webinar, July 12. Slide 21.
- [19] Jeffrey Parker and Associates. (2009). I-595 corridor roadway improvements value for money analysis. State of Florida: Department of Transportation
- [20] Partnerships British Columbia. (2012). Methodology for quantitative procurement options analysis discussion paper. Vancouver, BC. Retrieved from <http://www.partnershipsbcc.ca/files-4/documents/ProcurementOptionsAnalysisDiscussionPaperOctober142011.pdf>
- [21] C. Katsanis. (2010). Models of public policy and finance in ppp for infrastructure projects. Working Paper Proceedings, Engineering Project Organizations Conference, South Lake Tahoe, CA Retrieved from http://www.academiceventplanner.com/EPOC2010/Papers/EPOC_2010_Katsanis.pdf
- [22] M. Burnett. (2009). Using Competitive Dialogue in EU public procurement: Early trends and future developments. European Institute of Public Administration, SCOPE (2), 17-23. Retrieved from http://www.eipa.eu/files/repository/eipascope/20100114121857_Eipascope_2009_2_Article2.pdf
- [23] European Commission. (n.d.) Explanatory note—competitive dialogue classic directive. Directorate General Internal Market and Services: 1
- [24] P. Desscan & S. McCann. (2012). Competitive Dialogue: a critical monologue. Retrieved from: www.morgan-cole.com
- [25] Office of Governmental Commerce. (2006). Olympic delivery authority: delivery partner procurement using competitive dialogue: a lessons learned study. United Kingdom.
- [26] M. Hoezen, J. Van Rutten, & G. DeWulf. (2010). Toward better customized service contracts through the competitive dialogue procedure. Construction Management and Economics (28) 1177-1186.
- [27] World Bank Institute. (2012). Public private partnerships reference guide version 1.0. Washington, DC: Author.
- [28] E. Farquharson, C. Torres de Mastle & E. R. Yescombe. (2011). How to engage with the private sector in public private partnerships in emerging markets. Washington, D.C.: The International Bank for Reconstruction and Development/The World Bank.
- [29] E. Iossa, G. Spagnolo & M. Vellez. (2007). Best practices on contract design in public private partnerships. Washington, D.C. The World Bank.
- [30] E.R. Yescombe. (2007) Public private partnerships: principles of policy and finance. Burlington, MA: Elsevier
- [31] A. Boardman & A. Vining. (2010). P3s in North America: Renting money (in Canada), selling roads (in the USA). In G. Hodge, C. Greve, & A. Boardman, (Eds.), International handbook on public-private partnerships. (pp. 354-398). Cheltenham, United Kingdom.
- [32] San Diego Association of Governments. (2011, August 26). State road 125. South Bay Expressway: Board Meeting.
- [33] L. Gilroy & D. Aloyts. (2013). Leasing the Indiana toll road: Reviewing the first six years under private operation. Reason Foundation, Policy Brief 108. Retrieved from http://reason.org/files/indiana_toll_road_lease.pdf
- [34] S. Gatti, (2008). Project finance in theory and practice: Designing, structuring, and financing private and public projects. London: Elsevier.
- [35] K. Hedlund. (2007). Nuts and bolts of public private partnerships. Presentation made to the State of Florida House Committee on Infrastructure, January 11.

- [36] S. Dochia & M. Parker. (2009). Introduction to private public partnerships with availability payments. Philadelphia, PA: Jeffrey A. Parker and Associates. Retrieved from http://www.pwfinance.net/document/research_reports/9%20intro%20availability.pdf
- [37] C. Ugarte, G. Guiterrez, & M. Phillips. (2012). A Roadmap to Funding Infrastructure Development, International Transport Forum, Discussion Paper 2012-9, Prepared for the Roundtable on: Public Private Partnerships for Funding Transport Infrastructure, Sources of Funding, Managing Risk and Optimism Bias. Retrieved from <http://www.internationaltransportforum.org/jtrc/DiscussionPapers/DP201209.pdf>
- [38] J. Forrer, J. Kee, K. Newcomer & E. Boyer. (2010). Private-public partnerships and the public accountability question. *Public Administration Review* 70 (3), 475-484.
- [39] Ministry of Defense, MOD Private Finance Unit. (2010). Contract management of PFI/PPP projects version 3.0. United Kingdom, Bristol: 6. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27683/20111021MODPAv2v20U.pdf
- [40] National Audit Office (2006). A framework for evaluating the implementation of private finance initiative projects: Volume 2. London: Author Retrieved from http://www.nao.org.uk/wp-content/uploads/2006/05/Framework_PFI_Projects_ii.pdf
- [41] W. D. Davison & E. Wright. (2007). Contract administration. Herndon, VA: National Institute for Governmental Purchasing, second edition.
- [42] B. McQueen. (2013). Public private partnerships for the provision of new highways: Some thoughts for Florida. Unpublished manuscript.
- [43] U S General Accountability Office. (2002). Transportation infrastructure: Cost and oversight issues on major highway and bridge projects. Washington, D.C.: Author, GAO-02-702T.
- [44] W. Lawther. (2006). The growing use of competitive negotiations to increase managerial capability: The acquisition of e-government services. *Public Performance Management and Review* 30 (2), 204-221.
- [45] T. Duval. (2007, February 13). Testimony before the Committee on Transportation and Infrastructure, US House of Representatives.
- [46] A. Fung. (2004). Empowered participation: reinventing urban democracy. Princeton, NJ: Princeton University Press.
- [47] M.E. Daniels. (2006). Indiana Toll Road Oversight Board. Indianapolis, IN: Author, Executive Order 6-10. Retrieved from http://www.in.gov/governorhistory/mitchdaniels/files/EO_06-10.pdf
- [48] N. Kelly. (2008, June 22). Toll road detractors air gripes with the state. *News Gazette*, Fort Wayne, Indiana
- [49] L. English & J. Guthrie. (2003). Driving privately financed projects in Australia: what makes them tick? *Accounting, Auditing and Accountability Journal* 16 (3): 493-511.
- [50] T. Napoli. (2013). Private financing of public infrastructure: risk and options for New York State. Albany, NY: Office of the State Comptroller. Retrieved from http://www.osc.state.ny.us/reports/infrastructure/p3_report_2013.pdf
- [51] J. Buxbaum & I. Ortiz. (2009). Public sector decision making for public private partnerships. Washington, D.C.: Transportation Research Board, NCHRP Synthesis 391. Retrieved from http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_syn_391.pdf
- [52] C. Mylvaganam & S. Borins. (2005). If you build It ... business, government and Ontario's electronic toll highway. Toronto: University of Toronto Center for Public Management.
- [53] P. Baxandall. (2007). Road privatization explaining the trend, assessing the facts, and protecting the public. Boston MA: United States Public Interest Research Group. Retrieved from <http://uspirg.org/sites/pirg/files/reports/Road-Privatization.pdf>

- [54] I. Boers, F. Hoek, C. van Montfort and J. Wieles. (2013). Public—Private partnerships: International audit findings in P. de Vries & E. Yehoue. (Eds.) The Routledge companion to public—private partnerships (pp. 451-478). New York: Routledge.
- [55] Florida Department of Transportation (n.d.) The Florida 2012 Safety and Security Performance Report. Retrieved from <http://www.dot.state.fl.us/planning/performance/2012/2012SafetySecurity.pdf>
- [56] M. Garvin, K. Molenaar, D. Navarro & G. Proctor. (2011). Key performance indicators in private public partnerships. Washington DC: Federal Highway Administration. Retrieved from: <http://international.fhwa.dot.gov/pubs/pl10029/pl10029.pdf>
- [57] S. Remias, T. Brennan, C. Day, H. Summers, E. Cox, D. Horton, and D. Bullock. (2013). Indiana mobility report: full version. doi: 10.5703/1288284315190.

Transparency Notices in the EU Public Procurement Regime:

An Empirical Study of the use of Transparency Notices in Sweden and the United Kingdom

Lisbeth la Cour¹, Anders Milhøj² and Grith S. Ølykke³

¹ Copenhagen Business School,
Porcelaenshaven 16A
2000 Frederiksberg, Denmark
E-mail: llc.eco@cbs.dk

² University of Copenhagen,
Østre Farimagsgade 5
1353 Copenhagen K, Denmark
E-mail: anders.milhoj@econ.ku.dk

³ Copenhagen Business School,
Porcelaenshaven 16A
2000 Frederiksberg, Denmark
E-mail: goe.eco@cbs.dk

I. Introduction

Public procurement is estimated to have a value of 19 % of GDP in the EU.[1] In general, the hypothesis is that regulation of public procurement will prevent protectionism and corruption, increase competition and ultimately lead to cheaper contracts for the public authorities.[2] The EU Public Procurement Directives [3] prescribe that public contracts of a certain value need to be subject to a public tender. According to an impact assessment published by the Commission, only 20 % of public procurement is advertised at EU level; this is explained by the available exemptions and exclusions from the Directives.[4] Therefore, in this paper, focus will be on situations where contracts are awarded to an economic operator without prior advertising at EU level and in most cases without competition. It is necessary to distinguish between illegitimate and legitimate direct award of public contracts.

Illegitimate direct award of a contract covered by the EU Public Procurement Directives is the most serious breach of public procurement law. Direct award of contracts constitutes a circumvention of the rules, may waste taxpayers money, and singles out an economic operator as preferred provider over other potential providers who have not been granted the opportunity to compete for the contract. The sanction for illegitimate direct award of contracts is suitably the most serious sanction prevailing in the Remedies Directive, namely ineffectiveness of the contract.[5] Direct award of public contracts as well as award of public contracts without application of the EU Public Procurement Directives, is legitimate under certain circumstances. The former is authorised by the negotiated procedure without prior publication of a contract notice, which is available, subject to conditions, in all of the Public Procurement Directives; this procedure essentially allows for direct award of the contract, but a contract award notice must be published. The latter occurs when the relevant public contract does not have a value above the threshold provided in the EU Public Procurement Directive, or when explicit exemptions apply. Where the award of public contracts is outside the scope of the Public Procurement Directives, the award may however be governed by the general principles of EU law, if there is a certain cross-border interest in the contract and/or by national procurement law. Together with the ineffectiveness sanction, in 2010, a possibility of publishing a transparency notice in order to prevent directly awarded contracts from being subject to ineffectiveness was introduced.[6] Transparency notices hereby provides legal certainty for contracting authorities when they reasonably assume that direct award of a public contract is legitimate or not covered by the EU Public Procurement Directives by shielding the awarded contract from ineffectiveness. The degree of legal scrutiny of the discretion exercised by contracting authorities in this regard is currently subject of a preliminary reference to the Court of Justice of the European Union (CJEU).[7]

On the basis of a search in the TED database (see further Section II.1), the use of transparency notices varies considerably between Member States, cf. **Table 1**:

Country	Transp. notices (TN) Number	Contract Awards (CA) Number	TN/CA %	Population (P) Mill. 2010	TN/P Number/mill
Austria	328	9650	3.4	8.4	39.2
Belgium	24	15032	0.2	10.8	2.2
Bulgaria	96	13061	0.7	7.4	12.9
Cyprus	47	1590	3.0	0.8	57.4
Czech Rep.	95	18555	0.5	10.5	9.1
Germany	181	79144	0.2	81.8	2.2
Denmark	1429	8546	16.7	5.5	258.2
Estonia	18	4434	0.4	1.3	13.5
Spain	349	39151	0.9	46.5	7.5
Finland	843	10498	8.0	5.4	157.5
France	27305	155762	17.5	64.7	422.3
Greece	27	5403	0.5	11.2	2.4
Croatia	57	359	15.9	11.2	5.1
Hungary	3	9158	0.0	10.0	0.3
Ireland	31	3247	1.0	4.5	6.8
Italy	935	31940	2.9	59.2	15.8
Lithuania	198	8847	2.2	3.1	63.0
Luxemburg	3	2117	0.1	0.5	6.0
Latvia	102	4889	2.1	2.1	48.1
Malta	0	735	0.0	0.4	0.0
Netherlands	196	15104	1.3	16.6	11.8
Poland	3531	92602	3.8	38.2	92.5
Portugal	17	4947	0.3	10.6	1.6
Romania	1	15079	0.0	20.3	0.0
Sweden	291	15140	1.9	9.3	31.2
Slovenia	705	5557	12.7	2.0	344.4
Slovakia	559	4442	12.6	5.4	103.7
UK	1741	34408	5.1	62.5	27.9

Table 1: Data from TED (Tender Electronic Daily) and EUROSTAT. The number of transparency notices and contract award notices is for the period 1. January 2010 – 31. December 2013.

In this paper, an empirical study is carried out of all transparency notices published in the TED database by contracting authorities in Sweden and in the United Kingdom (as highlighted in **Table 1**). Initially, it was planned to include Ireland and Norway as well, but due to the low number of transparency notices and the difficulty of extracting data due to differences in registration, respectively, these two countries were not included in the analysis. Moreover, the data on Denmark was supposed to be examined; however, it was not conceivable to finish the data analysis in due time. As this is work in progress, the data on Denmark will subsequently be included and presented at the IPPC6 conference in Dublin 2014.

In Section II, the methodology applied will be explained. In Section III, an overview of the data is given. In Section IV, the results of the data analysis with a focus on the reasons given to justify the use of a transparency notice, will be presented and discussed, and in Section V, conclusions are made.

II. Methodology

In this Section, the applied methodology will be explained. Firstly, the origin of the data, the Tender Electronic Daily, will be described. Secondly, the treatment and categorisation of data is accounted for.

II.1 The TED database.

In the present study we work with TED: The Tender Electronic Daily which is “an online version of the 'Supplement to the Official Journal of the European Union', dedicated to European public procurement”.[8] In addition to being a forum for doing business in the procurement field with announcements and notices and links to detailed specifications of the projects, the site also contains a database of contract award notices. It is only possible to retrieve data via the TED archives 5 years back in time. As the present study exclusively uses data from transparency notices and not awarded contracts or tender announcements this timespan suffices; the possibility of using transparency notices was introduced ultimo 2009. The data is basically text documents and are not made readily available for use in a more traditional database sense. Hence in order to use these data a large amount of work has to be done. For the present study we use SAS software to extract and pre-process the information contained in the transparency notices for the time period 2010 to 2013. We focus exclusively on data for Sweden and the United Kingdom. The transparency notices contain information on the *contracting authority*, the *legal basis* (the Directive, and most often the Article relied on) for the use of a transparency notice, *the main reason for the use of a transparency notice*, *additional reasons – if any*, *the type of work (services, supply, works, other)*, and *the industry* by CPV-codes. It must be noted, however, that sometimes the data is rather incomplete which necessitates thorough assessment and discretionary legal judgment to allow categorisation of the data. Even though information on the value of the contract would be very interesting for empirical studies, it is rarely available, and often the numbers do not make much sense; therefore, this variable has not been included in the present study.

II.2 Treatment of data

The data from TED has systematically been registered in excel sheets, identified by the TED ID, and where observations were missing, the available information has been individually assessed, in order to make the best possible estimate constructing the unavailable information. For example, if it was clear from the information that the contract has been awarded directly on grounds of prevailing exclusive rights, but no legal basis was provided (in more than 30 % of all the analysed transparency notices no reference was made to a specific Article in the EU Public Procurement Directives), the relevant legal basis has been applied, dependent on which EU Public Procurement Directive was applying to the award. If only a national legal basis was provided, this was examined further by looking up the relevant national legislation to confirm the legal basis, and translation into the legal basis provided in the relevant EU Public Procurement Directive was made. Another example is where the specific ground for the legitimate use of a transparency notice was not explicitly provided, but instead, the technical characteristics of the relevant product was listed. In these cases, it was assumed that the ground for the use of a transparency notice was “technical reasons”, which may justify the use of the negotiated procedure without prior publication of a contract notice. In addition, it appears that the templates used to publish a transparency notice in some instances contain errors; e.g. in 2010-2011 most transparency notices from Sweden refer to the Utilities Directive even though it is clear that the contracting authority in most cases is subject to the Public Sector Directive, and in 2010 most transparency notices from the United Kingdom indicated that both the Utilities Directive and the Public Sector Directive applied. Another type of error occurs in the observations from the United Kingdom, as some contracting authorities systematically refer to the ground that no suitable tenders were received (without accounting for a previous tender) or that exclusive rights exist, in addition to other grounds which are clearly more relevant. This necessitates a critical assessment of the relevant ground to use a transparency notice.

It is acknowledged that the use of the best estimate made by the authors may be subject to criticism and that the perfect way to account for missing observations would be to call on the relevant contracting authority to require more information. This would however be very cumbersome and time consuming; moreover, data goes back to 2010, and tracking past grounds for the use of transparency notices would very likely be unsuccessful.

The categorisation of data relies on the actual ground provided by the contracting authority, without questioning the validity or applicability of the ground (except from the mentioned “systematic” errors). However, observations on general trends or possible mistakes will be included in the results of the data analysis. In many instances, 25 % of all the observations, contracting authorities provide more than one reason to justify their use of a transparency notice to advertise the direct award of a contract. Sometimes, it appears that, instead of thoroughly develop the central reason justifying the use of a transparency notice, contracting authorities state a variety of grounds to be sure that at least one will apply.

In order to facilitate the quantification of results, it was decided to distinguish between the most important reason, which is used for the analysis below in Section IV, and other reasons, which may be mentioned in the analysis as well, but are not displayed in the presentation of the data. The most important reason is either the first mentioned reason, or the reason which, on the basis of a legal assessment of the text, is the reason which in the first place justified the direct award of a contract. For example, if the contracting authority states that the award concerns Annex II B services, and then further adds that the provider has unique competences making the choice of economic operator the only feasible one due to technical reasons, the character of the service has been registered as the most important reason, even though technical reasons could be the ground justifying absence of competition.

This is because the character of the service brings it outside the scope of the Directives and might in some cases in itself justify the direct award, where there is no cross-border interest and no national regulation applies.

Lastly, it should be mentioned that a small number of observations have been ignored in the data analysis, i.e. taken out of the dataset. For Sweden, only 1 observation was ignored: it involved purchase of shares. However, this one observation will be discussed in the context of acquisition or rental of land and property, because ancillary works were involved. For the United Kingdom, 29 observations have been ignored. Some because they involved sale of land (rather than a purchase) – these are however in a grey zone and will be discussed together with the cases on acquisition or rental of land and property - some because they were actually calls for competition, some because they were concerning transfer of staff, or because the procuring entity states not to be a contracting authority, one concerned a collaboration agreement on research between universities, a couple were ignored due to complete lack of data, and the only observation from 2009 was ignored as well.

III. Data at a first glance

All together 2002 observations are included in the analysed dataset;[9] 290 observations from Sweden, and 1712 observations from the United Kingdom. **Table 2** shows the number of transparency notices divided by country and by year.

Country	2010	2011	2012	2013	All years
UK	211	430	478	593	1712
Sweden	44	100	72	74	290

Table 2: Transparency notices in the dataset per year in Sweden and the United Kingdom, respectively.

This shows an upwards trend in the use of transparency notices in both countries.

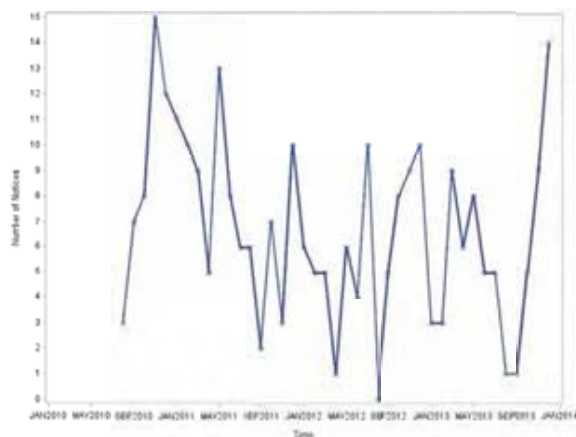


Figure 1a: Number of transparency notices over time, Sweden

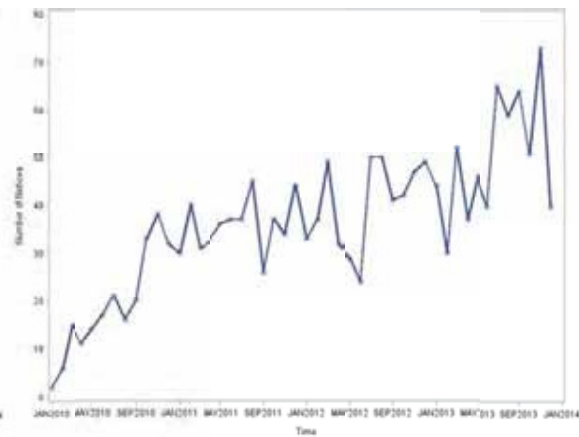


Figure 1b: Number of transparency notices over time, the United Kingdom

From the graphs in **Figure 1a** and **1b**, where monthly intervals are displayed, quite different patterns for Sweden and the United Kingdom are nevertheless observed. In the United Kingdom there seems to have been an upward trend in the number of transparency notices while the development in Sweden show no trend and in general the picture is much more volatile. A trend of increasing use of transparency notices is not rejected using statistical tests on the observations from the United Kingdom, and the trend is weakly significant and negative in the observations from Sweden. Another hypothesis is that around major holidays (July-August and December) the contracting authorities may want to post more transparency notices to increase the likelihood of no objections. There is no strong visual support for such a hypothesis; still a statistical test was performed by running a simple linear regression of the number of notices on a time trend and dummy variables for July, August and December. For the United Kingdom there is very weak support of the hypothesis when it comes to the summer months (using a 10% test level and a single sided alternative) while no significance is found for December. For Sweden there is some support for a larger number of notices in December, while for August the effect is significant and negative (contrary to the hypothesis) and for July the effect is insignificant. The results of the statistical tests for trend and holiday effects should be interpreted with care due to the low number of observations.

If the observations are divided according to the applicable Directive, it shows different patterns for Sweden and the United Kingdom, cf. **Figure 2**.

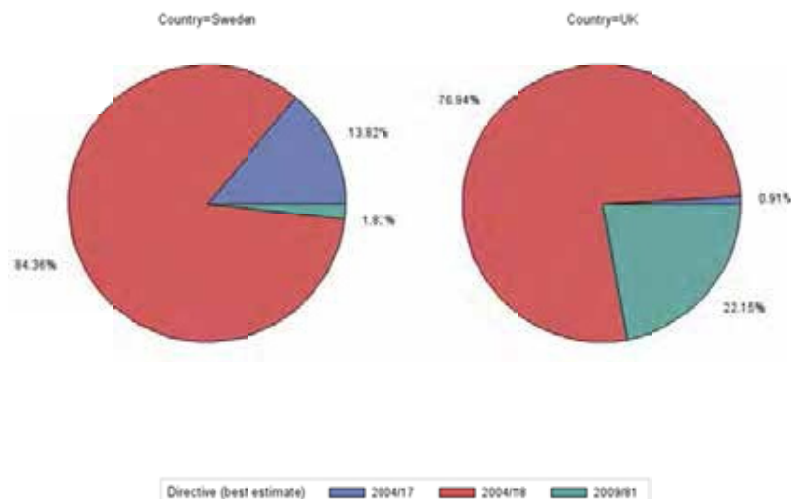


Figure 2: Applicable Directive (2004/17 = Utilities Directive; 2004/18 = Public Sector Directive; 2009/81 = Defence Directive).

The proportion of contracts awarded under the Utilities Directive in Sweden should be seen in relation to the relatively low total number of observations, compared to the United Kingdom; the actual number of contracts awarded under the Utilities Directive is 28 for Sweden and 13 for the United Kingdom. In this context, the systematic error indicating that all transparency notices in Sweden were published under the Utilities Directive in 2010 and part of 2011 could affect the number for Sweden, as the registered Directive has only been changed from Utility to Public Sector where it was clear that the contracting authority was *not* subject to the Utilities Directive.[10]

Not unexpectedly, compared to Sweden the United Kingdom publishes a considerable proportion of transparency notices for the award of contracts under the Defence Directive. It could be noted that the proportion of transparency notices published by contracting authorities in the defence sector in the United Kingdom is larger than it occurs from **Figure 2** because some purchases were made prior to transposition of the Defence Directive (transposition deadline in August 2011), and some are still subject to the Public Sector Directive.

When the observations are divided on the basis of the object of the contracts, relatively similar patterns occur, cf. below **Figure 3**. One difference is that almost half of the transparency notices for Sweden concern supply, whereas more than half in the United Kingdom concern services. Moreover, transparency notices concerning contracts for are included in the “Other” category, due to the relatively low number of observations in both countries.

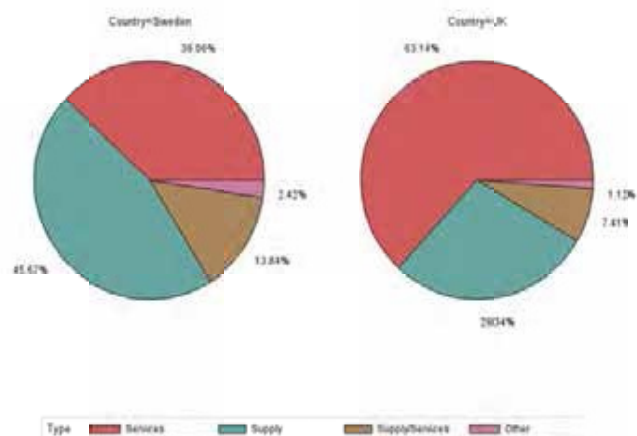


Figure 3: Division of transparency notices according to object of the awarded contract.

The category Supply/Services includes e.g. supply of spare parts combined with maintenance/repair services; often the reason to use the particular provider is stated to be technical reasons, as only that provider can supply the spare parts, and knows how to repair the relevant product. However, the category Supply/Services is also used for e.g. supply of software licenses and related service agreements. In such cases it is not possible without further information to assess whether it is a supply or a service contract as this depends on the respective value of each part of the contract.[11]

In order to examine which types of contracts are awarded after the publication of a transparency notice, the CPV-codes have been registered for each notice. However, many of the transparency notices' mention more than one CPV-code. It was decided to use *all* 2-diget CVP-codes in the dataset to get an idea of which sectors are involved and to detect any discrepancies between the two countries; this implies that there are more observations than there are transparency notices. The result is displayed below, in **Figure 4**.

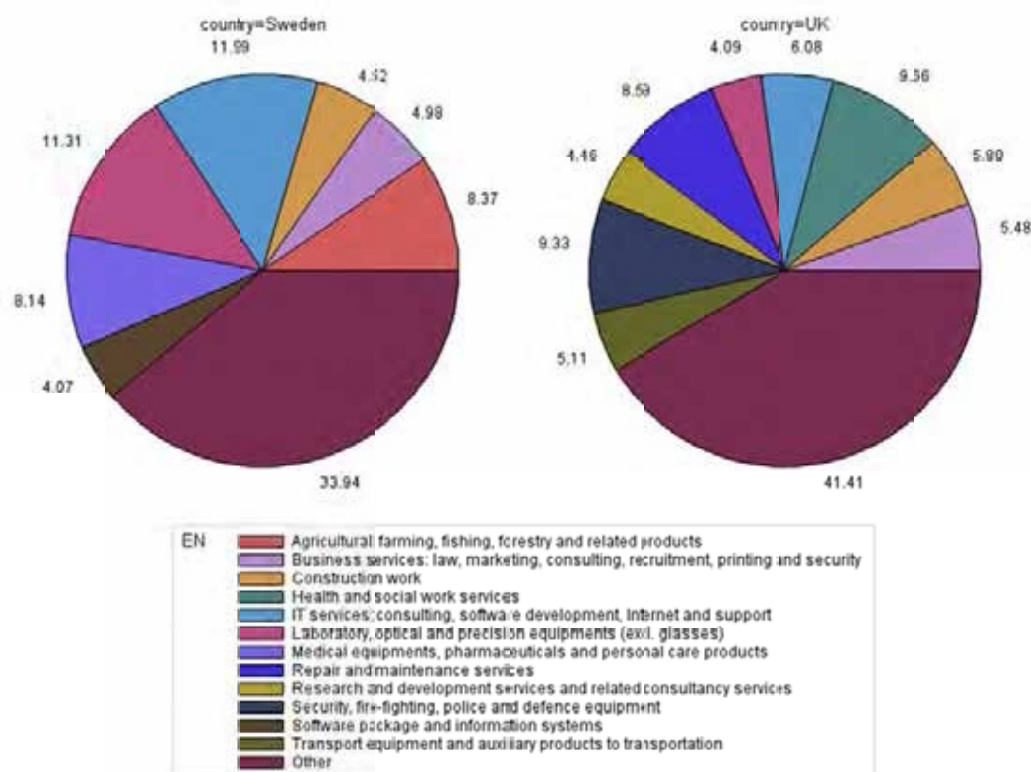


Figure 4: CPV-codes used in transparency notices.

The immediate impression is that many different CPV-codes occur; cf. the large proportion of “Other” CPV-codes in both countries.

However, some patterns are emerging, as business services and construction work each account for about 5 % in both countries, whereas IT-services and laboratory equipment are also represented in both countries, but the proportion of both is largest in Sweden. It could be wondered why construction work is relatively heavily represented when CPV-codes are observed, whereas the proportion of contracts categorised as works contracts was close to non-existing, according to **Figure 3**, above, but perhaps the text description of the contract to be awarded does not mention (construction) works.

Differences are that medical equipment, software packages and agricultural and related products are only represented in the Swedish pie, whereas transport equipment, security/defence equipment, R&D, repair and maintenance as well as health services only show up in the pie for the United Kingdom. This matches some of the findings below in Section IV. However, those CPV-codes are represented in the “Other” category for the country where they do not show in the pie; i.e. they are there, but the proportion is below 4 %.

IV. Assessment of the reasons provided for the use of transparency notices

Transparency notices are being used to prevent the contract from being declared ineffective in all situations where the contracting authority assumes that the direct award is justified, or at least it is justified not to apply the procedural requirements of the EU Public Procurement Directives. This includes but is not necessarily limited to: award of contracts with a value below the thresholds; awards under framework agreements; award of contracts for Annex II B services; the award of service concession contracts; when ex post amendments are made to an awarded contract which in the contracting authority's assessment does not require a new tender to be conducted; the exemptions mentioned in Articles 16 and 31 of the Public Sector Directive, Articles 24, 26 and 40(3) of the Utilities Directive and Articles 13 and 28 of the Defence Directive (no suitable tenders; artistic, technical reasons and exclusive rights; urgency; additional purchases); and, inhouse awards. The overall division of these reasons over all the years is illustrated below, in **Figure 5**.

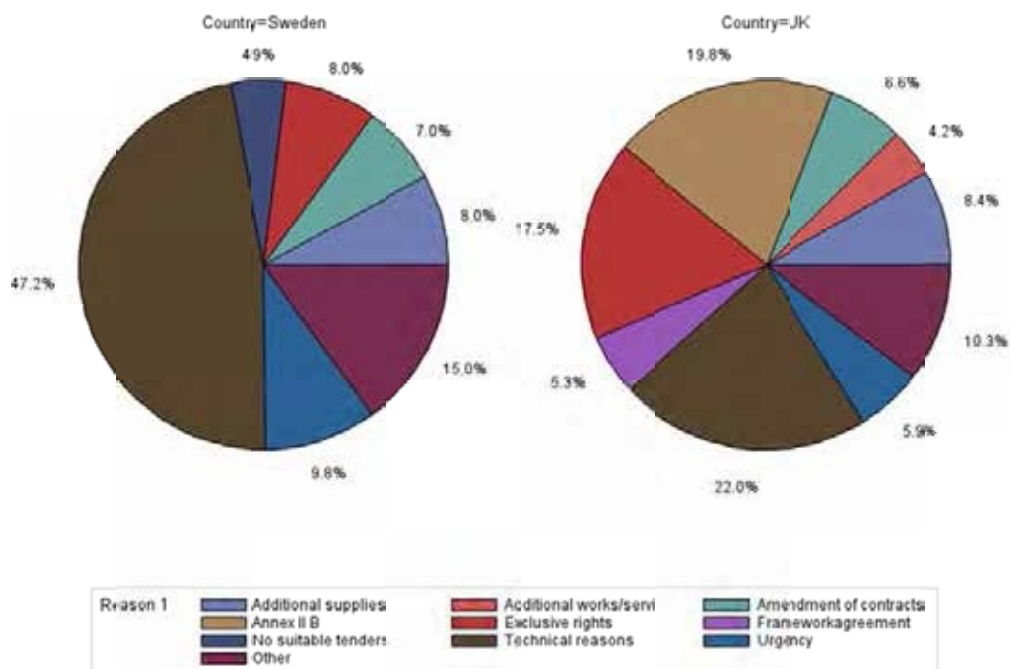


Figure 5: Reasons provided for the use of a transparency notice; i.e. justifications for direct award of contracts.

Recalling the effect on patterns which the large difference in number of observations has and bearing in mind the 4 % limitation, clear differences and some similarities between the countries in the reasons applied to justify the use of transparency notices appear. Firstly, the use of technical reasons as a ground is twice the proportion of transparency notices from Sweden, compared to the United Kingdom. Secondly, the award of contracts concerning Annex II B services is below 4 % in Sweden, whereas it is close to 20 % in the United Kingdom. Thirdly, about 5 % of the transparency notices from Sweden indicates that no suitable tenders were received in response to an advertised public procurement procedure, whereas this ground is used in 2 % of transparency notices from the United Kingdom (i.e. below the 4 % limit). Fourthly, it is also evident that use of transparency notices on grounds of exclusive rights and for additional supply, works or services is common. Fifthly, amendment of contracts is a similar proportion of observations in both countries. With an offset in these main trends it is interesting to observe **Figures 6** and **7** below representing a yearly division of grounds for the two countries.

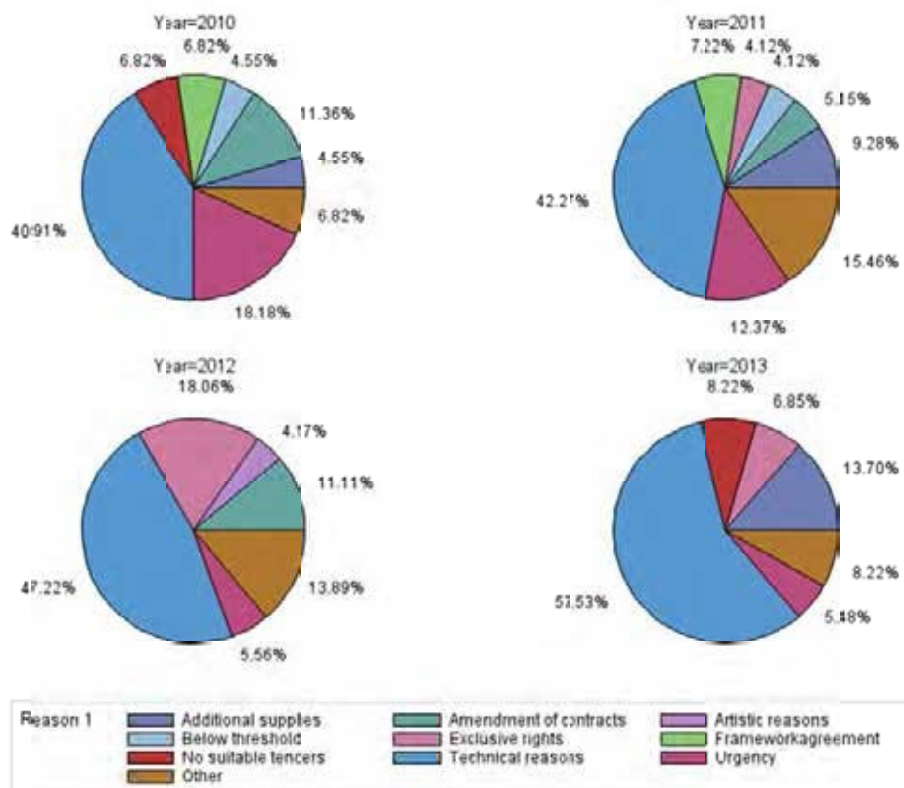


Figure 6: Reasons provided in Sweden for the use of a transparency notice, divided by year.

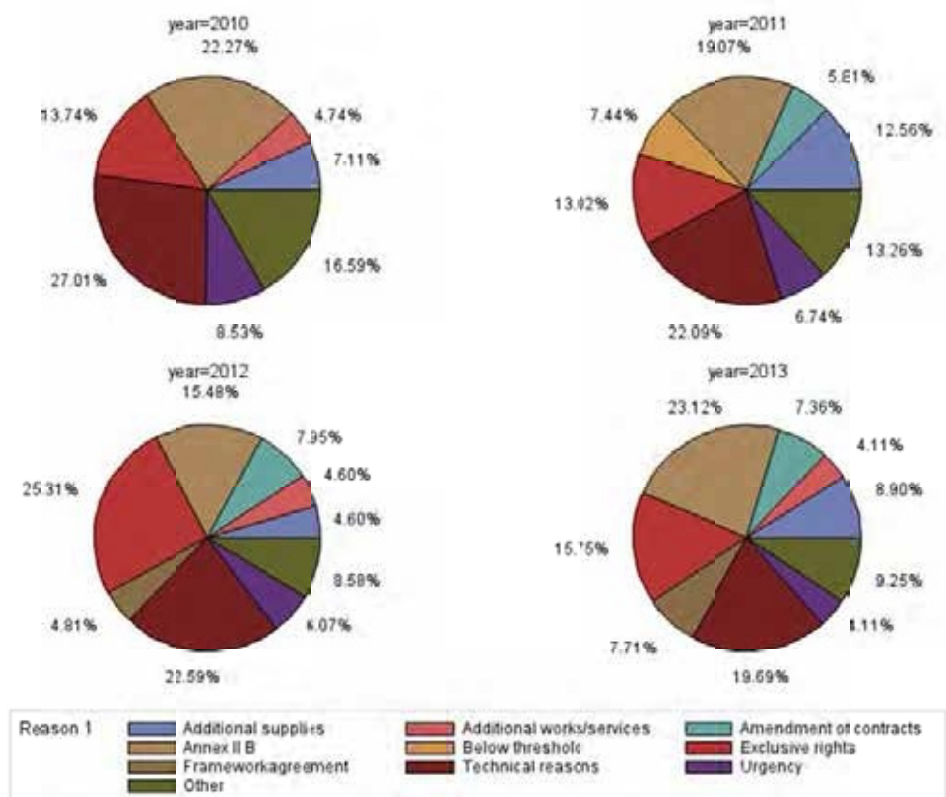


Figure 7: Reasons provided in the United Kingdom for the use of a transparency notice, divided by year.

In the following sections, each of the grounds used by the two countries to justify the advertising of a transparency notice will be discussed, with reference back to **Figures 5-7** above and supported by additional data.

IV.1 Below threshold

Where the value of the contract is below the threshold stipulated in the EU Public Procurement Directives, the Directives do not have to be followed.[12] In situations where there are national procurement rules, these will apply instead, subject to national value thresholds. In circumstances where the contract has a cross-border interest, the principles of equal treatment and transparency apply, irrespective of the low value of the contract,[13] implying that the contract will have to be advertised to ensure that interested tenderers from other Member States are aware of the award and have the possibility to express their interest in the relevant contract.[14] As is evident from **Figures 6** and **7**, transparency notices are used both in Sweden and in the United Kingdom to advertise the award of below threshold contracts; however, most years they represent less than 4 % of the Transparency notices in both countries.

IV.2 Awards under framework agreements

A framework agreement is a type of contract, which is awarded by the contracting authority to one or several economic operators according to one of the procedures in the EU Public Procurement Directives.[15] However, the individual economic operator is not as such certain to actually supply any goods/services/works under the framework agreement. When the contracting authority decides to utilise the framework agreement, it could be done by direct award of a contract to the, or one of the, economic operator(s), or by issuing a mini-competition between the economic operators in the framework agreement. It is the actual awards under the framework agreements which may be secured by the use of a transparency notice. Hence, when in the data analysis it is indicated that the reason for the use of a transparency notice is a framework agreement, it implies that a framework agreement has been used to award a contract. There are a couple of observations where transparency notices have been used to inform of the award of the framework agreement in itself, but in those instances it is not as such the character of framework agreement which justifies the use of the transparency notice, but other grounds.

It appears that the use of framework agreements, or at least the use of transparency notices to indicate the award of public contract by utilisation of a framework agreement, is more common in the United Kingdom, where, according to **Figure 5**, more than 5 % of the transparency notices are published for this reason. Where the data is displayed by year, cf. **Figure 6**, it shows that transparency notices advertising award of contracts under framework agreements were also used above the 4 % limit in Sweden in 2010 and 2011. In the Public Sector Directive and the Defence Directive, it is specified that framework agreements can only be used by the contracting authorities and the economic operators who were originally part to the agreement. In the data from the United Kingdom, there are a few observations suggesting that contracting authorities are publishing transparency notices to indicate that they will join and utilise an existing framework agreement contrary to the rules. The Utilities Directive is different, as the use of framework agreement is not as strictly regulated as in the two other Directives.

IV.3 Award of contracts for Annex II B services

Annex II B services are services listed in Annex II B of the Public Sector Directive. They include the services which – compared to Annex II A services – showed less potential for cross-border interest, and have therefore up until now been exempted from the public procurement procedures prescribed in the EU Public Procurement Directives.[16] There are similar lists on non-priority services in the Utilities Directive (Annex XVII B) and the Defence Directive (Annex II, where the list is however reduced compared to the other Directives, probably according to relevance; e.g. cultural services are not particularly relevant for contracting authorities in the Defence sector). Contract awards for services listed in these Annexes of the EU Public Procurement Directives are only subject to certain provisions, namely the requirement to make technical specifications and to publish an award notice. Nevertheless, in its case law, the CJEU has required contracting authorities awarding contracts for this kind of services, which display cross-border interest, to apply the principles of equal treatment and transparency.[17] Therefore, the use of transparency notices could be expected to be significant for the award of this type of contracts to shield the contract from ineffectiveness.

In quite a large number of transparency notices from the United Kingdom published in 2010, the indication of applicable Directive is indecisive, as both the Utilities Directive and the Public Sector Directive are mentioned. There is a similar situation in Sweden, as mentioned in Section II.2, where in 2010 and most of 2011, all contract awards are indicated to be under the Utilities Directive. Most of these contracts for both countries are, nevertheless, according to the authors' best estimate, contracts awarded by contracting authorities subject to the Public Sector Directive.

This problem with registration of data is mentioned in the context of Annex II B service, because, for the United Kingdom, a number of these contract awards concern Annex II B services, but is registered as maybe concerning Annex XVII B services under the Utilities Directive (25 out of the total of 211 transparency notices published by the United Kingdom in 2010; see **Table 2**). All of these contract awards were estimated to actually concern Annex II B services under the Public Sector Directive.

If it were possible to generalise on the basis of the total number of analysed observations of transparency notices it might be said that the non-priority services are only relevant for contracting authorities subject to the Public Sector Directive, as there are no registration of valid reference to Annex XVII B in the Utilities Directive, or Annex II in the Defence Directive. This is even though the lists of non-priority service in the various Annexes of the EU Public Procurement Directives include a residual category of other services. However, the data is not complete as the publication of transparency notices is voluntary, and as contract award notices could give a more correct picture.[18]

It is possible to observe that the award of Annex II B services accounts for a stable proportion of transparency notices in the United Kingdom of about 20 %, whereas for Sweden the proportion is below the 4 % limit, irrespectively of whether the data is accumulated or displayed by year (cf. **Figures 5-7**). This difference is significant,[19] but might be explained by the more frequent use of the market for provision of this kind of services in the United Kingdom.

IV.4 Award of service concession contracts

According to Article 17 of the Public Sector Directive and Article 18 of the Utilities Directive, the award of service concession contracts is outside the scope of the current Directives.[20] Nevertheless, the CJEU has stated that if the concession has cross-border interest, the principles of equal treatment and transparency apply.[21] The award of a service concession as ground to publish a transparency notice has not been used in Sweden, and according to the authors' best estimate it has only been used ten times in the United Kingdom. Therefore, it falls in to the "Other" category of **Figures 5** and **7**. One of the observations from the United Kingdom was not reasoned as the award of a service concession contract, but rather as a sale of land not involving any public works, in order to argue that the award fell outside the EU Public Procurement Directives which do not apply to sale, cf. Section IV.6.i. However, from the transparency notice it is clear that the transaction involved the long term (250 years) lease of land at a low cost to the economic operator ("peppercorn rent") but contingent on the construction and operation of a foodstore on the land. The contracting authority argued that it did not have any influence on the construction of the foodstore, and that the economic operator was not legally obliged to construct the store, hence, no public works contract existed. However, the set-up, i.e. providing of the foodstore as a shopping facility (presumably in a commercially unattractive location) which could be a service in the interest of the contracting authority, and the economic operator being remunerated by the low rent and the right to explore the service (the foodstore) retaining of all the risk, is, without knowing further details, similar to a service concession contract and the observation was therefore categorised as such.

IV.5 Amendment of an existing contract

Since the *Pressetext*-judgment,[22] it has been clear that where material amendments are made to an awarded contract, it may constitute a new contract which needs to be (re)tendered according to the EU Public Procurement Directives. The use of a transparency notice on the ground of amendments to an existing contract indicates that the contracting authority does not find that the amendment constitutes a new contract, and is a relatively frequent ground in both Sweden and in the United Kingdom (on average 8 % per year in both countries, or a total of 20 and 112 notices, respectively).

The typical amendment to the contracts is prolongation of the contract period, typically based on options in the original contract, which is unproblematic, as the option has been part of the original (tendered) award. Another frequent ground for prolonging the contract is to cover a transitional period until a new provider has been chosen in a(n ongoing) tender.

However, there are also a couple of amendments which may be problematic, such as inclusion of another contracting authority's demand in an existing contract, and situations where no explanation is provided for the prolongation of the contract.

IV.6 Specific exclusions

All of the 3 current EU Public Procurement Directives have provisions on specific exclusions from their application. Largely the same grounds for exclusion prevail, but there are adaptations for relevance reasons in the three Directives. The specific grounds for exclusion in the Public Sector Directive includes acquisition and rental of land or existing property, the "broadcasting exemption", arbitration and conciliation services, certain financial services, employment contracts and contracts for R&D, *except from* where the R&D service is paid for by, and the benefits accrue to, the contracting authority (which would be a service contract). In the Utilities Directive and Defence Directive there are other specific exclusions. The only additional grounds for exclusion which seem relevant according to the dataset is Article 26 in the Utilities Directive excluding certain contracts concerning the purchase of water or electricity, when the contracting authority operates within those sectors, and Article 40(3)(j) of the Utilities Directive on bargains. The specific exclusions which have been observed in the dataset are examined below.

IV.6.i Acquisition or rental of land or existing property

This exclusion provides for direct award in situations where the contracting authority purchases land (where there is not always an actual choice) and existing property. However, the actual construction of works on the acquired land may be a public works contracts depending on the circumstances, and the distinction between existing property and property constructed for the contracting authority's purposes, but only purchased subsequent to its construction gives rise to grey zones for the use of this exclusion. In relatively recent case law from the CJEU, there have been a number of cases concerning the distinction between works contracts and public authorities' sale or purchase of land/properties as well as their administrative planning powers.[23] In this case law, the CJEU makes clear that the sale of land by a public authority is not a public contract in the sense of the EU Public Procurement Directives. Moreover, in order to constitute a public works contract, the transaction must involve a pecuniary interest which implies that the contract must be carried out for the contracting authority's immediate economic benefit in the public interest; it is, however, not necessary that the service should take the form of the acquisition of a material or physical object. The mere exercise of planning powers to fulfil the public interest does not constitute an economic interest and it does not constitute the necessary specification of a contracting authority's requirements in order to make the transaction a public works contract.[24] In addition to the requirement of immediate economic benefit and a prevailing public interest, the economic operator must be legally obliged to carry out the works. In a number of observations in the dataset, the case law in this area is directly or indirectly referred to justify the direct award of the contract.

In the United Kingdom, there are 27 observations where Article 16(a) has explicitly or implicitly been relied on by the contracting authority in order to directly award contracts or justify transactions, and they are mainly from 2012 and 2013, but do not show up in **Figure 7**, due to the 4 % limit. Six of these were ignored as they concern sale of land, which is outside the scope of public procurement regulation; instead, the rules on State aid apply. However one of these is more difficult to categorise as it concerns urban development on land owned by an economic operator, and ancillary works for the immediate economic benefit of the contracting authority is involved; it is explicitly recognised that this works constitutes a public contract for the purpose of the Public Sector Directive, but economic reasons are used to reject any obligation to tender the contract separately. The included observations for the United Kingdom concerning land and property may be divided into broadly two different types: firstly, pure purchase or rental contracts; and, secondly, situations where the land is owned by the economic operator who is therefore being awarded the works contract. The only observation concerning acquisition or rental of land or property in Sweden is of the latter type. This type of contract has not been subject of case law before the CJEU, and it is questionable in legal terms. However, if the contracting authority cannot convince the owner of the land to separate the acquisition or rental of the land owned by the economic operator from the works contract, then urban development may be impossible due to the shortage of available land.

The case law does not so far clearly outline all the different types of arrangements used by contracting authorities, therefore there is still some legal uncertainty. The use of transparency notices for transactions concerning land and property combined with works contracts is therefore probably a good example of instances where the legal certainty provided by the publication of transparency notices is welcome.

IV.6.ii The "broadcasting exemption"

This exemption only prevails in the Public Sector Directive, and excludes public service contracts relating to the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time. The exclusion has only been interpreted by the CJEU in *Bayerische Rundfunk*,[25] where the CJEU concluded that cleaning services carried out at the premises of a public service broadcaster were not excluded according to Article 16(b) of the Public Sector Directive; that is, the CJEU opted for a narrow construction implying that the exclusion only applies to the contracts specifically mentioned in the text of the provision. The broadcasting exemption has been used to justify the use of transparency notices twice in the United Kingdom. In one of these instances, however, the contracting authority stated that it had intended to use a competitive process, despite the exemption, but had realised that due to technical reasons, only the incumbent provider could deliver the required services. This indicates uncertainty as to the applicability of the exemption to the relevant services, which were TV subtitling, audio description and signing.

IV.6.iii Contracts for R&D, where the benefits do not accrue to the contracting authority

Usually, State aid rules would apply to public authorities' funding of R&D where the benefits accrue to economic operators, and public procurement rules would not apply. However, the wording of the exclusions on R&D in the Public Sector Directive and the Defence Directive[26] allows for direct award of contracts where the financing and sharing of benefits are divided between the contracting authority and the economic operator. The wording of the R&D exclusion in the Utilities Directive is worded differently, and is more permissive, it excludes all contracts awarded for the purpose of research, experiment, study or development, without regulating the financing or sharing of benefits between the economic operator and the contracting authority; but seemingly the Utility R&D exclusion has not been relied on by any contracting authorities. The R&D exclusions in the Public Sector Directive and the Defence Directive are used in a number of cases, in particular for R&D in the defence sector in the United Kingdom (below 20 observations in total). In all cases where the exclusion is relied on, however, there is no

specification of how the R&D is financed, or how the benefits are divided between the parties. A related ground for direct award where R&D is involved is the possibility to use the negotiated procedure without prior publication of a contract notice when the procured product is manufactured purely for the purpose of research, experimentation, study or development.[27] this reason has been used twice in Sweden and five times in the United Kingdom (whereof four observations are within the scope of the Defence Directive).

For Defence contracts on R&D, the lack of specification with regard to legal basis for the direct award of R&D contracts might be explained by the general exclusion on supply and service contracts concerning R&D in Article 28(2)(a), stating that the negotiated procedure without prior publication of a contract notice may be used for other service contracts on R&D. Hence, there is a sense of confusion for the regulation of the award of R&D contracts within the scope of the Defence Directive, as it is ambiguous why three separate legal bases are needed, especially when one of those is a very broad *lex generalis* kind of exemption.

IV.6.iv Purchase of water or electricity

There is a special exclusion in the Utilities Directive for particular contracting entities in the water and energy sectors: when they purchase water and energy or fuel for production of energy, respectively. This exclusion has only been used infrequently to justify the publication of a transparency notice, namely twice in Sweden and once in the United Kingdom.[28]

IV.6.v Bargains

The exclusion for bargains is only available in the Utilities Directive,[29] however, there is a similar but more narrow possibility in the Public Sector Directive, where Article 31(2)(d) allows for the use of a negotiated procedure without prior publication of a contract notice where the economic operator is winding up the business, is going bankrupt or is in a similar situation according to national law. In Sweden, only one transparency notice has been published on this ground (winding up of a business). In the United Kingdom the reason that a bargain or an advantageous price has been obtained has been used four times. In two of these four instances, the Public Sector Directive applied, and in one of those the strict condition of winding up was not explicitly stated to be fulfilled. The two bargains in the United Kingdom obtained by contracting authorities under the Utilities Directive were for mobile harbour cranes.

IV.7 Negotiated procedure without prior notification of a contract notice

In the EU Public Procurement Directives the negotiated procedure without publication of a contract notice, i.e. direct award of a contract, may be used in the specific situations stipulated in the relevant provisions, which varies from Directive to Directive. It can be seen from the examined data that the three main grounds provided for the use of the negotiated procedure without prior publication of a contract notice – no suitable tenders received in response to an advertised tender; artistic, technical reasons or exclusive rights; and, urgency – are used very frequently by contracting authorities in Sweden (about 70 %, counting in also categories below the 4 % limit) and in the United Kingdom (more than 45 %, counting in also categories below the 4 % limit), cf. **Figure 5**, to justify the use of a transparency notice; other reasons to use the negotiated procedure without prior publication of a contract notice includes additional supply, works or services. The application in practice of these different grounds for direct awards is considered below.

IV.7.i No suitable tenders

The applicability of this ground for use of the negotiated procedure without prior publication of a contract notice in the Public Sector Directive requires that the contracting authority in response to a public or restricted procedure does not receive any tenders, does not receive any suitable tender, or does not receive any applications for participation in the procedure (application for pre-qualification). However, in the Utilities Directive and the Defence Directive, there is no requirements of specific procedures having been used in the unsuccessful tender, as long as a procedure from the Directive has been used; hence, the access to direct award of contracts on the ground that no, or no suitable, tenders were received is wider in scope, but the reasons for this difference is not evident.

The number of observations of no suitable tenders is 10 for Sweden and 16 for the United Kingdom. In Sweden, this is used as ground for the publication of a transparency notice on average in approximately 5 % of the observations, cf. **Figure 5**, whereas this ground is below the 4 % limit for the United Kingdom in all years, cf. **Figure 7**.

In Sweden, there is one observation where a contracting authority subject to the Public Sector Directive unsuccessfully had used a negotiate procedure *with* prior award of a contract notice; even though this is strictly not allowed in the Public Sector Directive, as mentioned, this difference in the Directives does not necessarily make much sense. More problematic is another observation from Sweden, where the contracting authority indicates that on two previous occasions it has had no responses to contract notices, therefore it decided to opt directly for a transparency notice. This could lead to a foreclosure of a market which might develop over time, as the demand of the contracting authority becomes visible for potential entrants into the market through contract notices. However,

it could be argued that the publication of a transparency notice ensures sufficient transparency about the demand for potential future suppliers to contact the contracting authority and make their existence and interest known.

When the ground is used in the United Kingdom it appears from the few observations available that generally, there has been some response to the original tender, but either the tenders were not admissible or there was only one tender.

IV.7.ii Artistic reasons

This ground for the publication of transparency notices is less than the 4 % limit in both countries. It has been used for the purchase of art on 6 occasions in Sweden. It appears that there is some uncertainty as to how “artistic reasons” could be used, as in the United Kingdom this reason is sometimes referred to where the contract concerns R&D in the defence sector,[30] and provision of services on urban development planning, involving drawings etc.

IV.7.iii Technical reasons

The test developed by the CJEU for assessment of the applicability of the negotiated procedure without prior publication of a contract notice on ground of technical reasons has been developed in cases concerning works contracts, and it has two steps:[31] firstly, it must be shown that technical reasons exist; and, secondly, it must be shown that these reasons make it “absolutely essential” that the contract is awarded to one particular economic operator, because of the insurmountable difficulties the award to another economic operator would imply.[32] Even though the provision constitutes an exemption, the CJEU has generally taken a lenient approach to identify technical reasons. However, so far no Member State has been able to lift the burden of proof to show that the technical reasons imply that only one particular undertaking could be awarded the contract. Therefore, the assessment made by the CJEU does in reality not leave much discretion to the contracting authority; on a scale, the test is further towards whether an actual monopoly exists, than on when the contracting authority may reasonably perceive a provider as monopolist in the specific situation. Claiming that the chosen provider provides the most efficient solution to the contracting authority is not sufficient to constitute a technical reason.[33] Neither is, generally, the particular proximity or location of an economic operator.[34] The capabilities of the economic operator – that is, the ability to use the particular method chosen by the contracting authority - is not considered sufficient to constitute a technical reason.[35] Hence, the exemption is interpreted narrowly, and generally, there will be an obligation to test the market for similar, reasonably appropriate solutions.[36]

In more than 60 % of the transparency notices on supply (goods) from Sweden, the ground for using a transparency notice is technical reasons, whereas this is only the case for about 30 % of these observations from the United Kingdom.

The details given in different transparency notices on the technical reasons relied on varies greatly; sometimes, it is evident that the contracting authority really argues its case, whereas in other observations the technical reasons is merely list of product specifications, or there is not any specification of the technical reasons. This could indicate that technical reasons are used as default justification where no other reasons apply, or when the contracting authority has a preferred product/service provider.

There is some difference with regard to the use of technical grounds as justification for direct awards, as it is used twice as often in Sweden, compared to the United Kingdom, see **Figure 5**. There might be a good explanation for this difference, namely that in the United Kingdom, existence of exclusive rights is often the primary reason used, mentioning technical reasons as a supporting reason for publication of a transparency notice. If the percentages for technical reasons and exclusive rights are added up, the total is about 55 % for Sweden and 40 % for the United Kingdom. It is clear that technical reasons and exclusive rights as grounds for direct award of contracts is not the same, as the ground “exclusive rights” actually requires the existence of such, whereas technical reasons are reasons other than exclusive rights. Moreover, the use of the ground exclusive rights might be perceived as legally safer as it can be documented; see further below on exclusive rights.

IV.7.iv Exclusive rights

The use of exclusive rights as ground for direct award of a contract does not as such imply that any IPR protected product or service can be procured by direct award. There is a requirement for contracting authorities to hold a competition where the market for similar products is tested.[37]

In addition to what has already been stated on the relation between technical reasons and exclusive rights, it may be observed that the use of the ground exclusive rights varied considerably in Sweden, with a 18 % high in 2012, cf. **Figure 6**, whereas its use is more stable over time in the United Kingdom, about 13-25 % per year, cf. **Figure 7**.

In Sweden, the number of observations on exclusive rights in 2012 is 13, and 11 of these concern IT services, support, upgrading etc. Three of these contracts concerning IT services are awarded by the same contracting authority to the same economic operator on the ground that the economic operator own IPR to the programmes for which support is needed. The two transparency notices which do not concern IT are for consultancy services.

It is difficult to generalise over the large number of observations from the United Kingdom, but many instances concern IT and other products protected by IPR or maintenance services, where the serviced product is protected by IPR.

In a few transparency notices where exclusive rights is used as ground for direct award it is stated that the economic operator is the only provider with a license to produce the product or provide the service in the United Kingdom. Examples of products include vaccine, other medicines and particular weapons, and the IPR owner for these products is from another country, using selective distribution systems, or has set up branches in various countries. The “license” argument is also sometimes reversed in the sense that it is stated that the producer of an IPR protected product has decided *not* to give any licenses for the production or servicing of the product, as a kind of superfluous excuse: it is usually the right of the IPR holder to choose not to license. In any event, competition between license holders of the same product might be influenced by the license conditions granted by the license owner. Hence, the creation of competition would have to be between reasonable substitutes, rather than between licensees of the same product.

IV.7.v Urgency

There is only relatively sparse case law on the interpretation of this provision.[38] However, the CJEU has emphasised the three cumulative conditions for application of the urgency exemption: existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom.[39] The provision is used as legal basis for the use of a transparency notice in nearly 10 % of the observations from Sweden and in 6 % from the United Kingdom. In several instances, urgency is backed by other reasons, such as additional supply/works/services or technical reasons, seemingly to make additional justification for the choice of provider.

In Sweden, the urgency reasons have been used in 11 cases where the urgency was caused by complaints being issued over the conduct of a public procurement procedure and the contract could therefore not be awarded until a decision on the complaint had been issued by the relevant national court – one such case has come up in the United Kingdom as well. In these cases, typically the contract with the existing provider was prolonged and this prolongation was advertised by transparency notice. There is also one case in Sweden, and three in the United Kingdom, where it turned out that the successful tenderer could not fulfil the contract, and the contracting authority used a transparency notice to re-award the contract to the second tenderer in the original public procurement procedure. Moreover, there is a case in Sweden where the tenderer was suddenly arrested for serious economic crimes. All of these situations seem to constitute genuine urgency which is not attributable to the contracting authority.

In the United Kingdom, many of the transparency notices using urgency to legitimise direct award of contracts do not explain how the urgency occurred, only that it is present. Some attribute urgency to political decisions and budgeting, and 50 % of the transparency notices issued on ground of urgency was from contracting authorities in the defence sector (48 out of 98). There is a variant of the urgency ground in the Defence Directive, where urgency due to a “crisis” can also justify the use of the negotiated procedure without publication of a contract notice.[40] The crisis referred to is defined in Article 1(10) as: “... any situation in a Member State or third country in which a harmful event has occurred which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or has a substantial impact on property values, or requires measures in order to supply the population with necessities; a crisis shall also be deemed to have arisen if the occurrence of such a harmful event is deemed to be impending; armed conflicts and wars shall be regarded as crises for the purposes of this Directive.” It is not obvious which value this provision adds as, surely, crisis would be conditions of extreme urgency not attributable to the contracting authority. According to the authors’ best estimate, this special exemption has been used 8 times, but the actual “crisis” is not consistently identified.

IV.7.vi Additional supply/works or services

This exemption from the obligation to hold a tender applies under specific conditions mentioned in the EU Public Procurement Directives.

For supply, these conditions are that it must be purchases from the original supplier that replaces or extends normal supplies or situations where a change of supplier would imply products with different technical characteristics resulting in incompatibility or disproportionate technical difficulties. In the Public Sector Directive, this exemption is limited to three years, in the Defence Directive to five years, whereas in the Utilities Directive, there is no time limit.[41] In many transparency notices, contracting authorities referring to technical reasons (cf. above Section IV.7.iii), as ground for the use of the negotiated procedure without prior publication of a contract notice, also refer to disproportionate technical difficulties indicating that they will buy from a previous provider. Hence, there is a tendency to mix the two reasons, even though they have quite different scope of application. Firstly, the provision on additional supply assumes an existing or a previous contract between the parties, which is not required by the exemption on grounds of technical reasons. Secondly, the provision on additional supply is fairly elaborate on the relevant circumstances, i.e. the purchase of different products with different technical characteristics which makes them unable to function together or gives rise to disproportionate difficulties in such regard. It is also clear that, in accordance with the general state of law under free movement rules, it is the technical aspects that matter, not e.g.

economic considerations; e.g. the cost of training staff is not perceived as a technical reason by the CJEU.[42] Thirdly, the timeframe of three years set in the Public Sector Directive for additional supply implies that, even though it is an exemption, it may have a wider scope of application than the provision giving exemption on technical grounds. However, when the three years have expired, it is generally not possible to use incompatibility with existing equipment to justify direct awards on the basis of technical grounds. Compatibility and interoperability are relevant technical reasons, and the system of justifications in the Public Sector Directive has taken this into account for supply by setting the timeframe of 3 years (5 years in the Defence Directive). Clearly, in the Utilities Directive the important difference between technical reasons and additional supplies is the first mentioned, i.e. whether there is a previous contract or not.

Due to the lack of reference to legal basis and the tendency to mix technical reasons and additional supply, often the registration has been made by the best estimate considering the text of the transparency notice. Only rarely is there a reference to the timeframe of original and new supply, and there is generally no comments on whether the original contract was tendered or not, which would seem to be a condition for using direct award of additional supply, unless, of course, an exemption applied.

From **Figure 5** it is clear that additional supply as a ground to use the negotiated procedure without prior publication of a contract notice is used in a similar proportion by contracting authorities in Sweden and the United Kingdom, namely in about 6-10 % of the observations. In Sweden the yearly frequency ranges from 0-13 %, whereas in the United Kingdom it is more stable at 4-12 %; cf. **Figures 6 and 7**.

For works and services, the condition for using additional purchases which were not included in the original contract, the conditions are that the works or service must have become necessary due to unforeseen circumstances, and either that the additional works or services cannot technically or economically be separated from the original contract without major inconvenience for the contracting authority, or that the works or service can be separated from the original contract, but are necessary for the completion of this contract. It is also a condition that the value of the additional works or services is not more than 50 % of the value of the original contract.[43] This limit on value is not required in the Utilities Directive. The same reservations with regard to the identification of situations where this legal basis has been relied on as indicated just above for additional supply applies, due to the wording of the provision where technical difficulties are mentioned.

The best estimate of the use of the exemption for additional works/services is below the 4 % limit for Sweden (it has seemingly only been used twice, in 2011), whereas in the United Kingdom it is generally used in just above 4 % of the observations (except from 2011, where the proportion is 3.5 %, i.e. just below the 4 % limit), cf. **Figure 7**. The 50 % value threshold is generally referred to in observations from the United Kingdom.

IV.8 Inhouse

Since *Commsision v Germany* (the Hamburg case), [44] there has been a lot of focus on uncertainty of contracting authorities with regard to public-public cooperation.[45] However, even though it might be obvious to reduce the legal uncertainty by use of transparency notices for inhouse award of contracts and public-public cooperation, there is seemingly only 1 observation from Sweden and 7 observations from the United Kingdom on inhouse awards.

However, from Sweden there is 1 additional observation, where the original intention had been to employ a person to provide certain services. The result of the interviews with applicants was that the person the contracting authority wanted to employ had his own company providing the demanded services, and therefore a service contract was being awarded instead of an employment taking place.

Two of the observations ignored from the United Kingdom, because they was difficult to categorise in one of the available exemptions, concern two transactions on the same case where employees of the contracting authority were transferred to a separate economic entity and contracts were part of the separation. However, the text is implicit and the context difficult to grasp, but it appears to be the opposite of inhouse, i.e. the externalisation of a department. It is not clear how this could be done without tendering the contracts which were for auditing services, i.e. a service where there clearly is a market. One reason given by the contracting authority is that the transfer of employees to a separate legal entity is in line with the United Kingdom's Government objective of increasing employee participation in the leadership of organisations.

V. Conclusions

The purpose of this paper has been to give an overview and an impression of the use of transparency notices, and to compare the use in Sweden and the United Kingdom. There are fundamental differences between the countries, for example the lack of observations on Annex II B services from Sweden, compared to the large number of observations on Annex II B services in the United Kingdom. However, there are also similarities, such as the use of technical reasons and exclusive rights as grounds for publishing transparency notices. There are no general sectors which display an excessive use of transparency notices, but the IT-sector and the sector for medical equipment are represented in a fair share of observations for both countries. This could indicate that some sectors are more widely

perceived to be outside the scope of meaningful tendering under the EU Public Procurement Directives than others. One general observation which can be made on the basis of the data analysis is that consideration of possible cross-border interest in the contract is only very rarely mentioned, even though this should be part of any award of Annex II B service contracts, services concession contracts and below threshold awards.

The overall impression when studying the data is that the quality of data greatly varies. This makes it difficult to ensure the stability of observations and findings. Some contracting authorities simply do not provide the required data in the template for transparency notices, some are being very ambiguous on the reason to use a transparency notice, whereas others do not choose one reason for the direct award but a range of reasons which makes the argument blurred. One reason for contracting authorities to use several grounds could be legal uncertainty as to the scope of the various exemptions, as case law on many of the exemptions is sparse. This might be an important area for guidelines from the Commission since now, compared to earlier, data is actually available because of the introduction of the transparency notice instrument. As mentioned in the introduction, the CJEU will in the near future take a position on the scope of review of the reasons provided by contracting authorities in transparency notices. It shall be interesting to observe how the judgment will affect the quality of data provided in transparency notices.

Acknowledgements

We would like to thank the European Union for making the TED database available, © European Union, 1998-2013. Moreover, we owe thanks to stud.merc.(jur.) Natasha Oxlund for dedicated and diligent research assistance.

References

- [1] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on public procurement, COM(2011) 896 final, Section 1.
- [2] See P. Cecchini, M. Catinal, A. Jacquemin (1988) *The European Challenge*, 1992, the Benefits of a Single Market, Aldershot, Wildwood House, for the economic arguments.
- [3] The currently applicable Directives which are relevant for this empirical study are Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1 (the Utilities Directive); Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114 (the Public Sector Directive); and, Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ 2009 L 216/76 (the Defence Directive). The Utilities Directive and the Public Sector Directive has recently undergone revision, and new Directives were adopted in February 2014; see press release 6337/14 from the European Council, "Council adopts directives for the reform of public procurement", available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/140975.pdf (accessed in March 2014).
- [4] Commission Staff Working Paper: Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation, SEC (2011) 853 final Part 1, p. 27.
- [5] Cf. Article 2d(1)a of Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ 1989 L 395/33 as amended by Directive 2007/66/EC amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007 L 335/31 (Remedies Directive, as amended). See also C-503/04 *Commission v Germany* [2007] ECR I-6153.
- [6] Article 2d(4) of the Remedies Directive, as amended.
- [7] C-19/13 *Ministero dell'Interno v Fastweb S.p.a.*, OJ 2013 C 86/11.
- [8] <http://ted.europa.eu/TED/misc/aboutTed.do>.

- [9] The number of observations in **Table 2** deviates from the total number of transparency notices for Sweden and the United Kingdom (cf. **Table 1**), as some data has been ignored, cf. Section II.2.
- [10] The result mirrors the impact assessment made by the Commission of the current EU Public Procurement Directives in 2011 showing that based on value of total awards of contracts, Sweden awards more contracts to Utilities than the United Kingdom, cf. Commission Staff Working Paper: Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation, SEC (2011) 853 final, Part 1, Figure 2, p. vi.
- [11] Article 1(2) (d) of the Utilities Directive; Article 1(2) (d) of the Public Sector Directive; and, Article 1(5) of the Defence Directive.
- [12] See the thresholds in Article 16 in the Utilities Directive, Article 7 in the Public Sector Directive, and Article 8 in the Defence Directive, which have all most recently amended by Regulation 1336/2013 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the awards of contract.
- [13] See e.g. C-147-148/06 SECAP [2008] ECR I-3565.
- [14] Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006 C 179/2.
- [15] Article 14 and 40(3) (i) in the Utilities Directive; Article 32 in the Public Sector Directive; and, Article 29 in the Defence Directive.
- [16] See the Recitals of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. It should be noted that the new Public Procurement Directives do not distinguish between A and B services, but has a separate regime for social services (social, health and education services) which according to the Commission in its proposal for a new Public Sector Directive only have very limited cross-border interest; cf. Section 2 of COM(2011) 896 final.
- [17] C-507/03 An Post [2007] ECR I-9777.
- [18] Commission Staff Working Paper: Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation, SEC (2011) 853 final Part 1, p. 30, where the Commission estimates that contracts for non priority services advertised by Utilities has a total value of EUR 1.5 billion a year, and the United Kingdom is mentioned as one of the Member States advertising such contracts.
- [19] See also Commission Staff Working Paper: Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation, SEC (2011) 853 final Part 1, p. 30 where the United Kingdom is mentioned as one of the countries where Annex II B services are advertised widely. This could indicate a transparency culture in the award of Annex II B contracts which spills over into the data on transparency notices.
- [20] However, a new Concession Directive has just been adopted, cf. FN [3].
- [21] C-324/98 Telaustria [2000] ECR I-10745.
- [22] C-454/06 Presstext [2008] ECR I-4401.
- [23] Cf. C-399/98 Ordine degli Architetti and Others [2001] ECR I-5409; Case C-220/05 Aurox [2007] ECR I-385; C-451/08 Helmut Müller [2010] I-2673; C-306/08 Commission vs Spain [2001] ECR I-4541; and, C-576/10 Commission vs Netherlands, judgment of 11. July 2013, which was dismissed by the CJEU due to wrong legal basis, as the transaction had taken place prior to the transposition deadline for the current Public Sector Directive.
- [24] C-451/08 Helmut Müller [2010] ECR I-2673, paras 54-57 and 68.
- [25] C-337/06 Bayerischer Rundfunk [2007] ECR I-11173.
- [26] Article 40(3)(j) of the Utilities Directive; Article 16(f) of the Public Sector Directive; and, Article 13(j) of the Defence Directive.
- [27] Article 31(2)(a) of the Public Sector Directive and Article 28(2)(b) of the Defence Directive.

- [28] This finding is not supporting the great emphasis put on the exclusion of this type of contracts by the Commission, cf. Commission Staff Working Paper: Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation, SEC (2011) 853 final Part 1, p. 28-29. However, it might be that contracting authorities relying on this exemption do not use transparency notices, perhaps because the exclusions is quite firm with no room for interpretation.
- [29] Article 40(3)(j) in the Utilities Directive.
- [30] These observations have been ignored and are therefore not part of the dataset. The reason is that the observations were in reality invitations to express interest in contributing as subcontractor on research projects. However, the main contractors (on each occasion a number of undertakings) had been chosen prior to the award of the transparency notice. The actual set-ups are difficult to extract from the wording of the transparency notices.
- [31] See e.g. C-57/94 *Commission v Italy (Ascoli-Mare)* [1995] ECR I-1249, para. 24 and C-394/02 *Commission v Greece* [2005] ECR I-4713, para. 34.
- [32] C-57/94 *Commission v Italy (Ascoli-Mare)* [1995] ECR I-1249, para. 27.
- [33] Opinion of AG Lenz on 13 January 1987 concerning C-199/85 *Commission v Italy* [1987] ECR 1039, para. 5 read in conjunction with para. 33.
- [34] Joined Cases C-20 and 28/01 *Commission v Germany* [2003] ECR I-3609, para. 63.
- [35] See in particular opinion of AG Geelhoed on 28 November 2001 concerning Joined Cases C-20 and 28/01 *Commission v Germany*, para. 76.
- [36] See also S. Arrowsmith (2005): *Public and Utilities Procurement*, Sweet & Maxwell, at p. 614.
- [37] See also S. Arrowsmith (2005): *Public and Utilities Procurement*, Sweet & Maxwell, at p. 615-616.
- [38] C-24/91 *Commission v Spain* [1992] ECR I-1989; C-107/92 *Commission v Italy* [1993] ECR I-4655; C-328/92 *Commission v Spain* [1994] ECR I-1569; C-318/94 *Commission v Germany* [1996] ECR I-1949; and C-126/03 *Commission v Spain* [2004] ECR I-11197. In the more recent C-378/08 *Raffinerie Mediterranée* [2010] ECR I-1919, the national court had not provided sufficient information for the CJEU to answer a question concerning the urgency ground. In her opinion, AG Kokott mentioned that cleaning up pollution could be an urgent matter in the sense of Article 31(1)(c) of the Public Sector Directive, but questioned the applicability of the exemption as the pollution had been present for a long time, probably since the Second World War; see the joined opinion of AG Kokott on 22 October 2009 concerning C-378-380/08 *Raffinerie Mediterranée*.
- [39] C-126/03 *Commission v Spain* [2004] ECR I-11197, para. 23, and the case law mentioned in that paragraph. See the wording of Article 40(3)(d) of the Utilities Directive; Article 31(1)(c) of the Public Sector Directive; and, Article 28(3)(d) of the Defence Directive.
- [40] Article 28(3)(c) of the Defence Directive.
- [41] Article 40(3)(e) of the Utilities Directive; Article 31(2)(b) of the Public Sector Directive; and, Article 28(3)(a) of the Defence Directive.
- [42] See C-337/05 *Commission v Italy (Agusta Helicopters)* [2008] ECR I-2173, para. 55 read in conjunction with para. 59.
- [43] Article 40(3)(f) of the utilities Directive; Article 31(4)(a) of the Public Sector Directive; and, Article 28(4)(a) in the Defence Directive.
- [44] C-480/06 *Commission v Germany* [2009] ECR I-4747.
- [45] Cf. Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), SEC(2011)1169 and Recital 31 of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

Improving the Effectiveness of Bid Protest Mechanisms: Learning from the Problems of Indonesia's Public Procurement System

Richo Andi Wibowo

Universitas Gadjah Mada | Utrecht University

Jalan Sosio Justitia No 1, Yogyakarta, Indonesia | Achter Sint Pieter 200, Utrecht, the Netherlands

E-mail: richo.wibowo@ugm.ac.id | r.a.wibowo@uu.nl

Introduction

Generally speaking, there are various forums available to submit and to facilitate bid protest in public procurement. Usually, the complaint is submitted to the authority which review the bidding proposal and/or to its superior institution. In addition, whenever the protester is dissatisfied with the result; he may lodge his protest to judicial agencies or to an independent body that has a judicial character. Indeed, the bid protest mechanism in Indonesia has similar logic as above; however, on the implementation, it becomes unclear whether it should be submitted to: (i) administrative court; (ii) general (civil) court, or (iii) business competition supervisory commission (KPPU). The latest name mentioned is a new agency that has judicial character. This creates some confusion on the practical level, not only to the justice seekers, but also to the administrations and legal enforcers. From principle of good governance perspective, situation above infringes principle of effectiveness, particularly effectiveness of the accountability in bid protest mechanism.

This paper tries to elaborate the above mentioned problems, by addressing questions: (i) why bid protest mechanisms is less effective in Indonesia?; (ii) what should be done to increase its effectiveness; and, (iii) what lesson learned can be obtained by other countries from this experiences? In relation to that, the structure of elaboration will be as follows.

This paper will first describe the concept of bid protest from the perspective of control and accountability. Later on, it will elaborate on the regulation concerning the bid protest system in Indonesia. Some fundamental information will be exposed, such as: what bid protest means, when the protest can be submitted, where/which forums can be used to submit the protest, and who will be in charge of the complaints. In the next step, urgency of the principle of effectiveness will be distinguished. It will then be discussed further, on how ineffectiveness in the system happens. Furthermore, this paper will expose why ineffectiveness can happen. This elaboration will be followed by suggestions on how the problem should be handled. Finally, this paper will be wrapped up, not only by two concluding answers from the questions above, but also by providing lesson learned for other countries from Indonesia's experience.

This paper will argue as follows. The causes of ineffectiveness can be classified by three layers, namely: (i) symptom; (ii) core problem; and (iii) root cause. In symptomatic level, the problem is caused by the inconsistencies decisions among the judges and commissioners related to court competence for handling this matter. The core problem level is caused by the absent of clear regulation. It is also caused by the "everlasting" problem in public procurement. Likewise in some other countries, the central purchasing body has double functions: as the administrative evaluator for deciding the award winner and as the representative of the institution to sign the contract. In the root cause level, this paper will argue that the amendment of constitution, which shifted Indonesia from continental legal traditions to mixed legal tradition, contributes to some confusion in this matter.

This paper offers two solutions for the problem above: *first*, enhancing dialogue among the stakeholders to obtain same perception concerning on (legal) accountability forum for bid protest. *Second*, embodying clear procedures related to bid protest mechanism in the public procurement law. This paper reminds countries which have desire to shift their legal traditions. These countries may face the same problem above. To avoid the problem, implementing the offered solutions can be used as alternative prevention.

The Concept of Bid Protest: Control or Accountability?

Bid protest is a complaint by dissatisfied bidder about procurement processes which happens before and/or in the contract phase [1]. It aims to evaluate the correctness of the administrator's action in purchasing body. It can also be used as feedback to improve the quality of the procurement system. According to Wittig, bid protest should be differentiated from disputes, as disputes should be meant as collision between contracting officer with the private parties who has been awarded the procurement contract [2].

From the conceptual level, it is interesting to evaluate the position of bid protest: whether it is the manifestation of control or manifestation of accountability. This section is aimed to find the answer from a conceptual perspective.

For some people, control and accountability are two interchangeable concepts. Indeed, those are two different things that can be separated. It is relevant to regard Scott's point of view: in Anglo Saxon countries, the concept of control covers the concept of accountability [3].

There are three dimensions of control, namely: *ex-ante* control, on-going control, and post control, as following [4]. The *first* terminology refers to a concept that limits the autonomy action of the agents. In this context, agents refer to procurement officers themselves. *Ex-ante* control refers to a type of direct control exercised by the agent's principal: the superior(s) of procurement officers. The *last* terminology is part of control, but in retrospective process. This term can be used interchangeably with accountability. Besides the concept above, this paper would add an emphasis that unlike with the two previous controls, the character control in accountability is less direct, as it is performed by the institutions beyond the institutions where ex ante and on-going structures are laid.

Related to the discussion above, accountability refers to the conceptual framework that has seven constitutive elements as follows [5]: (i) there should be a relationship between an actor and a forum; (ii) (in which) the actor is obliged; (iii) to explain and justify; (iv) his conduct; (v) then, the forum can pose questions; (vi) and pass the judgements; (vii) thus, the actor may face the consequences. In addition, Bovens also distinguished at least five forums on accountability as discussed below, namely: political, legal, administrative, professional, and social accountability [6]. In essence, political accountability refers to the oversight conducted by elected representatives, political parties, voters and media. Legal accountability is a supervision that is represented by courts. Administrative accountability refers to the oversight conducted by auditors, inspectors and controllers. Professional accountability is the oversight that is conducted by professional bodies. Lastly, social accountability is variety of supervision which manifested by NGOs or interest groups.

Going back to the discussion about bid protest mechanism, generally speaking, a dissatisfied bidder submits his complaint to the procurement committee. After it proceeded, the committee will give the answer. Whenever the bidder feels dissatisfied with the answer, he can lodge the administrative appeal to the procurement committee superior. If after having gone through that process, he still feels aggrieved, then he can submit his protest to the court or independent review body. From the complaint flow as above, it can be concluded that bid protest mechanism precisely falls in all three dimensions of control: ex ante, on-going and post. In addition, the information above also implies that, even though theoretically there are five accountability forums; bid protest in public procurement relies heavily on legal accountability forums.

Ex-ante control	On-going control	Post-control (accountability)
Complaint to procurement committee	Administrative appeal to the superior of procurement committee	Protest to the court or independent review body

Fig. 1. Control in relation to bid protest mechanism

It is already clear that the court is categorized as a legal accountability forum, but what about the independent review body? An independent review body is classified as administrative agency. This agency can either be agent of the executive or independent agency. It is not a court but can act as quasi-judicial bodies [7]. Hence, as quasi-judicial body has judicial character, independent review body can be classified as legal accountability forum.

Regulation on Bid Protest in Indonesia

Ex ante and on-going control

Before elaborating bid protest mechanism in Indonesia, it is essential to explain the key person who is involved in public procurement system. The procurement structure is slightly different to the structure in some other countries. In Europe for instance, people refer to a "central purchasing body" as one single institution whereas in Indonesia, this body is separated into two bodies, as: "procurement committee" and "commitment officer".

In Indonesia, people refer to “procurement committee” as those who are in charge of evaluating the bid proposals. Sometime, this paper will also refer to the term “procurement service unit”, as the office that unifies the procurement committee.

The evaluation result from the committee will describe which proposal (bidder) that should be awarded the contract, and which proposals that may be considered as the second and third alternatives. This result is handed over to the “commitment officer”. This officer is the one who will award and sign the contract together with the contract winner.

Procurement committee and commitment officer have two superiors which so called “budget owner” and “representative of budget owner”. Usually the budget owner is the head of the institution, a minister for instance, while representative of budget owner is also the top management of the structure, but under budget owner’s position. It can be the general director or other relevant structures.

Procurement committee and commitment officer share an equal position. Commitment officer can reject the suggestion from procurement committee. On the other hand, the committee also can disagree with commitment officer decision. Whenever this situation happens, budget owner or its representative will be the decision maker.

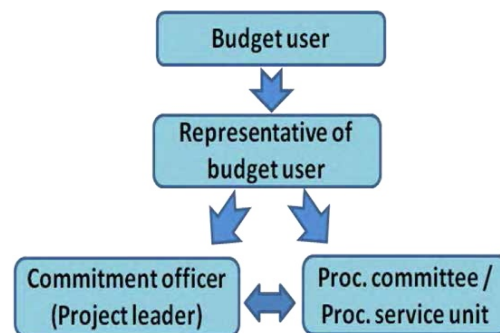


Fig. 2. Procurement structure in Indonesia

In Indonesia, public procurement is regulated under Presidential Regulation number 54/2010 (hereinafter PR 54/2010). Some mechanisms about bid protest are embodied in this regulation. According to the regulation, bid protest refers to protest submitted by the bidder whenever he finds [8]: (a) violation of the regulation or bidding document on the procurement process; (b) manipulation that impacts to unfair competition; (c) abuse of power performed by procurement committee and/or other civil servants.

Unsatisfied bidding participant are required to submit the letter protest to procurement service unit, and give its carbon copy to the commitment officer, budget owner (or its representative), and inspectorate general of the institutions. Regulation mandates that the protester should lodge his complaint within five working days after the contract winner is announced. Hence, unlike some other counties, bid protest in Indonesia only can be conducted before the contract has been signed, at the stage after the publication of the award winner but before the contract is signed.

Having the protest letter, procurement committee/procurement service unit has to respond in writing within five working days, starting from when the letter is received. The response can be an acknowledgement that the protest is correct, but it can also be the clarification that the committee’s performance is justified.

Whenever the earlier situation exists, then the committee will make correction. In contrast, if the later situation happens, and the protester is unsatisfied with the answer; then they may submit their protest to the superior of procurement committee: the budget owner. This mechanism is called the appeal of bid protest, creates automatic suspension for the procurement procedure [9].

In order to ensure that the appeal of bid protest is based on good will and serious reason, the protester has to put in a sum of money as guarantee. The value is two per mill (2/1000) from the total value of owner estimate, or a maximum of 50 million IDR (approx 4200 USD). The budget owners (or its representative) has maximum fifteen working days.

If after thorough examination, budget owner or its representative considers the complaint to be unjustified, then the complaint will be rejected, and the guarantee will be stored as government assets. In reverse, if the complaint is correct, then budget owner will instruct the procurement committee to revise its decision. In addition, the guarantee will be returned to the protester.

All those mentioned above are the administrative procedure on bid protest in Indonesia’s procurement regulation. As it can be seen, those mechanisms fall in ex ante and on-going control. This mechanism is essential as: (i) a corrective procedure of the administration, and as (ii) a communicative tool between bidders and administration. By

providing these points, it can minimize the bidder's chance to lodge complaint to legal accountability forums. Furthermore, it can create and maintain public trust towards civil servant involved in public procurement activities.

Ex post control or accountability

Similar to other countries, people in Indonesia go to the court demanding legal accountability. There are two courts available to ask for the review related to public procurement, namely: general court and administrative court. The following below will elaborate on legal foundation for those forums to examine case on bid protest.

First, complaint bidder may submit their suit in general court. Usually, the bidder will argue that civil servant involved in public procurement processes has performed unlawful action. The bidder will use article 1365 of Civil Code for legal basis of their suit [10]. This article states that every unlawful act that causes damage onto another person obliges the wrongdoer to compensate such damage [11].

Second, complaint bidder may submit their suit in administrative court. Usually the bidder will argue that the (announcement of) contract award is categorized as administrative decision. In the law, it is declared that "administrative decision is a written determination issued by the board or administrative officer containing legal action of the administration which is based on regulations, has concrete characteristic, individual and final, and brings particular legal consequences for a person or private legal entities" [12].

Application of Bid Protest in Indonesia

Distrust in ex ante and on-going control stage

Based on the elaboration above, one may assume that Indonesia has such a comprehensive mechanism of bid protest in ex-ante and on-going control type. It has also various forums in ex-post control stage. Indeed, some problems exist in the system.

Generally speaking, people do not fully trust the administration to perform ex-ante and on-going control. Conceptually, the foremost reason is that civil servants involved in procurement activities are not immune to being influenced by outside incentives. In addition, they are susceptible to the temptation to save time and effort by "cutting corners", either because slothfulness, insufficient incentives to maximize taxpayer's interest, lack of resources, or wrong perception [13].

Such situation as above also happens in Indonesia. My interview with the director of a construction company explicitly shows his distrust to bid protest in some regency in Indonesia [14]. Another reason to not fully trust ex-ante and on-going control is that the involvement of top management in corrupt activities. Evidences from several corruption cases, shows that top officials of the institution are the one who steer procurement committee to perform unequal treatment; they use their influence to ensure their affiliation win the contract award [15]. Indeed, many of these top officials are seated as budget owner or its representative; the two key positions who are in charge to review the appeal of bid protest. Hence, the complainant can easily distrust ex-ante and on-going stage in bid protest mechanism, as the reviewers have been assumed to perform unequal examination.

For the purpose of this paper, even though it is also essential, the explanation in ex-ante and on-going stages will not be continued. It is used merely to describe the comprehensiveness of the problem. Rather, this paper will focus on ex-post (accountability) stage, as this problem should obtain more attention.

Inconsistencies on the forum review in ex post control/accountability stage

Condition in ex-ante control and on-going control as mentioned above create such incentives for justice seeker to rely more on legal accountability forum; however, the availability of the forums is not ruled by the procurement regulation. It is interpreted from other available regulations. This interpretation creates inconsistencies and confusions in the applicative level, as the following examples.

There was a case about lamp procurement in Sampang regency, East Java as follow [16]. One of the bidders who failed on obtaining contract submitted a protest to the procurement committee. As he was not satisfied with the answer from the committee, he then submitted bid protest appeal to the budget owner. Indeed, regulation mandates that the appeal should be answered, and the procurement process should be stopped; however, he did not obtain any response, and the procurement process continued. Having this condition, he decided to lodge protest to Sampang general district court. The object of his suit was to annul the decision of the award winner. After the examination, judges decided to deny this case. According to the judges, this case should be submitted to administrative court instead of general court. The judges regard the decision of the award winner case falls in the category of administrative decision; therefore, the suit for annulment of administrative decision should be the competence of

administrative court. In addition, judges argued that the bid protest procedure and its appeal refers to a particular mechanism which is only recognized by the administrative law, so called “administrative appeal”; therefore, when someone has followed this step and felt dissatisfied, he should continue his protest to administrative (high) court.

On the other hand, there was a case about providing health infrastructure in Lebong Regency, Bengkulu as below [17]. There was a bidder who failed to obtain the contract and feel aggrieved. Then, he followed the process for bid protest; he submitted bid protest to the procurement committee, and later on he submitted an appeal to the budget owner/its representative. Dissatisfied with the result, he lodged protest to Bengkulu’s administrative court. Same as the case above, the object of his suit was to annul the decision of award winner. After having such examination on the case, judges considered to not accept his suit. According to the judges, this case should fall in the competence of general court, because the administrative decision (contract award decision) is a series of government activity towards a contract; therefore, the decision should be categorized as a private law action. In addition, judges argued by referring to article 2 of administrative court regulation: all government decision made for private law action cannot be classified as administrative decision; therefore, administrative court does not have the competence to handle the case.

Indeed, an administrative court judge has admitted that inconsistencies could happen in practical level, exactly as the above cases. He said that some of his colleagues, judges in administrative court, accommodate to handle bid protest case in administrative court; however, his other colleagues reject it and regard it should be submitted to general court [18] [19]. Unfortunately, he only admits about the problem, and does not offer any solution. What he does, merely share his position that the case should be handled by administrative court.

KPPU as additional legal accountability forum = additional confusion

Unfortunately, the puzzle above becomes more complicated when Business Competition Supervisory Commission (KPPU) is considered as another legal accountability forum in this matter. KPPU is a commission formed to oversee entrepreneurs in conducting their business activities to ensure that they do not conduct monopolistic practices and/or unfair business competition. It is enacted that the commission is an independent institution, free from government or other parties influence or power. This agency is independent and has some various authorities, i.e. receiving reports, conducting investigations, summoning the entrepreneurs, deciding and determining the loss of other entrepreneurs or the public; imposing and administering sanction to entrepreneurs who violate provisions [20]. Hence, conceptually, KPPU is an independent administrative agency that has a judicial characteristic.

KPPU admitted that they received a lot of report about public procurement activities, for instance bid rigging performed by the bidders, or manipulation between the bidder(s) with civil servants involved in procurement processes. According to their internal report, from 2006 to 2011, KPPU handled 205 cases. 90 percent of these were based on the public reports while the rest were based on KPPU initiative. Surprisingly, 75 percent of the handled cases by KPPU were related to public procurement [21].

In their decision, KPPU commissioners regarded KPPU to have the competence to handle procurement case. KPPU refer to Article 22 Law on Banning Monopolistic Practices and Unfair Business Competition, which mandates entrepreneurs are prohibited from conspiring with other parties to arrange and/or determine the winner of the tender, and thus causing unfair business competition. KPPU considers that public procurement process as business activities. In addition, KPPU regards that not only the bidders that can be classified as entrepreneur, but also civil servants. Based on these two interpretations, KPPU beliefs that public procurement cases are under their jurisdiction. Based on the jurisprudence, Supreme Court agrees with KPPU perspective.

Procedurally, someone submits his report to KPPU, then KPPU will investigate and summon the parties, and determines the decision concerning guilty or not guilty and the sanction. The decision can be challenged in district court, and whenever any party is still dissatisfied, it can be re-challenged in Supreme Court as the final mechanism.

For better illustration, it is worth noting to see the following case. KPPU reviewed a tender for irrigation infrastructure which happened in 2010 in Sanggau regency, West Kalimantan. This case was triggered by a report submitted to KPPU. It is unknown who the reporter was, as KPPU always conceal the information on their decision; however, said to be that it was submitted by the unsuccessful bidder who felt discriminated during the procurement process. Allegedly, as they are the most likely party who has information advantages concerning violations of procurement law. They are the one who are able to work more effectively to oversight the infringement, as they are pushed by profit incentive if they can obtain the contract [22].

The report alleged that unfair business competition happened between procurement committee (first party), joint operation of PT. CBGA and PT BPB (second party), PT TM, PT GMP, and PT SK (third, fourth and fifth party). After having investigations and reviews, commissions decide that there was a horizontal conspiracy between second party and third, fourth and fifth party to perform moot competition. In addition, there was also a vertical

conspiracy between second party and first party. The first party sets a particular procurement requirement to ensure the second party would be the winner easily. This requirement, hence, reduced the quality of competition [23].

Commissions concluded this case with three conclusion points: *first*, all the parties are guilty; *second*, fining second party for 651 million IDR (approx 54 thousand USD); *third*, banning second, third, fourth and fifth party to participate in public tender for two years. This decision had been final and binding, as the Supreme Court decision agreed with the commissions' decision [24].

Actually, Supreme Court has agreed many times for similar cases. Miller Marpaung cs v KPPU case in 2010 is just another instance [25]. From these decisions, it can be extracted that KPPU and Supreme Courts have performed progressive legal finding as follow: (i) public procurement is seen as a business activity, even though it is conducted purely by the government bodies (and not state owned enterprises, for instance); (ii) those who can impose by the sanction are not merely the private entities, but also civil servants who are involved in public procurement activities; (iii) KPPU becomes an alternative of legal accountability forum for bid protest, as long as the protester can convince the commissioners that unfair business competition happens.

Analysis of the problem, its solution, and lesson learned

Overlapping legal interpretation

Whenever legal enforcers are confused about which forums should accommodate the suit, then the worse condition will be felt by common people, particularly those who are positioned as justice seeker. This confusion, will give incentive to bid protester for submitting the application to all available forums at the same time. This condition is more likely to happen, as a protester is always motivated to struggle his rights and interest. This action cannot be prevented, because there is no system to monitor whether or not a suit has been accepted in another forum.

At the beginning of this analysis, only two available forums are available: administrative and civil courts. Regarding the situation in paragraph above; what if both of the forums regard that the case are under their courts' competence? When this situation arises, it can create another debate: which decision should be implemented, from the administrative court or from civil court? Alternatively, it is also possible that both of the courts regard that the case is not under their courts' competence. It means that the courts, unintentionally, have closed or obstructed the opportunity of bid protester to seek justice. Before the problem above is solved, KPPU (with the endorsement of Supreme Court) has added the confusion about the position of the government in public procurement process.

Beforehand, at the discussion regarding the court competence, there were two perspectives. *First*, the government is considered as public body; so that, the decision of contract award should be classified as administrative decision and thus it falls within the competence of administrative court. *Second*, even though the government is considered as public body; its decision of contract award should not be classified as administrative decision, but as private action; therefore, it falls in the competence of civil court. After KPPU created progressive interpretation, the *third* perspective arises. KPPU regards that the government can be categorized as private bodies. Whenever the government institutions/officers are involved in unfair business competition, KPPU considers itself to have the competence to handle the case, and even giving sanctions both to the private entities and to government institution.

The description above illustrate fundamental problem that happens when a legal interpretation overlaps with other legal interpretations. This overlapping situation creates ineffectiveness on the legal accountability system. Effectiveness, indeed, is a legal principle. It has just been relatively developed due to the need to know whether or not a certain regulation has produced the desired result [26]. From this point of view, problem elaborations above clearly shown that the regulations did not produce the desired result, at least for the context of bid protest. In addition, the overlapping interpretation creates confusion, and the confusion creates delay on the presence of justice. Consequently, as legal maxim said, justice delayed is justice denied.

One may address a question, why a similar problem does not happen in other countries while they also have several accountability forums? It can happen because public in that country succeeded to build common perception concerning which forum should be applicable based on the characteristic of the case itself. In the US for instance, bidder prefers to submit protest to Government Accountability Officer (GAO) even though bidder can also submit protest to judicial branch either district courts or court of federal claim [27]. One submits complain to GAO when he cannot determine clear violation of the contracting authority [28], if he is able to do so, then he may submit to the court. In addition, take the EU for another instance, protester can submit bid protest to more than one forum and even at the same time, to: (i) European Commission (in which by its own discretion, the commission will decide later whether or not to bring the complaint to EU Court of Justice); and (ii) national review bodies; however, there is already perception that minor breaches which are not of general importance (of the member states) will be expected to be reviewed through national review bodies [29].

Anatomy of the problems

It is worth noting, to map the anatomy of the problems mentioned above, in order to seek the most precise solution. The structure of the problems can be classified into three layers as illustrated by figure 2 below [30]: (i) symptom; (ii) core problem; and (iii) root cause.

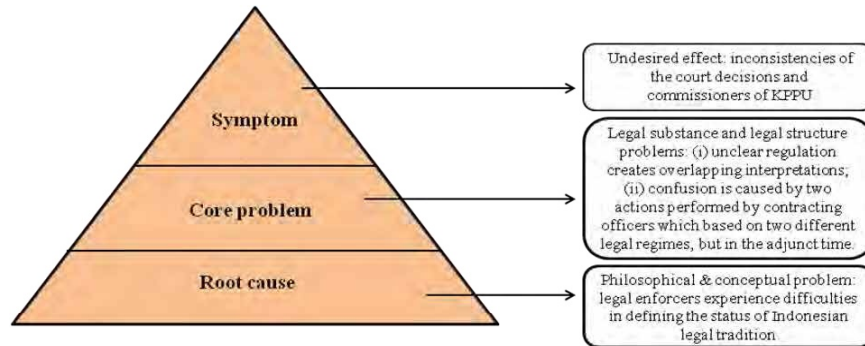


Fig.3. Anatomy of the problems in bid protest mechanism

Usually, *symptom problem* is very easy to be found, as it is located on the surface level. In the problem description above, symptom problem is the inconsistency of judges regarding which accountability forum that should be applied for bid protest mechanism. The inconsistencies worsen the confusion on the implementation level.

Core problem in here refers to the cause of the symptom problem. From the previous discussion, there are two core problems that can be detected. *First*, unclear public procurement regulation creates core problem. Presidential Regulation Number 54/2010 only explains about bid protest mechanism for ex-ante and on-going stage. It does not explain about the mechanism for ex-post stage. Consequently, judges use their interpretation to cover the loopholes. Commissioners worsen the condition by interpreting that KPPU has an attribution to handle the case. As a result, overlapping interpretations happen. Unfortunately, due to poor communication among them/these institutions; the problem remains.

Second, the “everlasting” problem in public procurement also contributes to core problem. In some other countries, officer in the purchasing body has double functions: as the administrative evaluator for deciding the award winner and as the representative of the institution to sign the contract. Similar condition happens in Indonesia. Officer in the purchasing body (in this context: commitment officer) has an administrative duty to appoint the award winner based on procurement committee suggestion [31]. In addition, commitment officer also represents the government institution to sign the procurement contract [32]. These two actions are regulated by two different legal regimes; the former mentioned is by administrative law and the later mentioned is by contract (private) law. As commitment officer conducts two different legal actions but in the adjacent time, it may cause the confusions which law that should apply administrative or private contract law.

Root cause is the hardest one to be found; so that, it is relevant to seek this by guidance. Indeed, root cause has four specific characteristics, as the following [33]: (i) root causes are specific underlying causes; (ii) root causes are those that can reasonably be identified; (iii) root causes are those that management has the control to fix; (iv) root causes are those for which effective recommendations for preventing recurrences can be generated. From the characteristics above, it is believed that the root cause of the problem is caused by the unclear situation in which legal tradition Indonesia stands for: as a Continental, Anglo Saxon, or Mix legal tradition. It can be so because Indonesia has been transitioning from Continental to Mix legal tradition.

Each legal tradition has its particular consequences on public procurement system. The differences laid on the character or nature of the regulations, the structural relationship between the government and bidders, and the procedure to challenge the government action/decision. Regarding this, it is worth noting to explain the differences between those three legal traditions, as it is described below.

Continental legal tradition country exercises heavily on the government power by public law [34] [35]. This country regards liberty and progressive reform by the existence of the state; henceforth, it is also called stateness country [36]. In public procurement, this condition influences the relationship structure between the government and the private party. Private party is in the sub-ordinate position, carrying the task from the government. Therefore, if someone wants to seek justice from legal accountability forum, he should lodge his complaint to the administrative court.

Anglo Saxon legal tradition countries exercise heavily on the power of their government by private law. These countries praise liberty by the absence of the government [37] [38]; therefore, it is also called stateless country [39].

This condition creates equal relationship between the government and private party. Hence, if someone wants to seek justice from legal accountability forum, he should lodge his complaint to the general court.

Unlike two legal traditions above, mix legal tradition tries to hybrid the good practice from two or more legal traditions, usually between Continental and Anglo Saxon [40]. Orucu also regards that all the legal systems are basically mixed; however, it varies the level of combinations. It can be so because it is performed based on the needs of the adopted countries. In addition, he also warned that government should understand the contextual and functional aspect of the law that want to be adopted (transplanted); otherwise, the adoption of the law will not work properly, and may be dangerous for the legal system [41].

Returning to problem on bid protest mechanism in Indonesia, as it has been identified above, overlapping interpretations among the judges and the commissioners reflect that these legal enforcers are confused by which legal tradition Indonesia currently stands for. This confusion influences their perspective in handling bid protest case, particularly about the relationship between government (contracting officer) and bidders or award winner, and about which legal accountability forum that should be implemented.

That hypothesis is based on the fact that Indonesia has been shifting its legal development from continental to mixed legal tradition. From the legal history perspective, founding father clearly formulates Indonesia to be a stateness country [42]. In addition, on its constitution, it is stated that: "Indonesia is a state that based on the law (*rechtstaat*)". As it is known, terminologies of stateness and *rechtstaat* refer to continental legal tradition. However, the situation changed in 9 November 2001 when third amendment of constitution happened. After amendment, the sentence "Indonesia is a state that based on the law" is kept, but the bracket word of *rechtstaat* is erased. Mahfud MD, ex-chief of constitutional court commented: "the deletion of *rechtstaat* stresses Indonesia's position to not only follow Continental legal traditions, but also Anglo Saxon or even other legal tradition, as long as it matches with Pancasila, Indonesia's fundamental norms" [43]. Unfortunately, public relatively do not know about this development.

This shift in legal tradition has been desired since long time before by some Indonesian scholars. They realize that Indonesia has obtained significant influence from Anglo Saxon legal tradition due to globalization process. Lots of Indonesia's legal scholars studied in Anglo Saxon legal countries too; therefore, they may have different perspective. Mahfud regards this situation positively; he cited Fred Riggs' idea about prismatic paradigm which illustrates a good society that can absorb all the good things and blend it together to make it better [44]. Indeed, this belief is in contrast with the problem evidences shown above..

Solutions

Absorbing many good things and integrating these together are a good objective, it aims to improve the legal system; however, blending legal idea without clear direction can create overlapping interpretations among legal scholars. It has been proved by the cases explained in this paper. To eliminate this, there should be more dialogue among legal scholar in order to prevent conflict on legal interpretation. This dialogue is also important to ensure correct action is taken by particular person/institution.

It is sad to realize this problem exists for a long period of time. This phenomenon is similar to bureau-pathology which happens in executive level: "nobody admits responsibility; nobody confesses errors; nobody ends wrongdoing" [45]. Nobody in here may refer also to institution. But why legal scholar or legal enforcers in Indonesia seem to abandon this problem? Probably, it is caused by poor digitalization of court decision, so it cannot be traced easily via internet. Indeed, the current situation is better now, as people can access court decision through the website. However, the decision is less categorized. Hence, it reduces public accessibility. Another possibility that seems to be the reason why public abandons this problem is that because legal scholars are seems to be more focused on other significant issues, for instance: eradicating corruption.

As Indonesia has amended its constitution to be a mixed legal country; then all the regulations and interpretation should reflect this position. All regulations which do not reflect mixed legal tradition should be adjusted to minimize the "impossibility of joint compliances". The good illustration concerning this terminology is described by Hill as follows: if the two cues hit a billiard ball at the same time, the ball will not travel directly into the desired pocket, the same situation will occur if two different norms guide subject into different directions [46]. This undesired situation should be prevented.

To ensure that legal enforcers have the same perspective, the possibility for them to conduct interpretation should be minimized. It can be done by creating clear regulation. Presidential Regulation No 54/2010 should be revised. The regulation already has ex-ante and on-going stages; therefore, it should also add clear procedure mechanism for ex-post stage. Ideally, the regulation should mention court competence; on this matter is general civil court within the following reasons.

Based on its nature, award decision should be admitted as an administrative decision. It can be so as commitment officer (together with procurement committee) exercise their actions by administrative law; however, because administrative decision is issued to reach contract, and contract falls in private legal regime; thus, the administrative decision should be seen as the ongoing process of government action to private action. This concept is known as blended theory (*teori melebur* (Indonesia) or *oplosing* theory (Dutch)) [47]. This theory has been distinguished since many years ago; it is unknown why some judges do not affirm this theory in their decisions above. As the award decision is seen as the ongoing process to private action; therefore, it can be reviewed in civil court. This idea is coherent with mixed legal tradition, as it recognizes the character of public law, but also allows civil court to be the legal accountability forum.

Having said the discussion above, to ensure legal certainty, the regulation should clearly states that bid legal accountability forum for bid protest is civil court. In addition, it should also states that civil court should also accommodate both civil and administrative law during case examination. It should be so, as it is undeniable that the processes of bid procurement from call for proposals to pause time are exercised by administrative law.

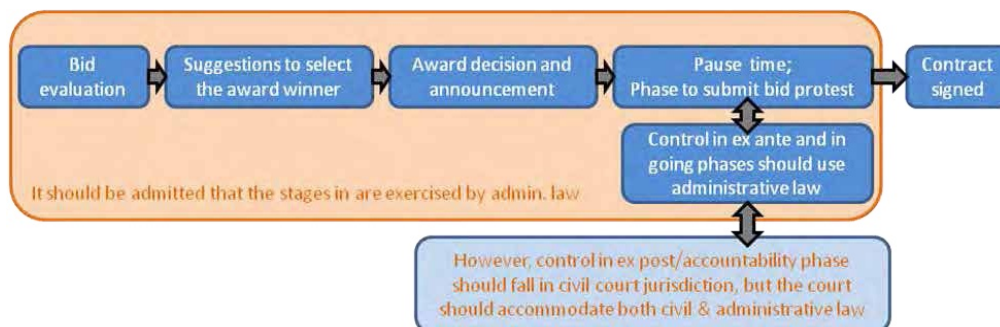


Fig. 4. Legal regimes that covers the processes of bid procurement and bid protest

Additional advantage is obtained by declaring civil court as the legal accountability forum for bid protest. It is easier for justice seeker to reach civil court, as it is situated in almost all 414 capital regencies/cities in Indonesia. The accessibility of civil court cannot be compared to administrative court, as this court is situated merely in 28 out of 34 capital province. KPPU is also far from ideal to be the legal accountability forum, as it is located only in Jakarta the capital city of Indonesia. It is better and more professional if KPPU focuses on merger, acquisition or other big market domination case.

Lesson learned

The problem happened in Indonesia may also happen in other countries. Particularly to those which wants to shift their legal tradition. Rwanda is a good example. Due to its accession in East Africa Community, there is discussion in there to shift from continental legal tradition country to mix legal tradition [48]. The Government of Rwanda should prevent similar problems as mentioned above by: (i) building same perception among legal enforcers; and (ii) providing clear regulation to minimize extensive interpretation among them.

Conclusion

Bid protest procedure can be categorized into three stages of control, namely: ex ante, on-going, and ex-post (accountability). Similar to other countries, bidders in Indonesia do not fully trust ex-ante and on-going control. They tend to rely more on ex-post control/accountability. Despite this, it is unclear which legal accountability forums should apply for bid protest case. Originally, there are two forums available: administrative and general-civil court. Sometime judges accept the case in administrative court, but in other similar cases, judges reject these. Similar inconsistencies also happen in civil court. The unclear situation worsened when business competition supervisory commission (KPPU) regard themselves also has competence to handle the bid protest case. The unclear situation and confusion above indicate that bid protest mechanism in Indonesia is ineffective

The condition above is caused by the overlapping interpretations among the judges and commissioners. It happens due to three causes. *First*, procurement regulation in Indonesia do not regulate about mechanism for bid protest in ex-post stage. As a consequence, the absent of such regulation create loopholes. To cope with the loopholes, legal enforcers conduct legal finding by interpreting other regulations, such as: administrative court law, civil code law, and ban on monopolistic practices and unfair business competition law.

Second, it is believed that overlapping interpretations are also caused by the confusion related to the position of commitment officer. Commitment officer has an administrative duty to appoint the award winner, and this action is

exercised by administrative law. In addition, he also represents the government institution to sign the procurement contract which is exercised by private law. As these two actions are regulated by two different legal regimes; it may cause confusions which law and which court competence that that should be applied.

Third, that overlapping interpretations are also caused by the different perspective of the judges and commissioners who handle the case. Some of them use continental legal tradition perspective to analyze the case; some others use anglo saxon legal traditions, while the rest use mixed legal tradition. Indeed, it is believed that the constitutional changes in Indonesia, which shift from continental legal tradition to mixed legal tradition, contribute to the variety of perspectives above.

To increase the effectiveness, the legal enforcers (particularly judges and the commissioners) should have same perspective. The possibility for them to conduct wide interpretation should perhaps be constricted. To do so, it can be done by refining the procurement regulation to incorporate which legal accountability forum that has competence to review. This paper suggested that civil court should be the legal reviewer institution, because: (i) procurement processes are initiated to create a contract exercised by civil law; (ii) it is coherence with the concept of mixed legal tradition; and (iii) civil law is spread in almost all 414 regencies and cities in Indonesia; hence, it is easier to be accessed by justice seekers. In spite of these arguments, realizing the character of administrative law in the procurement processes, civil court should accommodate both civil law and administrative law to be applied on the examined case.

The problem that happens in Indonesia may occur to other countries, particularly to those who desires to reform its legal tradition. To prevent the same problem to happen, it is worth noting for the stake holder of the country to build the same perception related to which law that should be applied. In addition, it is also important to create/refine clear regulation concerning which legal accountability forum should apply. By doing so, it can minimize inconsistency among the legal enforcers.

Acknowledgements

The author is grateful for the government of the Republic of Indonesia for providing Dikti scholarship which enables the author to pursue PhD program in Utrecht University (UU). Also, thank you to Institute of Constitutional and Administrative Law UU for facilitating financial aid, so the author can participate in this conference.

References

- [1] W.A. Wittig. (2000): A Framework for Balancing Business and Accountability Within a Public Procurement System. International Trade Centre UNCTAD/WTO, Geneva, Switzerland, .p. 37.
- [2] W.A. Wittig. (2000): A Framework for Balancing Business and Accountability Within a Public Procurement System. International Trade Centre UNCTAD/WTO, Geneva, Switzerland, .p. 37.
- [3] M. Busuioc. (2010): The Accountability of European Agencies. Eburon. Delft, the Netherlands, p. 35.
- [4] M. Busuioc. (2010): The Accountability of European Agencies. Eburon. Delft, the Netherlands, p. 35-37.
- [5] M. Bovens. (2006): Analysing and Assessing Public Accountability, A Conceptual Framework. European Governance Papers No C-06-01. Available from:: <http://dspace.library.uu.nl/handle/1874/234842>, p. 12.
- [6] M. Bovens. (2006): Analysing and Assessing Public Accountability, A Conceptual Framework. European Governance Papers No C-06-01. Available in: <http://dspace.library.uu.nl/handle/1874/234842>, p. 15-17.
- [7] US Legal. (17/01/2014): Quasi-Judicial Functions. Available online in: <http://administrativelaw.uslegal.com/administrative-agencies/quasi-judicial-functions/>
- [8] Article 81 (1) of Presidential Regulation number 54/2010 concerning Public Procurement in Goods and Services
- [9] Article 82 (4) of Presidential Regulation number 54/2010 concerning Public Procurement in Goods and Services
- [10] Hendri. (13/09/2011): Kesimpulan Gugatan Perkara Perdata Tender di Aceh (Conclusion for Civil Suit on Procurement in Aceh). Available in: <http://forum.pengadaan.org/phpbb/viewtopic.php?f=9&t=1849>
- [11] Article 1365 of Civil Code
- [12] Article 1 (3) of Administrative Court Law
- [13] E.A. Troff. (2005): The United States Agency level Bid Protest Mechanism: A Model for Bid Challenges Procedures in Developing Nations. Air Force Law Review 57. USA, p. 119-120.
- [14] Interview with H. Buldan, director of Construction Company, Muara Mitra Mandiri, Yogyakarta (13/04/2013).

- [15] R.A. Wibowo. (2013): Designing a Better Public Procurement Structure in Indonesia to Prevent Corruption and to Reach Sustainable Economic Growth. Proceedings in the International Conference on Indonesia Development, jointly held by Indonesian Student Association in the Netherlands and the Institute of Social Science of Erasmus University. Available from: http://icid.ppibelandia.org/wp-content/uploads/2013/09/Proceedings_full_paper_pdf.rar, p. 5-7.
- [16] District Court Decision Number 12/Pdt.G/2012/PN.SPG
- [17] Administrative Court Decision Number 15/G.PLW/2011/PTUN-BKL
- [18] T.C.I. Permana. (2009): Pengujian Keputusan Diskresi oleh Pengadilan Tata Usaha Negara (Reviewing Discretion on Administrative Decision in Administrative Court). Master Thesis in Diponegoro University, Semarang, Indonesia, p. 70-72.
- [19] T.C.I. Permana. (2013): Contoh-contoh Kasus di PTUN (Example on Cases in Administrative Court). Available from: http://ptun-surabaya.go.id/index.php?view=article&catid=34%3Aberita-terbaru&id=123%3Acontoh-kasus&format=pdf&option=com_content&Itemid=97, p. 6.
- [20] Article 36 Law Number 05/1999 on the Ban on Monopolistic Practices and Unfair Business Competition
- [21] Editor (2012): Jejak KPPU 2006-2012 (Trace on Business Competition Supervisory Commission 2006-2011). Magazine "Kompetisi", Jakarta, p. 8.
- [22] R.C. Marshall, M.J. Maurer, J.F. Richard. (1991): The Private attorney General Meets Public Contract Law: Procurement Oversight by Protest. Hofstra Law Review Vol. 20 Issue 1, p. 30.
- [23] KPPU decision Number 03/KPPU-L/2011
- [24] Supreme Court decision number 390 K/PDT.SUS/2012
- [25] Supreme Court decision number 796 K/Pdt.Sus/2010
- [26] G.H. Addink. (Forthcoming): Good Governance: Concept and Context. Oxford University Press. Oxford, the UK, p. 118.
- [27] R.E. Lloyd. (2009): Bid Protest: Theory and Practice in *Khi V Thai* (ed.). International Handbook of Public Procurement. Boca Raton, FL, USA, p. 660.
- [28] W.A. Wittig. (2000): A Framework for Balancing Business and Accountability Within a Public Procurement System. International Trade Centre UNCTAD/WTO, Geneva, Switzerland, p. 38.
- [29] S. Arrowsmith. (2010): EU Procurement Law. Nottingham, the UK, p. 11.
- [30] H. Haq. (2006): Managing Uncertainty and Complexity in the Utilization of Biodiversity Through the Tailor-Made Inventor Doctrine and Contract Law. Presented at International Workshop Managing Uncertainty and Complexity in Biodiversity and Climate Change, University Catholic Louvain, La-Neuve, Belgium, p. 6.
- [31] Article 17 (2) (f) and article 11 (1) (b) Presidential Regulation No 54/2010 concerning on Government Procurement on Goods and Service
- [32] Article 1 (21) Presidential Regulation No 54/2010 concerning on Government Procurement on Goods and Services
- [33] J.J. Rooney and L.N. Heuvel (2004): Root Cause Analysis for Beginners. Quality Progress. Available in: https://servicelink.pinnacol.com/pinnacol_docs/lp/cdrom_web/safety/management/accident_investigation/Root_Cause.pdf, p. 46.
- [34] C. Harlow. (2008): Book Reviews for Freedland and Auby, *The Public Law/Private Law Divide, Une entente assez cordiale?*. European Public Law. Volume 14. Issue 3, p. 434.
- [35] B. Russel (2007 (1946)): Sejarah Filsafat Barat (History of Western Philosophy). Pustaka Pelajar, Yogyakarta, Indonesia, p. 910.
- [36] J.P. Nettl (1968): The State as A Conceptual Variable. *Worlds Politics*. Volume 20. Number 4, p. 561.
- [37] C. Harlow. (2008): Book Reviews for Freedland and Auby, *The Public Law/Private Law Divide, Une entente assez cordiale?*. European Public Law. Volume 14. Issue 3, p. 434.
- [38] B. Russel (2007 (1946)): Sejarah Filsafat Barat (History of Western Philosophy). Pustaka Pelajar, Yogyakarta, Indonesia, p. 820.
- [39] J.P. Nettl (1968): The State as A Conceptual Variable. *Worlds Politics*. Volume 20. Number 4, p. 564.
- [40] E. Orucu. (2008): What is Mixed Legal System: Exclusion or Expansion?. *Journal of Comparative Law*, Erasmus University, Rotterdam, the Netherlands, p. 11.
- [41] E. Orucu. (2002): Law as Transposition. *International and Comparative Law Quarterly*, Volume 51, Issue 02, Cambridge, the UK, p. 206.
- [42] Y. Latif. (2012): Negara Paripurna: Historisitas, Rasionalitas dan Aktualitas Pancasila (The Perfect State: Historicity, Rationality and Actuality of Pancasila). Gramedia, Jakarta, Indonesia, p. 585.
- [43] M. Mahfud. (2008): Hukum, Moral dan Politik (Law, Moral, and Politic). Presented in Stadium Generale for Program Doctor of Law, University of Diponegoro, Semarang, Indonesia, p. 23.

- [44] M. Mahfud. (2008): Hukum, Moral dan Politik (Law, Moral, and Politic). Presented in Stadium Generale for Program Doctor of Law, University of Diponegoro, Semarang, Indonesia, p. 23.
- [45] G.E. Caiden. (1991): What Really is Public Maladministration?. *Public Administration Review*, Volume 51, Number 6, p. 491.
- [46] H.H. Hill. (1987): A Functional Taxonomy of Normative Conflict. *Law and Philosophy* (6), p. 238.
- [47] Indroharto. (1996): Usaha Memahami Undang-Undang tentang Peradilan Tata Usaha Negara Buku I (First Book concerning Efforts on Understanding Administrative Court Law). Pustaka Sinar Harapan, Jakarta, Indonesia, p. 115-118.
- [48] F. Zigirinshuti. (2012): Good Governance and Public Contracts – A Comparative Perspective on the Balance between Public and Private Law in Rwanda. Uitgeverij BOXPress, 's-Hertogenbosch, the Netherlands, p. 303.

Missed opportunities in public procurement: what is inside the black box?

Christine M Tonkin

Consultant and Director at Collaborative Edge
130 McKenzie St
Wembley, Western Australia
E-mail: maelisonkin@gmail.com

Abstract

Contrary to expectations, extant models of public procurement regulation not only fail to support transparency and integrity but also do not deliver value for taxpayer/donor investments. Traditional ways of controlling public procurement consisting of procedural requirements serve to create a black box in which the machinations of fraudulent, corrupt and other exploitative dealings may be obscured. This phenomenon is explored using three case studies each involving substantial procurement related expenditure. It is argued that exploitative dealings are difficult to conceal when there is intra-organizational transparency of procurement strategy based on documented research and analysis of the requirement, of the relevant supply market and of stakeholders' needs and issues. However, challenging the conventional wisdom on public procurement practice and governance requires producing coherent evidence that explains how and why the dominant public procurement paradigm is deficient, managing the objections of those who would benefit from the status quo and demonstrating effective models of how public procurement may be and is being transformed.

Introduction

Public procurement transactions are generally undertaken in the context of regulation or policies that prescribe procedural requirements. Regardless of the legal form that such prescription takes, it will generally have two explicit or implicit aims: to ensure that public funds are not diverted for fraudulent or corrupt purposes and to make the best use of the funds in meeting certain policy objectives. The latter generally relates to minimising cost but in public policy terms, much more may be expected of the impact of public procurement. Associated policy objectives include: the direct impact of minimising government budgetary outlays; maximisation of quantity and quality of the services, infrastructure and programmatic benefits that may be delivered; the furtherance of benefits to particular groups such as women, minorities or others that may be considered socially or economically disadvantaged; supporting the economic benefits of sustainability; promoting economic efficiency through facilitating or supporting particular market conditions including free trade; as well as, minimising the market distortions associated with the fraudulent or corrupt misdirection of economic resources.

Traditional procurement management is transactional in focus and the overall procurement effort of public sector organisations is generally conceived of as the sum of all transactions. The procedures to be applied to each transaction usually vary according to relative estimated value. Transaction value thresholds are generally the basis for determining: who is permitted to undertake the process including their function, qualifications and experience; the extent of competition to supply to be solicited from the market including the characteristics of potential suppliers from which offers may be sought; the nature, duration and timing of any public advertising of tenders; procedures governing bid solicitation, receipt and evaluation; procedures for contract award including any review of the procurement process; who is permitted to bind a the public sector entity contractually and how; and, requirements for public disclosure of information about the award of contracts.

Procedural compliance and associated controls such as delegation of authority, segregation of duties, use of generic specifications and avoidance of splitting requirements to circumvent thresholds are thought to mitigate potential for fraud and corruption and support the achievement of policy objectives.

Audit of public procurement is generally concerned with procedural compliance. Commentary on outcomes is mostly limited to instances where: it is arguable that the "best offer" was not selected; there was failure on the part of the supplier to deliver as expected; or if the value of the contract awarded subsequently exceeded that expected at

the time of award. Where empowered to do so, public sector audit functions may consider performance issues but these are often expressed in terms of transaction processing efficiency rather than effectiveness.

A primary consideration in traditional public procurement is that of facilitating competition to supply. It is assumed that compliance with the prescribed procurement procedure will generate competition and as a consequence least cost at the optimal quality will be achieved. It is almost an article of faith that more competition will result in better procurement outcomes.^[1] Various elements of the traditional procurement policy frameworks are thought to be instrumental in facilitating competition. These include the use of generic specifications, the advertising of tenders, the use of standardised solicitation processes including requirements to solicit a minimum numbers of bids as well as the use of evaluation processes that do not discriminate unfairly against suppliers on the basis of extraneous factors. It is widely assumed that the extent of competition achieved is a function of the public procurement procedure that is used. Thus the same procedures are applied regardless of the conditions in the supply market from which goods and services are being procured.

Competition is actually a function of the supply markets themselves rather than resulting from the imposition of public procurement procedures. Different supply markets exhibit different characteristics and potentially differing levels of responsiveness to different customers. There are various factors that influence the way in which supply markets operate including: the ways in which suppliers in a market compete with each other, (price, quality, innovation etc); the structure of the market, (monopoly, oligopoly, monopolistic competition, competitive); the nature and quality of the supply chain; the availability of substitutes; the customer's value to each supplier, (nuisance, exploitable, development prospect or core); as well as other factors such as regulation, the environment etc. It is noteworthy that anecdotally public sector procurers often view themselves as universally attractive to suppliers. Whereas suppliers attitudes to public sector buyers will vary widely both within and between supply markets and they will thus be in varying degrees responsive to meeting the public sector customers' needs.

Certainly there are markets that are highly competitive such as mass consumer markets where the public sector buyer may find it difficult to get the attention of suppliers especially where public procurement procedures are at odds with normal customer behaviour and business practice. There are other markets that may be on the face of it competitive but where few, if any suppliers will be responsive to the public sector procurer's expressed needs. It may be that suppliers find the public sector procurer unattractive as a customer or that the needs are expressed in a way that makes it difficult or costly for the supplier to be responsive. In monopolistic and oligopolistic markets, the standard, predictable public procurement procedures may leave the public sector buyer open to exploitation. Indeed, it is possible for the public sector buyer to create a self-imposed monopoly or oligopoly by the manner in which their requirements are bundled or expressed or by the way in which responses are solicited from the supply market. Failing to understand the nature and quality of the supply chain may see the public sector procurer seeking to attract offers from the wrong part of the supply chain. An extreme example is that, while it may be possible to achieve very low prices by buying pencils and other individual stationary items direct from manufacturers, the transaction costs of managing the supply of stationary to end users on an item by item basis may significantly outweigh any price advantage of buying direct from manufacturers. Where customers are unclear about their requirements, or ask suppliers to do business in a manner that is not normal business practice, or present particular risks in the minds of suppliers, premium prices will be sought from public sector customers notwithstanding the application of a so-called competitive public procurement procedure.

One of the key reasons why traditional procurement processes fail to support transparency and integrity and achieve value for taxpayer/donor investments is because of the assumption that it is public procurement procedures that facilitate competition. Because the nature and extent of competition is a function of supply markets, the flexibility to adjust procurement strategy in response to known market conditions is essential but generally unavailable to those working within traditional public procurement frameworks. While deep knowledge of every supply market is unnecessary to achieving a satisfactory procurement outcome, it is necessary in the case of high risk and/or high value procurements which actually represent relatively few transactions in any one year. For example, statistical information published by the Australian Government about its procurement identifies that over 88% of contracts by value present only 11% of the contracts entered into in the 2011/2012 financial year.^[2]

Public procurement regulatory frameworks come in three distinct forms: legalistic or rules based, principles based and the outcomes or strategic management approach. The legalistic/rules based and the principles based approaches represent the traditional forms.

Legalistic or rules based approach

The legalistic or rules based approach includes that found in the US jurisdictions, in the European Commission's Procurement Directives and in the UNCITRAL Model Law on Procurement of Goods, Services and Construction. This approach is also widely adopted in developing countries notably in Latin America. The focus is on adherence

to the regulation of individual procurement transactions within the legal framework of the jurisdiction. Generally, there is little discretion exercised because ultimately decision-making and the exercise of any discretion may be challenged through legal and/or quasi legal process. Importantly, accountability is for compliance with the regulations or rules in the context of managing each transaction.

It is the received wisdom that strictly controlling procurement processes and decision-making within a legal framework mitigates the potential for fraud and corruption. It is assumed that limited discretion and strict compliance achieves transparency and fairness and that ultimately the policy objectives for procurement will be met. The achievement of such policy objectives may be assumed as is the case with the European Union's imperative to create a single European market to supply member states or explicit as in the US in directing a proportion of procurement related expenditure to small business, minority and women owned businesses. This latter policy occurs on a transaction by transaction basis in the hope that the overall objective of economic benefit to such firms occurs.

Principles based approach

The principles based approach is that commonly adopted by UN system organisations and in certain common law jurisdictions. The principles are embodied in process related rules governing each procurement transaction. Unlike the legalistic/rules based approach there is generally no legal or quasi legal process for challenging procurement processes or decisions. While offering more discretion in practice than the legalistic/rules based approach, there is a reliance on compliance with process as a basis for achieving fairness and transparency as well as other policy objectives. As with the legalistic/rules based approach, documentation is focussed on process and on how decision-making is compliant with the rules. Accountability is for compliance. The achievement of policy objectives is likely only to the extent to which the principles are given meaningful impetus in the rules. However, if compliance is the goal, even with rules that may incorporate an impetus for following certain principles, the route to the desired policy outcomes is very indirect.

Outcomes or strategic management approach

The outcomes or strategic management approach focuses on delivering beneficial outcomes from procurement effort at both the level of each transaction and across the aggregate of the organisation's procurement effort. Different categories of goods and services are treated differently depending on the value and complexity of procuring that goods or services in the category. At the organisational level strategy under this approach is called portfolio management and is a management technique commonly used in the private sector. The differentiated management of categories of goods and services being procured is known as category management in the private sector. There are few public sector jurisdictions that apply this approach systematically. However, the International Atomic Energy Agency, a UN system organisation is a notable example. The approach was also developed and applied in the Queensland State Government from 2000 and has also been used in practice in the Republic of Ireland and in the United Nations Development Programme where the approach is now incorporated into its procurement training programme.

Accountability at the level of individual transactions is for the application of the correct and defensible strategy to achieve the programmatic goals/objectives and best value for money based on evidence derived from analysis of relevant data. Accountability is also required for the performance of the procurement function overall. At the aggregate organisational level procurement strategy is framed and organisational level performance is monitored and managed. Thus under this approach to procurement governance, accountability is multi-dimensional.

Transparency and fairness are achieved by basing the approach to the market on documented evidence derived from analysis of the requirement, of the needs and issues of stakeholders and of the focal supply market. The extent of detail in such analysis depends on the complexity and/or relative value of the procurement. For high relative value and/or complex procurements, teams consisting of a procurement team leader and procurement staff as well as the programme and technical staff specifying the requirement are formed to undertake the research and analysis necessary to frame the procurement strategy including associated risk management. Those specifying requirements must concur in writing with the strategy to approach the market for all but low value, simple procurements before procurement strategy is executed. Thus there is cross functional ownership of the approach to the supply market and therefore of the outcomes achieved. Transaction level procurement strategies are subject to audit and may be reviewed to determine that they defensible and have been followed as approved.

The achievement of policy objectives is a fundamental requirement of this approach to procurement governance. By taking into account complexity of procurement both in managing the procurement portfolio of the organisation and individual transactions, the approach involves risk management. Accountability is strong and directly focusing on outcomes achieved. The extent of transparency and fairness evident in procurement processes is readily reviewed through examining relevant documentation. The use of teams for developing and documenting

procurement strategy is in itself an effective internal control because the rationale for procurement action is well documented, readily subject to review and based on shared understandings of the evidence.

It is feasible for the outcomes or strategic management approach to operate as practice under the traditional public procurement frameworks. For example, the practices inherent in this approach have been used in the Republic of Ireland which is bound by the European Procurement Directives. It has reported that the Irish Government achieved savings on pharmaceutical related expenditure of some €300M over a four period between 2006 and 2010 as a consequence of the implementation of improved supply arrangements with the industry.^[3] The procurement strategy underpinning the achievement of this outcome was initially developed in 2003 using a strategic management approach to the pharmaceuticals category.

While it is possible for a strategic management approach to practice to co-exist with traditional public procurement regulation, it is easier to make supporting changes to principles-based policy frameworks. Reforming legalistic/rules based regimes in a sympathetic way likely to be near impossible. Not only is it necessary to counter conventional wisdom but it is also necessary to convince political stakeholders of the vision and value of such change. It is also a matter that immediately raises issues with the legal system and its stakeholders. In many jurisdictions, public procurement is the domain of the legal profession and of the judiciary whose perspectives are not amenable to anything other than legal/ procedural frameworks based on the letter of the law, convention and legal precedence. In this context, it may be possible to introduce private sector analogous practice reforms that have very positive effects on public procurement outcomes because such practices are not contemplated in, or prohibited by the legal frameworks.

Is there evidence that public procurement regulatory frameworks work as intended?

There are very few examples of where public procurement regulation has been developed or modified through evidence based policy development processes even though this is the extant public policy paradigm.^[4] This is slightly different for the outcomes or strategic management approach which is derived from private sector analogies and where the literature is replete with examples providing evidence of the efficacy of this approach in practice in the private sector. In the public sector, the Queensland State Government's procurement policy, which was first implemented as an outcomes/ strategic management approach in 2000, was developed based on a number research analyses undertaken between 1995 and 1999 that were used as evidence in shaping what was then a unique public procurement regulatory framework. The European Commission has also undertaken a number of evaluative studies in considering modification of its Procurement Directives.

Overall, however, there is very little published information that could provide confidence that traditional procurement regulatory regimes actually work as intended. In fact there is evidence that traditional frameworks do not achieve the policy objectives that have been set for them. For example, the European Commission in evaluating its Procurement Directives commissioned a study of cross border procurement above EU thresholds. This study found that import penetration in the public sector estimated at 18.2% was marginally less than for the private sector at 19.1% if the public sector procured same proportion of each type goods and services as the private sector. The actual level of cross border procurement by the public sector was much lower at 7.5% overall with intra EU procurement accounting for 60-65 percent of this figure. It was found that larger economies imported less than smaller ones and that the average geographical distance between a public sector procurer and its supplier was 176km and even less for works suppliers. German contracting entities awarded only 1.4 percent of all contracts to suppliers outside Germany while Members States with similar language and geography were more likely to source from each other. In summary, it seems therefore, given the similar levels of import penetration between the public sector and the private sector when the mix of goods and services procured is controlled for, that the Procurement Directives have no impact on the achievement of the core policy objective underpinning their establishment – encouraging cross border trade through the creation of a single market to supply Member States.^[5]

The economic significance of public procurement related expenditures is often cited in the literature with Transparency International estimating that it amounts to an average of between 15 and 30 percent of GDP and in some cases more. This organisation also estimates that the cost of corruption where it is evident is normally between 10 and 25 percent of contract value.^[6] The cost impacts of inefficiency and ineffectiveness are more difficult to estimate systematically with mainly anecdotal evidence occasionally publicised.

It is a significant piece of research in itself to determine how such an apparent lack of interest in measuring the outcomes of public procurement arises. It could be that public procurement policy is developed and promulgated in an environment where objectives are merely aspirational and accepted as such within a political process. Having developed, negotiated and implemented a public procurement policy framework, political and bureaucratic actors may have no interest in assessing the outcomes because failure to achieve policy objectives could reflect badly with

stakeholders. Public procurement policy development is often a lengthy and difficult process of political negotiation involving satisficing solutions to policy dilemmas and such solutions may not be consistent with efficient and effective procurement management. Having endured such processes, stakeholders may be reticent to obtain information that upon consideration necessitates a revisitation of established policy. Further, those public practitioners with sufficient expertise to understand how to manage procurement to achieve particular objectives may not be involved in, or contribute meaningfully to the policy process. Even when such practitioners are involved, their views on the feasibility of implementing various policy agendas are likely to be subservient to political expedience. This is especially the case where public procurement is most commonly identified as being concerned with legal/regulatory considerations rather than being an aspect of business or economic management. Practitioners who have functioned effectively in a particular policy environment may, in any case, be change resistant due to a lack of knowledge or interest in more effective procedures and practices for securing desired policy outcomes. There is also the often insurmountable difficulty of gaining access to useful data that would enable an assessment of the outcomes of effort to be made. Public procurement is generally managed on a transaction case-wise basis and with considerable commercial sensitivity surrounding processes and the associated documentation. Much of the data that is published is statistical and generalised. With the achievement of policy objectives often assumed to arise through procedural compliance, there are likely to be few measures of the actual achievement of policy objectives considered or documented.

It has been suggested there are three enabling factors underpinning evidence based policy development including high-quality and relevant information sources, cadres of professionals with skills in data analysis and policy evaluation as well as political incentives for using such analysis as a source of policy advice to government.^[7] It would appear that none of these pre-conditions exists generally in the arena of public procurement.

There is reasonable doubt, in the absence of published evidence to the contrary, that traditional public procurement regulatory regimes actually deliver the outcomes expected. How then can a case be made for meaningful reform and the more widespread adoption of practices that support transparency, integrity and better deliver value for taxpayer/donor investments? One path is to chip away at the edifice of conventional wisdom concerning traditional public procurement regulation by highlighting evidence of policy failure and associated costs. This is the path that has been taken here.

Some insights derived from case studies

It is usually assumed in traditional public procurement regulation that transparency of process is sufficient to guarantee integrity and accountability as well as to deliver value for money. However, the lack of the explicit articulation of strategy and the evidence from which it is derived makes traditional public procurement into black box of procedural compliance with little or no transparency of the machinations inside.

It is useful to demonstrate this phenomenon through actual examples. These are drawn from different settings but all involve substantial cost to the procuring organisations and therefore opportunity for the unscrupulous to derive significant benefits at the cost of the taxpayer or donor. They are each drawn from traditional public procurement regulatory settings. Certain of these case examples involve actual or alleged fraud, corruption or other forms of exploitation. They are used to demonstrate the deficiencies in traditional public procurement management and how these deficiencies may be exploited. The names and details have been disguised to protect the guilty and their victims.

Example 1

To support delivery of a key programme, a public sector entity needed to obtain a mix of complex goods and associated services involving distribution over a wide geographic area and under very difficult circumstances. The entity did not have the internal expertise to frame the specifications/terms of reference and sought the assistance of expert consultants. Some highly reputable consultants, under a minor contract given to them directly because it was below the threshold for a competitive selection procedure, framed the terms of reference for competitively sourcing consultants who would establish the specifications/ terms of reference for acquisition of the goods and associated services. Thus there were three contracts: one for an initial low value consultancy; one for the larger consultancy; and, finally a contract for the delivery of the goods and associated services.

All three procurement processes were conducted by the procuring entity in compliance with its established and traditional procurement procedures. The competitive selection for the major consultancy was of such high value that a formal process of competitive public bidding with the associated processes was undertaken. The consultants who were awarded that contract were those that had framed the terms of reference for it under the minor consultancy. In this instance, although it appears that it was not necessarily understood by the organisational unit concerned, it was against the policy of the procuring entity to allow a consultant involved in an earlier phase of a

larger procurement process to bid for a subsequent phase in which they had been involved by framing terms of reference used for a competitive bidding process in which they would compete. However, such action is permitted by under the procurement regulations of other public entities. Under the second and major consultancy, the experts then framed the specifications/ terms of reference for the contract for the goods and associated services worth in excess of USD40M.

The process of selecting a supplier for the major contract was undertaken under a closed process. A number of companies that had been previously pre-qualified by the procuring entity in a separate process, in compliance with its procurement rules, were asked to bid to deliver the goods and associated services under the specifications/terms of reference framed by the consultants. In the end, certain of the prequalified entities did not bid and only one bidder was deemed to be qualified. It was recommended that this company be awarded the contract. A review of the procurement process found certain deficiencies and initially determined that the recommended company should not be awarded the contract. One such deficiency was a lack of transparency in the pricing and another was a lack of apparent experience by the recommended supplier in the delivery of one of the key service components. A further procurement process that was presumed would address deficiencies in the main procurement process was undertaken without any result and without any real resolution of the apparent deficiencies in the initial process. After a subsequent review, the contract was awarded to the company that had been recommended in the first instance. The contract was then effectively delivered in a timely manner.

In summary, the procurement procedures of the organisation had been followed and the company that was selected delivered the goods and associated services as required at the agreed price. So there was no problem: or was there? Unfortunately it was subsequently alleged that there had been an association between the consultants that had framed the terms of reference for the delivery of the goods and associated services and the company to which the contract had been awarded. It was further alleged that a large secret commission was paid to the consultants by that company. The company that allegedly paid the secret commission to the consultants has settled a substantial penalty imposed by authorities for its part. One of the consultants has admitted guilt in this matter.

The procuring entity had not been aware of the payment of any secret commission and had been very pleased with the outcome of the procurement and with its positive impact on the delivery of its programme. However, it was estimated that the secret commission that was include in the pricing of the supplier, would have amounted to approximately 10% of the contract's substantial value. As such the procuring entity had paid a corrupt premium for the goods and associated services.

In this case, the procuring entity relied on seemingly reputable consultants to fill a significant gap in its own knowledge. This gap concerned: how the relevant supply markets operated; the capabilities of the full range of potential suppliers and their respective supply chains; how to approach the market in a way that avoided the payment of a risk premium; and, how to achieve transparent pricing for the component goods and services. Without any verification of its own, the procuring entity blindly accepted the advice of the consultants to its detriment.

Example 2

A public sector entity required complex products on an ongoing basis. In compliance with its traditional procurement rules, it established a panel of suppliers with which orders would be placed from time to time over a pre-determined period and under pre-negotiated terms, conditions and pricing.

The public sector entity would bring the pre-qualified suppliers together on a regular basis to explain programme delivery objectives and challenges over the ensuing period. This it was thought enabled suppliers to better plan their production and to highlight any problems or issues that could arise in terms of continuity of supply. Such continuity was of critical importance to the achievement of the programme objectives.

After one such meeting and over a period of a few months, the public sector entity received requests from each of the suppliers under the arrangement for unexpected price increases. The suppliers argued that the cost of one of the key inputs to the products had suddenly increased significantly and that they were unable to continue to fulfil orders at the pre-negotiated price. This they said was because they could not readily substitute alternative sources for the key input.

When the procuring entity subsequently analysed the supply market, including the supply chain for the product it was buying, it was found that one of its direct suppliers was also the producer of the key input to the finished product to all the other suppliers on the panel. Under its arrangement with the procuring entity, that supplier fulfilled orders for a relatively small proportion of the total demand for the finished product. However, indirectly, through the sales of the key component to all the other panel suppliers, it received a large share of the total value of the procuring entity's demand.

The key input component supplier had apparently bid to supply the finished product in order to exploit the procuring entity. It did so by using the knowledge it gained about the anticipated demand and the imperatives of programme delivery to manipulate its pricing of the key input to the other suppliers under the arrangement.

Up to that point in time the procuring entity had relied on compliance with the traditional procurement regulations of the organisation to secure best value. The introduction of the practice of undertaking structured supply market analysis as a part of the information gathering needed to frame an effective procurement strategy was used by the procuring entity for the first time in response to the unexpected price rises under this panel arrangement. As a result of the somewhat belated supply market analysis, the exploitative behaviour of the key component supplier was uncovered.

Example 3

A public sector entity requires certain goods and associated services and bundles its requirements in a way that is convenient for the organisation in terms of eventual contract management. For ease of contract management, there is only one supplier contemplated and therefore only one contract to administer. The entity procures the requirement in compliance with its rules which represent a traditional approach to procurement regulation.

There are only two companies that are prepared to bid to provide the total bundle of goods and services in the manner specified by the procuring entity. It is thought that these are genuine competitors. They share between them contracts worth about USD200M per year.

No effort is made to break-down the requirement in a manner that would enable other suppliers that may be specialists in elements of the supply chain to address parts of the requirement. In any case, partial offers would not be entertained. There is no analysis of the supply chains undertaken by the procuring entity to determine if there is a better way to approach the relevant supply market and/or to bundle or unbundle its requirements. The procuring entity relies entirely on its procurement procedures to secure value for money and to ensure probity and accountability. The same configuration of requirements is repeatedly put to market with only minor variations to the requirement. In this way the procuring entity has effectively created a self-imposed duopoly.

So what happens? The suppliers that bid for the contract do so by pricing in a premium to cover the risk of any uncertainty in the elements of the supply chain in which they are not expert or which in other ways present them with potentially costly risks in the future. The aspects of the specifications/ terms of reference in which the suppliers are expert make up a relatively small proportion of the overall value of the requirement. Therefore the pricing offered is generally inflated with risk premiums. Negotiations in the form of clarifications are undertaken with the bidder whose offer is preferred upon initial evaluation.

What is not known is what the final contract price includes, because it is not transparent even after negotiation. Certainly the substantial contract pricing will contain the direct cost of the goods and services, indirect costs, overheads and the reasonable profit of the supplier. There will also be residual risk premiums. The lack of transparency of pricing means that the total amount paid could include forms of exploitative pricing such as oligopolistic rents and potentially corrupt transfers. However, the procurement process is always undertaken in full compliance with the rules and there is no apparent dissatisfaction with the manner of procuring these particular goods and services formally expressed.

Can black boxes be opened?

There are certain commonalities between the three case examples that have been provided. Each involved very high contract values so the cost to the taxpayer or donor of any misdirection of related expenditure is significant. The high potential gains to the unscrupulous provide a suitably large return on investment in fraud, corruption and other forms of exploitation. The size and/or complexity of such contracts also facilitates the hiding of corrupt premiums.

All three cases were conducted in accordance with the procurement rules of the respective organisations. In no case was there any indication that the organisation was dissatisfied with the procurement procedure itself or with the immediate outcome in terms of the selected suppliers or contract formation with them. In the first case, the public sector entity considered the contract and its delivery to be a great success. In the second, the organisation remained satisfied with the procurement process and contract delivery until each of the members of a panel of suppliers sought unexpected price increases. In the third instance no-one has formally expressed any dissatisfaction with the conduct of the procurement or with the contracts formed and delivered as a result – except perhaps lamenting occasionally the high cost.

Significantly, in no case did the internal or external audit functions of any of the organisations raise any issues. In the first example the alleged fraud was detected in an unrelated investigation by a third party that traced certain information and events back to the procurement. In the second case, it was the procuring unit itself that uncovered the exploitation through adoption of a new practice in the form of structured supply market analysis. In the third instance nobody apparently sees that there is a problem because history continues to repeat itself and the self-imposed oligopoly thrives.

In each case, there had been no evidence gathered internally by the procuring unit in the planning phase for these procurements that: critically considered the way in which the need is expressed in terms of specifications, statements of work, or terms of reference; provided an understanding of the dynamics of the relevant supply markets; and/or, systematically assessed the needs and issues of stakeholders.

In the first case the procuring unit did not have the capability internally to undertake such research and analysis and relied exclusively on the unverified advice of consultants. In the second example, the procuring unit belatedly took the opportunity to learn the skill of supply market analysis and demonstrated its utility. In the third case, the procuring entity does not see the need for such information gathering.

Without the documentation of essential evidence as a basis for strategy during the procurement planning phase, public procurement related fraud, corruption and exploitation will thrive and be will remain largely undetected.

Conclusion

The three case studies demonstrate significant policy failure under traditional procurement regulatory regimes. They also provide evidence that transparency of process is not sufficient to deliver the fundamental policy objectives of public procurement. The rote following of procedure appears to dull corporate thinking about procurement strategy with consequential costly and deleterious results.

For auditors and investigators, it is relatively easy to identify low grade procurement fraud and corruption where there was a lack of compliance with rules or a lack respect for internal controls. It is far less likely that the misdirection of substantial procurement related expenditure in major or complex contracts will be detected because auditors and investigators generally lack the knowledge and skill to recognise the “red” flags in this context.

In this paper evidence is presented that contrary to expectations, extant models of public procurement regulation not only fail to support transparency and integrity but also do not deliver value for taxpayer/donor investments. Traditional ways of controlling public procurement consisting of procedural requirements serve to create a black box in which the machinations of fraudulent, corrupt and other exploitative dealings may be obscured. It is argued here that exploitative dealings are difficult to conceal when there is intra-organizational transparency of procurement strategy based on documented research and analysis of the requirement, of the relevant supply market and of stakeholders’ needs and issues.

The adoption of private sector analogous procurement practice is a useful reform and an effective means of deriving better outcomes from public procurement effort. However, challenging the conventional wisdom about traditional public procurement practice and governance requires producing coherent evidence that explains how and why the dominant public procurement paradigm is deficient, managing the objections of those who would benefit from the status quo and demonstrating effective models of how public procurement may be and is being transformed. In this paper the limitations of traditional public procurement regulation has been explored. As outlined herein there are significant obstacles to be overcome in order to bring about much needed change. Not the least of these is the difficulty of engaging and sensitizing key bureaucratic and political stakeholders through the production of evidence that public procurement can be governed and managed in much better ways and with significantly better outcomes.

References

- [1] European Commission, DG Internal Market and Services. (2011): Public procurement in Europe - cost and effectiveness, p125. http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf Retrieved 31 January 2014.
- [2] Department of Finance and Deregulation. (2013): Data mining and analysis of AusTender data – 2011-12. <http://www.finance.gov.au/sites/default/files/austender-data-analysis-2011-12.pdf> Retrieved 31 January, 2014.
- [3] Pharmaboardroom. (2012): Interview with Anne Nolan, Chief Executive, Irish Pharmaceutical Healthcare Association. <http://www.pharmaboardroom.com/article/interview-with-anne-nolan-chief-executive-irish-pharmaceutical-healthcare-association> Retrieved 31 January, 2014.
- [4] G. Banks. (2009) Challenges of evidence-based policy-making. <http://www.apsc.gov.au/publications-and-media/archive/publications-archive/evidence-based-policy> Retrieved 31 January 2014.
- [5] European Commission, DG Internal Market and Services. (2011): Cross-border procurement above EU thresholds. http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf Retrieved 31 January 2014.
- [6] Transparency International. (2006): Handbook for Curbing Corruption in Public Procurement. Berlin, Germany. http://archive.transparency.org/regional_pages/asia_pacific/newsroom/news_archive2/handbook_for_curbing_corruption_in_public_procurement Retrieved 14 December 2013.
- [7] B. Head. (2009): Evidence-based policy: principles and requirements http://www.pc.gov.au/data/assets/pdf_file/0007/96208/03-chapter2.pdf . Retrieved 31 January, 2014.

Customers' preferences in municipal waste services procurement

Alessandro Ancarani, Carmela Di Mauro, Francesco Mascali, Liborio La Marca*

*Department of Civil and Environmental Engineering, University of Catania
Viale Doria 6, 95125 CATANIA, Italy*

**Corresponding author: Alessandro Ancarani, +39-095-7382715, aancaran@dica.unict.it*

Keywords: municipal services, solid waste management, public procurement, consumer preferences

INTRODUCTION

The government sector is, to a large degree, a service sector, which in the last decade has become more externally sourced than it used to be in the past. In Europe, it is estimated that around 50% of the total external sourcing in local governments is made up of contracts for services, such as construction work, maintenance work, public transport, municipal waste collection, social services and consultants, network services, etc. Municipal Waste Services (MWS) provision is one of the services shifting from public in-house management to outsourcing to private firms. Typically, MWS contracting-out involves a single commissioner placing contracts with a single provider and is based on an explicit specification of the service and performance criteria. These criteria are predetermined taking into account environmental and technical constraints, with the aim of meeting user requirements.

The growth of public service outsourcing implies that public buyers increasingly operate in service triads, whereby the provider directly delivers services to the citizen. Public buyers are for their business performance highly dependent on providers, who control service delivery and must therefore take measures to ensure appropriate behaviour, through contracts and Service Level agreements (van der Valk and van Iwaarden, 2011). With respect to equivalent service triads in the private sector, the relationships involved in public sector triads are much more complex (Ancarani, 2009). On the one hand, many public services are offered under monopolistic market conditions, leading to lower power of control and “voice” of citizens. On the other, public purchasers’ decisions are under scrutiny through administrative controls and internal audits (Pettijohn and Qiao, 2000), leading public purchasers to be more focused on the public’s perception that policies and procedures are being followed (Schiele, 2005), rather than on value for money spent, sustainability, quality, customer focus in service delivery, and cost reduction (Murray, 2001).

However, in recent years due to the processes of rationalization of public expenses and to increasing customer demand for improvements in service quality (Sweeney and Soutar, 2001), the evaluation of the performance of suppliers of public services is gaining more importance (Bovaird, 2006). In particular, the rising emphasis on customer-orientation and customer value (Brady and Cronin, 2001) also in public services (Osborne et al., 2013; Thomas, 2013) makes it essential for public organizations to understand how to assess value from the customer’s perspective (Woodruff, 1997; Leroi-Werelds et al., 2013). This implies that the attributes of the service should be carefully planned considering customer needs and expectations, in order to maximise benefits provided with

the service (Lai and Chen, 2011).

Further, in some specific public services, among which MSW is prominent, providing customer value is crucial also to avoid a lack of customer collaboration, which may undermine the effectiveness of the service provision itself (Ancarani and Mascali, 2012). In MWS the collaboration of users is paramount and a proactive role of the users is asked for, as the capacity of the provider to meet the targets strongly depends on the willingness of the users to differentiate waste before passing it to the collector for waste recycling. In this perspective, effective service provision and value co-creation is grounded in a commitment to collaborative processes among users, public buyers, and providers (Lusch et al., 2007; Lusch et al., 2008). The novelty of this approach consists in the fact that service providers are only providing partial inputs into the customer's value-creating processes, with input coming from other sources (Vargo and Lusch, 2011), including the customer's own activities.

A corollary to above line of reasoning is that the assessment of users' preferences is crucial for service design, in order to motivate and promote collaboration and maximise customer value. Therefore, prior to proceeding to entrusting a provider with service delivery, public procurers should incorporate these preferences in the definition of Service Level Agreements.

Various qualitative and quantitative approaches have been proposed in the literature to measure users' preferences for service attributes. In this paper we propose the use of Choice Experiments (CEs), a quantitative methodology in the tradition of environmental economics and management in alternative to other qualitative methodologies proposed in the marketing literature (Sánchez-Fernández and Iniesta-Bonillo, 2007). CEs are built on random utility theory, which assumes that choices are based on utility comparisons between the available alternatives, and that the alternative providing the highest utility will be the preferred choice (McFadden, 1974; Louviere et al., 2000).

CEs have been already been used to analyse MWS (among others Jin et al., 2006) but the relevance for public procurement has never been underlined. This paper presents and contrasts the results of two CEs studies conducted in two municipalities in a Southern region in Italy with the aim to illustrate the insights that public buyers can derive from such an analysis, and to show implications for public procurement. The CEs studies investigate the relevance for customers of significant service attributes (waste tax, frequency of door-to-door waste collection, percentage of recycling).

The rest of the paper is organised as follows: First an overview of the concept of customer value is provided. Next, the main features of the choice experiment methodology adopted, and the case-studies description and analysis are presented. The paper concludes with a discussion and implications of results.

VALUE FOR CUSTOMER

A review of the literature on customer value provides some key insights into the nature of the concept. First, a well-accepted definition is that proposed by Zeithaml (1988, p. 14), in which customer value is "the consumer's overall assessment of the utility of a product based on perceptions of what is received and what is given". Second, customer value is perceived by the customer, i.e. it is the customer who defines the value of a product/service and not the supplier (Vargo and Lusch, 2008; Woodruff, 1997). Third, customer value is personal. Each customer perceives value based upon personal characteristics such as his/her own needs and desires knowledge, previous experience, and financial resources (Grönroos, 2011; Holbrook, 1999;

Woodall, 2003). Fourth, the value perceived by the customer depends on circumstances, time frame, and location (Woodruff, 1997; Woodruff and Gardial, 1996). Fifth, customer value implies an interaction between the customer and the product/service and is experiential, which means that it resides in the consumption experiences derived therefrom. According to the notion of value-in use, which implies that real value only emerges during use, “value is not created and delivered by the supplier but emerges during usage in the customer’s process of value creation” (Grönroos and Ravald, 2011, p. 8). The supplier facilitates the customer’s value creation process by producing and delivering resources that represent potential value (or expected value-in-use).

Research in service markets suggests that measuring value requires the consideration of personal interactions, in line with the notion of value co-creation mentioned by Grönroos and colleagues (Grönroos, 2011; Grönroos and Ravald, 2011; Grönroos and Voima, 2013). Customers may integrate resources to achieve benefits from sources other than the supplier, and, in particular, from the customer’s self-generated activities (e.g., by accessing their own personal knowledge and skill sets and through their cerebral processes) that contribute to and that ultimately become part of this co-creation (Vargo and Lusch, 2011). The importance of these activities to the customers consists in the fact that they may offer both enjoyment from the actual experience and rewards from being able to customize and being in control (Bateson 1985; Dabholkar, 1996). However, this is likely to require effort and to determine physical, financial, psychological, performance, social, and time related risks (Etgar, 2008). Consequently, not all customers are likely to engage in these activities.

In the MWS setting, value co-created by the actors involved can be defined as “benefit realized from integration of resources through activities and interactions with collaborators in the customer’s service network.” That is, a multiparty all-encompassing process of resources integrator including the supplier, the public sources, the private sources, as well as the personal customer activities. This conceptualization of customer value co-creation includes the definition of the customer value-creation process as a series of activities performed by the customer as part of a broad multi-play of activities to achieve a desired outcome (Payne et al., 2008; Vargo and Lusch, 2008). Activities involved in MWS may range from simple (low level) activities such as compliance with service provider/providers, and collating information to complex (high level) activities such as co-learning, actively searching for information and providing feedback.

All these activities take place within social systems and individuals have the potential to learn, adapt, and make choices based on their perceptions of their socially constructed world. Central to this view is that the only way to understand reality is through asking individuals directly about their “sense-making” activities, as they are associated with social interactions as well as roles and positions within a social system (Edvardsson et al., 2011). Schau et al. (2009) suggest that not all customers have the same motivations when engaging in customer value co-creation. Some individuals may see greater value in engaging in certain activities than others and will have preferences for ways of interacting based on their mental model of their world, in particular their view of their role as a resource integrator within the given context.

The view that value co-creation is essentially personal and experiential is in line with Woodall’s classification (2003), which identified five primary forms of value for the customer, namely net VC (in terms of balance of benefits and sacrifices), derived VC (in terms of use/experience outcomes), marketing VC (in terms of perceived product attributes), sale VC (in terms of reduction in sacrifice or cost), and rational VC (in terms of assessment of fairness in the benefit–sacrifice relative comparison). In the context of MWS, we can apply this theoretical

conceptualization considering the customer value provided by the service management as an aggregated amount including all the customer perceptions along the different time phases of interactions, experience cycle with the service and experience cycle with the supplier. The relevant time phases for a generic public service are reported in table 1.

Table 1 - Time and experience phases along the public service provision

Time phases	Experience phases
1) <i>Ex ante</i> (pre-purchase)	<i>Collecting information</i>
2) <i>Transaction</i> (at the point of contract and during experience)	<i>Purchase</i>
3) <i>Routine operations</i> (normal operation)	<i>Learning</i>
3 bis) <i>Failure/Recovery from failures</i> (during use/experience)	<i>Emergency</i>
4) <i>Re-agreement or Disposition</i>	<i>Purchase/Disposition</i>

Combining the forms of value and the phases along the service experience, the model of value can be sketched as a Rubik cube in which each small face represents one of the components of the value perceived (fig. 1).

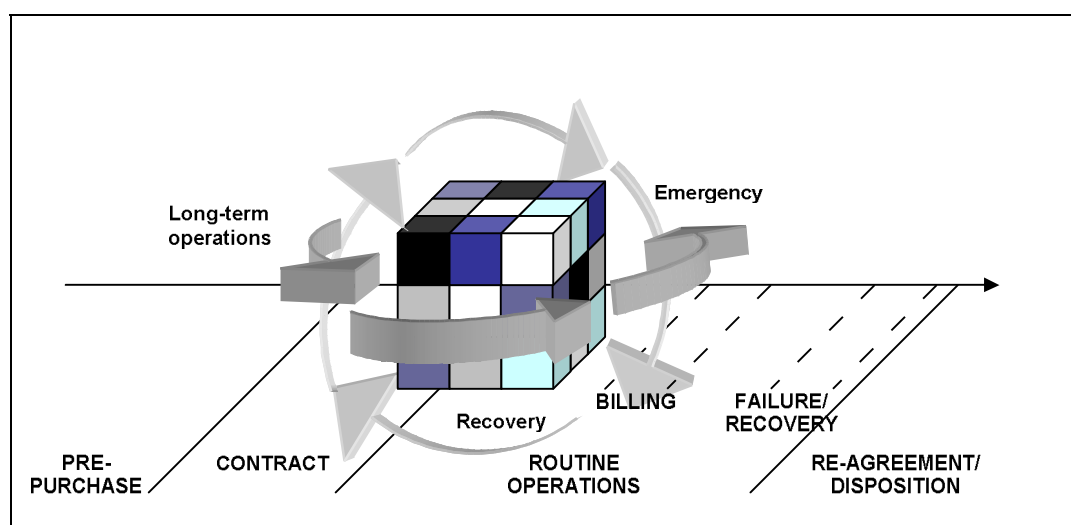


Figure 1 – Model of aggregated value for customer for MWS

In particular, the model takes into account both the *longitudinal perspective* (temporal dimension of value for the customer) and the *transversal perspective* (value perceptions change during the transition from an experience phase to another). The model of value for customer can be applied by considering aggregated value cube projections on planes corresponding to the time phases.

VALUE FOR CUSTOMER IN PUBLIC PROCUREMENT

The concept of customer value can be applied to the public sector, where the object of public procurement is to enhance delivered value to the users of public services (Jackson, 2001). Kelly and Muers (2002) defined the concept of public value as the means to deliver the goals and performance of public policy. Several authors have argued that the public value concept involves finding out

what the public thinks, and requires techniques effective at investigating public preferences. Further, Erridge (2007) reinforces the link between public value and procurement, emphasizing the importance of consultation to ensure that what is being delivered to citizens reflects public preferences. In the same vein, other authors have argued that the operative definition of public value calls for a deliberation involving the key stakeholders. As a consequence, public procurement for services must incorporate consultative and participative processes in order to “mediate between the particular values pursued by potentially competing publics” (Stoker, 2006).

In terms of stakeholder theory (Parent and Deephouse, 2007), the need for participative procedures and consultations has increased in the last few years, as the direct customers of public services have acquired salience by exhibiting attributes (power and urgency) they did not own before. This has turned end-users into key stakeholders whose preferences need to be measured in order to assure their participation in value creation.

Though the difficulties of achieving more than notional participation cannot be denied, research has engaged in the study of ways of addressing the problems of participation and of measuring perceived value. Among these are studies of the public’s motivations for participating (Lowndes et al. 2001), organising service users in “participation chains” (Simmonds and Birchall, 2005), and newer ways of assessing customer value (Leroi-Werelds et al., 2013). These approaches offer grounds for basing public procurement not only on value for money concepts but also on the wider concept of value for customer.

ANALYSIS OF USERS’ PREFERENCES

The relevance of customers’ preferences for the appropriate design of MWS provision has been investigated through two case studies in which the current service was considered unsatisfactory and in which the buyers (local governments) were in the process of entrusting through a public tender a private supplier with the service provision, and of defining the new attributes of the service itself.

Both buyers implemented a consultation with the residents in order to measure user preferences for various attributes of MWS by means of the discrete choice experiments methodology. In what follows, the results of such studies are reported with the aim to show the kind of information that can be retrieved from choice based methods as opposed to more traditional methods based on intention to participate or on the rating of the desirability of single attributes of the MWS. From a managerial point of view, the two cases further show how even a small municipality can implement this approach as an effective tool to evaluate the most appropriate attributes of the service and to foster customer participation.

Method: Discrete Choice Experiments

The Discrete Choice Experiment (DCE henceforth) method is a systematic approach for identifying the relative weights of a set of attributes among which the decision maker trade-offs when choosing among a possible set of alternatives. The method has its theoretical underpinnings in the random utility model and has been increasingly employed in the field of environmental management, marketing and the social sciences to analyse user preferences and to estimate the value of non-market goods and services (Adamowicz et al., 1994; 1998). Hence, the DCE method is suitable when the service to be evaluated is multi-dimensional, and trade-offs between them of particular interest. DCE allows modelling complex trade-offs between attributes by treating the

price of the service as just one component attribute of the valued good. Typically, a DCE compares various hypothetical policies/scenarios that are composed of attributes and estimates the values of improvements with respect to the status quo.

DCE has been previously used to measure the various economic values of the urban waste disposal system (Birol et al., 2008; Ezebilo, 2013; Karousakis and Birol, 2008; Ku et al., 2009 among others), by designing several experimental scenarios of waste disposal/collection (described by a combination of attribute levels). In the case of waste disposal, relevant attributes of the service are price, frequency, mode of collection, cleanliness, percentage of recycling, etc. After the identification of the relevant attributes and their possible numerical/categorical values, experimental design procedures are utilized to generate a set of alternatives. In our experiment, we follow the design used by Verma and Pullman (1998) based on fractional factorial design.

Organization of service

In the first Municipality (population 10859 as of 2012), the service has been run by a private entity since 2010 and has been implemented through door-to-door collection of the organic fraction of waste for about 25% of the population residing in the town centre. For the rest of the town population, the service collects waste and/or recyclables and/or organics on a scheduled basis from waste bins distributed across town, and dedicated to plastic, paper, glass and to non-recyclable matter. About 20% of waste is currently recycled.

In the second Municipality (population 10391) service was run in-house at the time of data collection. The mode of waste collection involved waste being dumped in street dustbins, emptied by collectors who load the contents into a garbage truck to take it to a landfill. Recycling of paper, plastic, glass, clothing and tin is further undertaken with the same method. Only 5% of waste is currently recycled. At the time of the study the Municipality was contemplating the possibility of introducing door-to-door collection.

Study deployment

In both municipalities data collection was carried out in the period May-July 2013. Scenarios based on the Choice Experiment methodology were built and administered to a randomly extracted sample of the population.¹

In the first municipality, only residents that received the door-to-door service were included in the study. Three attributes of service provision were considered (waste tariff, schedule of collection, percentage of recycling). Three levels were considered for each attribute. The resulting factor structure (Table 2) was used to build 8 scenarios (plus the status quo configuration), which were then combined into 4 choice sets, each made up of two scenarios and the status quo:

Table 2 - Attributes and levels of attributes – First Municipality

ATTRIBUTE	LEVEL 1	LEVEL 2	STATUS QUO
Schedule of collection	twice a week for organics and non-recyclable, once a week recyclables	Once a week irrespective of type of solid waste	3 times a week for organic and non- recyclable, once a week recyclables

¹ A second section of the study (not reported in this paper) collected information about the degree of satisfaction with the current service in terms of tax, percentage of recycling, customer care of the service provider, kindness and competence of personnel.

Tax reduction	10%	40%	none
% recycling	30%	60%	20%

In the second Municipality, the mode of collection was further added among the attributes, distinguishing among the standard collection system through dustbins, door-to-door, and Municipal Collection Centre (MCC).

Table 3 - Attributes and levels of attributes – Second Municipality

ATTRIBUTE	LEVEL 1	LEVEL 2	STATUS QUO
Mode of collection	MCC	Group A - Door-to-door (3 times a week for organics, once a week for other types of waste) Group B - Door-to-door (twice a week for organics, once a week for other types of waste)	Waste bins
Tax reduction	10%	40%	none
% recycling	30%	60%	5%

Respondents were further split into two groups (Group A and Group B) in order to allow for the evaluation of different schedules of door-to-door collection. This practice is common among researchers undertaking DCE studies (Verma and Pullman, 1998). Table 4 summarizes the characteristics of the two samples:

Table 4 – Sample characteristics

		Municipality 2 (n = 211)		Municipality 1 (n = 86)	
		Group A	Group B	Standard	Door to Door
Gender	Males	58%	57%	44%	42%
	Females	42%	43%	56%	58%
Age	<40	40%	43%	50%	47%
	40 - 60	39%	39%	40%	38%
	>60	21%	18%	10%	15%
Education	Primary	17%	13%	12%	19%
	Secondary-Low	44%	37%	36%	27%
	Secondary_High	34%	42%	45%	39%
	University degree	5%	8%	7%	15%

RESULTS

First Municipality

Data obtained from the scenarios were analysed through logit and alternative specific conditional logit (ASCL) models.

Data Analysis shows some distinct patterns of choice: first, respondents prefer scenarios offering a high frequency of waste collection, and/or a marked reduction in the waste service tax. Marginal attention is paid to the fraction of recycled waste. In particular, the condition leading users to opt for a service configuration alternative to the status quo is the joint presence of a marked reduction in the tax (-40%) and only a moderate decrease in the frequency of waste collection.

This pattern suggests that the frequency of collection is a key attribute for the citizen, who is on average willing to trade off a reduction in frequency only in exchange for a significant reduction in the payment.

This conclusion is further strengthened by the finding that the majority of respondents opted for the maintenance of the status quo configuration (in which the frequency of service collection was highest).

Table 5 shows the estimated coefficients for the three attributes as obtained from a logit regression. The size of the coefficients shows that the tax reduction is the most important attribute in determining the choice of a waste collection scenario, followed by the frequency of collection. Conversely, the percentage of recycling attribute is negatively related to the probability of choosing a scenario. This can be attributed to the fact that many households interviewed perceived a higher percentage of recycling as involving extra effort in separating waste for collection on different days, disposing it in separate street bins, etc. Interestingly enough, in the questionnaire that accompanied the DCE and aimed at investigating the most relevant and valuable aspects of a waste collection service, recycling emerged as one of the most valued attributes. The fact that this statement is at odds with the results of the DCE is a testament to the fact that when faced with trade-off choices, single attributes may not turn out to be as important as they may appear to be in principle.

Table 5 - Logit model on service attributes – First municipality

	Coefficient	Standard deviation	p-value
Tax reduction	1.688	0.543	0.002***
Frequency of collection	0.270	0.097	0.005***
% recycling	-4.238	0.473	0.000***
constant	-0.313	0.263	0.232

The application of the ASCL model allows disaggregating results based on selected control variables. In the first municipality, this model was applied to the valuation of different percentages of waste recycling. Choice was disaggregated according to the binary variable gender (males = 0, women = 1). The interest in the gender variable rest with the fact that women are often, especially in the south of Italy where data were gathered, the “waste managers” of the household. Therefore, their preferences are important because they may be more sensitive to non-economic attributes of the service which require active participation or which have effects on the life of the family. Quite interestingly, women seem to be the least interested in the attribute “percentage of recycling,” and the ones most in favour of the current configuration of the service.

Table 6 – Condition specific logit model – by gender

	Coefficient	Standard Deviation	p-value
Tax reduction	6.413	0.9113	0.000
Frequency of collection	0.1260	0.0996	0.206

30% recycling -gender	-0.7835	0.3286	0.017
-constant	-3.0501	0.4120	0.000
60% recycling -gender	-0.6036	0.2870	0.035
-constant	-2.5821	0.3710	0.000

Second Municipality

Results from the second study basically confirm the same choice patterns found in the first municipality. In particular, frequency of collection for the door-to-door mode and tax reduction are viewed as the two most important attributes of the service, while recycling is only marginally related to the probability that a scenario is chosen. Again, this is at odds with the results obtained from the questionnaires measuring the perceived importance of each attribute and the willingness to engage in recycling.

For the A group, the most frequently selected scenarios involve the high-frequency door to door collection (3 times a week) with MCC selected only by 8% of respondents. For group B, in which the frequency of the door-to-door collection is lower, MCC is selected by 19% of respondents. Further, while the variable “frequency of door to door collection” is statistically significant for Group A it is not for Group B. This suggests that door-to-door collection is considered a valuable attribute of the service only if it is matched by a high frequency. Tables 7 summarise the estimates from a logit model for the two groups.

Table7 - Logit with covariates– Group A

LR chi2(8) = 180.01, Prob > chi2 = 0.0000 Log likelihood = -698.70452 Pseudo R2 = 0.1141			
	Coefficienti	Dev.Strd	p-value
Tax	4.851968	.5066191	0.000
Door-to-door (2)	-.3109455	.300491	0.301
MCC	-.1867763	.2985241	0.532
% recycling	.5642148	.5011758	0.260
Age	.0188591	.113505	0.868
Gender	-.0581048	.140082	0.678
Education	.0312956	.078164	0.689
Titolo di studio	.049627	.103353	0.631
Intellectual Prof.	-1.864091	.4330784	0.000
Constant			

Table 8 - Logit with covariates– Group B

LR chi2(9) = 497.83, Prob > chi2 = 0.0000 Pseudo R2 = 0.3046 Log likelihood = -568.36705			
	Coefficienti	Dev.Strd	p-value
Tax	7.3019	0.555988	0.000
Door-to-door (3)	0.8471388	0.3411861	0.013
MCC	-0.2979454	0.3634279	0.412
% recycling	1.064225	0.5345671	0.047
Age	-4.98e-17	0.1386741	1.000

Gender	3.81e-17	0.1606571	1.000
Education	-2.10e-17	0.0816393	1.000
Titolo di studio	-3.67e-17	0.1211106	1.000
Intellectual Prof.	-6.25e-18	0.092037	1.000
Constant	-2.751336	0.5785987	0.000

CONCLUSIONS

Public service procurement needs to be grounded in a greater participation of the stakeholders involved in service attribute design. Direct users are clearly key among these stakeholders and this entails that consumer preferences must be explicitly held into account through various forms of consultations. MWS has a special role among services provided by the public sector, since the match between consumer needs and service specification is crucial to guarantee the collaboration of users and thus service effectiveness.

Although customer participation to MWS design cannot be given for granted, various qualitative forms of customer participation (focus groups or general consultations to elicit customer motivations and expectations) have been experienced. In this paper we suggest that these qualitative approaches may be inferior to choice based methods, which are no more difficult to administer than standard questionnaires, but offer the advantage of presenting customers with trade-offs between alternative specifications of the same service. Our two cases clearly show that while waste recycling emerged as an important feature of the MWS in questionnaires measuring desirability of each individual attribute, they rate quite poorly in the choice based study, where waste tariff and frequency of collection appear to be far more important.

REFERENCES

- Adamowicz, W., Boxall, P., Williams, M., and Louviere, J. (1998). Stated preference approaches for measuring passive use values: choice experiments and contingent valuation. *American Journal of Agricultural Economics*, 80(1), 64-75.
- Adamowicz, W., Louviere, J., and Williams, M. (1994). Combining revealed and stated preference methods for valuing environmental amenities. *Journal of Environmental Economics and Management*, 26(3), 271-292.
- Ancarani, A. (2009). Supplier evaluation in local public services: Application of a model of value for customer. *Journal of Purchasing and Supply Management*, 15(1), 33-42.
- Ancarani, A., and Mascali, F. (2012). What does it mean value for customer in public services? Proceedings 5th IPPC, Seattle (WA), 2211-2232.
- Bagozzi, R.P. (1992). The self regulation of attitudes, intentions, and behavior. *Social Psychology Quarterly*, 55, 178-204.
- Barnes, M., Newman, J., Knops, A. and Sullivan, H. (2003). Constituting “ the Public ” in Public Participation. *Public Administration*, 81 (2), 379-399.
- Bateson, J.E. (1985). Self-service consumer: An exploratory study. *Journal of Retailing*, 61(3), 49-76.
- Birol, E., Koundouri, P., and Kountouris, Y. (2008). *Applications of the choice experiment method in Europe: A review*. In: Birol, E. and Koundouri, P. (Eds). *Choice Experiments Informing Environmental Policy: A European Perspective*, 12-57.
- Bovaird, T. (2006). Developing new forms of partnership with the ‘market’ in the procurement of public services. *Public Administration*, 84(1), 81-102.

- Brady, M.K., and Cronin, J.J. (2001). Customer orientation effects on customer service perceptions and outcome behaviors. *Journal of Service Research*, 3(3), 241-251.
- Cronin, J.J., Jr., Brady, M.K., and Hult, G.T.M. (2000). Assessing the effects of quality, value, and customer satisfaction on consumer behavioral intentions in service environments. *Journal of Retailing*, 76(2), 193-218.
- Dabholkar, P.A. (1996). Consumer evaluations of new technology-based self-service options: an investigation of alternative models of service quality. *International Journal of Research in Marketing*, 13(1), 29-51.
- Edvardsson, B., Tronvoll, B., and Gruber, T. (2011). Expanding understanding of service exchange and value co-creation: a social construction approach. *Journal of the Academy of Marketing Science*, 39(2), 327-339.
- Erridge, A. (2007). Public procurement, public value and the Northern Ireland unemployment pilot Project. *Public Administration*, 85(4), 1023-1043.
- Etgar, M. (2008). A descriptive model of the consumer co-production process. *Journal of the Academy of Marketing Science*, 36(1), 97-108.
- Ezebilo, E.E. (2013). Willingness to pay for improved residential waste management in a developing country. *International Journal of Environmental Science and Technology*, 1-10.
- Gotlieb, J.B., Grewal, D., and Brown, S.W. (1994). Consumer satisfaction and perceived quality: complementary or divergence constructs. *Journal of Applied Psychology*, 79(6), 875-885.
- Grönroos, C. (2011). Value co-creation in service logic: A critical analysis. *Marketing Theory*, 11(3), 279-301.
- Grönroos, C., and Ravald, A. (2011). Service as business logic: implications for value creation and marketing. *Journal of Service Management*, 22(1), 5-22.
- Grönroos, C., and Voima, P. (2013). Critical service logic: making sense of value creation and co-creation. *Journal of the Academy of Marketing Science*, 41(2), 133-150.
- Holbrook, M. B. (1999). Introduction to consumer value. *Consumer value: A framework for analysis and research*, 1-28. Routledge: New York
- Jackson, P.M (2001). Public Sector Added Value: Can Bureaucracy Deliver? *Public Administration*, 79(1), 5-28.
- Jin, J., Wang, Z., and Ran, S. (2006). Comparison of contingent valuation and choice experiment in solid waste management programs in Macao. *Ecological Economics*, 57(3), 430-441.
- Karousakis, K., and Birol, E. (2008). Investigating household preferences for kerbside recycling services in London: A choice experiment approach. *Journal of Environmental Management*, 88(4), 1099-1108.
- Kelly, G., and Muers S. (2002). *Creating public value*. London: Cabinet Office, Strategy Unit.
- Ku, S.J., Yoo, S.H., and Kwak, S.J. (2009). Willingness to pay for improving the residential waste disposal system in Korea: A choice experiment study. *Environmental management*, 44(2), 278-287.
- Lai, W.T., and Chen, C. F. (2011). Behavioral intentions of public transit passengers—The roles of service quality, perceived value, satisfaction and involvement. *Transport Policy*, 18(2), 318-325.
- Leroi-Werelds, S., Streukens, S., Brady, M.K., and Swinnen, G. (2013). Assessing the value of commonly used methods for measuring customer value: a multi-setting empirical study. *Journal of the Academy of Marketing Science*, 1-22.
- Louviere, J.J., Hensher, D.A., and Swait, J.D. (2000). Stated choice methods: analysis and applications. Cambridge University Press.
- Lowndes, V., Pratchett, L., and Stoker, G. (2001). Trends in public participation: part 1—local government perspectives. *Public Administration*, 79(1), 205-222.
- Lusch, R.F., Vargo, S.L., and O'Brien, M. (2007). Competing through service: insights from service-dominant logic. *Journal of Retailing*, 83(1), 5-18.

Lusch, R.F., Vargo, S.L., and Wessels, G. (2008). Toward a conceptual foundation for service science: Contributions from service-dominant logic. *IBM Systems Journal*, 47(1), 5-14.

McFadden, D. (1980). Econometric models for probabilistic choice among products. *Journal of Business*, S13-S29.

Murray, J.G. (2001). Improving purchasing's contribution-The purchasing strategy of buying council. *International Journal of Public Sector Management*, 14(5), 391-410.

Osborne, S.P., Radnor, Z., and Nasi, G. (2013). A new theory for public service management? Toward a (public) service-dominant approach. *The American Review of Public Administration*, 43(2), 135-158.

Parent, M.M., and Deephouse, D.L. (2007). A case study of stakeholder identification and prioritization by managers. *Journal of Business Ethics*, 75(1), 1-23.

Payne, A. F., Storbacka, K., and Frow, P. (2008). Managing the co-creation of value. *Journal of the Academy of Marketing Science*, 36(1), 83-96.

Pettijohn, C., and Qiao, Y. (2000). Procuring technology: Issues faced by public organizations. *Journal of Public Budgeting Accounting and Financial Management*, 12, 441-461.

Prahalad, C.K., and Ramaswamy, V. (2004). Co-creation experiences: The next practice in value creation. *Journal of Interactive Marketing*, 18(3), 5-14.

Sánchez-Fernández, R., and Iniesta-Bonillo, M.Á. (2007). The concept of perceived value: a systematic review of the research. *Marketing Theory*, 7(4), 427-451.

Schau, H.J., Muniz, A.M., and Arnould, E.J. (2009). How brand community practices create value. *Journal of Marketing*, 73, 30-51.

Schiele, J.J. (2005). Meaningful involvement of municipal purchasing departments in the procurement of consulting services: case studies from Ontario, Canada. *Journal of Purchasing and Supply Management*, 11(1), 14-27.

Simmonds, R. and Birchall J. (2005). A Joined-Up Approach to User Participation in Public Services: Strengthening the "Participation Chain". *Social Policy and Administration*, 39(3), 260-283.

Stoker, G. (2006). Public value management a new narrative for networked governance? *The American Review of Public Administration*, 36(1), 41-57.

Sweeney, J. C., and Soutar, G. N. (2001). Consumer perceived value: the development of a multiple item scale. *Journal of Retailing*, 77(2), 203-220.

Thomas, J. C. (2013). Citizen, customer, partner: rethinking the place of the public in public management. *Public Administration Review*, 73(6), 786-796.

van der Valk, W., and van Iwaarden, J. (2011). Monitoring in service triads consisting of buyers, subcontractors and end customers. *Journal of Purchasing and Supply Management*, 17(3), 198-206.

Vargo, S.L., and Lusch, R.F. (2008). Why "service"? *Journal of the Academy of Marketing Science*, 36(1), 25-38.

Vargo, S.L., and Lusch, R.F. (2011). It's all B2B... and beyond: Toward a systems perspective of the market. *Industrial Marketing Management*, 40(2), 181-187.

Verma, R., and Pullman, M.E. (1998). An analysis of the supplier selection process. *Omega*, 26(6), 739-750.

Woodall, T. (2003). Conceptualising 'value for the customer': an attributional, structural and dispositional analysis. *Academy of Marketing Science Review*, 12, 1-42.

Woodruff, R.B. (1997). Customer value: the next source for competitive advantage. *Journal of the Academy of Marketing Science*, 25(2), 139-153.

Woodruff, R.B., and Gardial, S. (1996). Know your customer: new approaches to customer value and satisfaction. Blackwell Business.

Zeithaml, V.A. (1988). Consumer perceptions of price, quality, and value: a means-end model and synthesis of evidence. *Journal of Marketing*, 2-22.

The Impact of Changing Patterns of Commercial Card Use by the U.S. Government on Governmental Efficiency and Cost Savings¹

ABSTRACT. The U.S. Government has used bank commercial card technology since the 1980's to simplify and reduce the cost of the process to acquire goods and services. The benefits derived from card use vary by type of card, manner of card use, and degree of integration with the acquisition process. In fiscal year 2013, the U.S. Government spent \$26 billion on commercial cards and identified \$1.7 billion in administrative cost savings and card issuer rebates.

Notwithstanding the putative benefits, U.S. Government spending on all commercial cards has been in decline since 2011 and spending on purchasing cards (the card platform on which most spending is directed) peaked in 2008. Since the U.S. Government reaps benefits from card use, the purpose of this paper is to explore (a) potential causal factors driving reductions in commercial card spending, both in absolute terms and as a percentage of budgeted spending, and (b) the countermeasures available to government to optimize the benefits derived from commercial card use.

INTRODUCTION

The U.S. Government has used bank commercial card technology since the 1980's to simplify and reduce the cost of the process to acquire goods and services. The term "commercial cards" includes purchase, travel, and fleet cards. Generally, purchase cards are used to acquire non-travel-related goods and services of lower dollar value; travel cards are used to facilitate employee travel on government business and primarily used to purchase airline tickets, hotels, and auto rentals; and fleet cards support employee purchases of fuel and other automotive services for government vehicles.

The benefits derived from card use vary by type of card, manner of card use, and degree of integration with the acquisition process. Purchasing cards are a bank commercial card product designed to increase the efficiency of the procure-to-payment cycle by the delegation of certain types of purchase decisions to employee-cardholders. The government agency is obligated to pay *one* bill that summarizes monthly purchases made by *all* cardholders. The agency supports this distributed purchasing activity by assigning each cardholder a (revolving) monthly credit line. This process reduces or eliminates many activities and paperwork previously required to process these purchases, including approvals, requisitions, purchase orders, invoices, and payment while increasing days that payables are outstanding by extending the time to payment (Federal Reserve Bank of Philadelphia, 2011; McHugh, 2011). Estimates of government agency cost savings by use of purchase cards have ranged from \$54 to \$92 (Cohen, 1998; U.S. GAO, 1998). The General Services Administration estimates that, on average, government agencies save about \$70 per transaction in administrative cost savings each time a purchase card is used (instead of a paper procedure) (General Service Administration, 2013a).

¹ *Authors: Richard Palmer, Professor of Accounting, Harrison College of Business, Southeast Missouri State University; Mahendra Gupta, Geraldine J. and Robert L. Virgil Professor of Accounting and Management, Olin School of Business, Washington University in St. Louis, Nathan Palmer, Master's of Accountancy, Southern Illinois University at Carbondale.*

By contrast, travel and fleet cards do not produce clear transactional cost savings but do provide convenience to the government agency, efficiency and transparency in travel spend reporting and management, and the elimination of cash travel advances. When employees charge travel and fleet expenses the government avoids the expense and reduce risk associated with controlling cash advances while enhance visibility of spending activity. Aggregation and enhanced visibility of travel spending activity can be very important to obtaining discounts on airfare, hotels, or auto rentals. Modest transactional cost savings can be obtained with the use of travel cards when paired with expense management software, reducing the time it takes to complete requests for reimbursement from the government.

Given the benefits of commercial card use, spending on commercial cards increased steadily from the 1990's through 2008 where it peaked at \$30.8 billion. Since 2008, commercial card spending (both in dollars and as a percentage of budgeted spending) has been lower than the 2008 level and dropped sharply in 2012 and 2013. In fiscal year (FY) 2013, the U.S. Government spent \$26 billion on commercial cards, accumulating approximately \$1.7 billion in administrative cost savings and card issuer refunds from their use (General Services Administration, 2013b).²

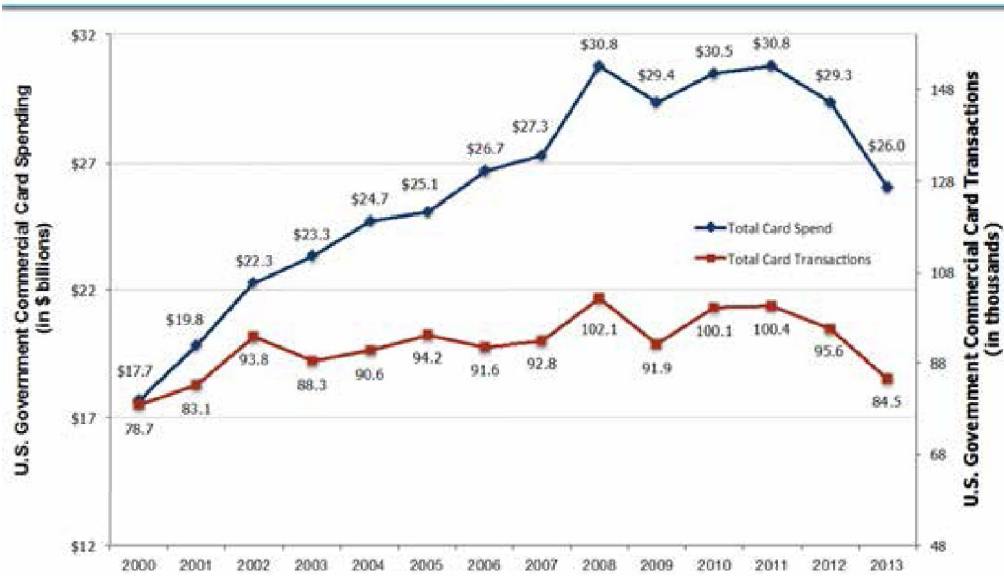
Since the U.S. Government clearly recognizes benefits from card use, the purpose of this paper is to understand (a) the causal factors driving reductions in commercial card spending both in absolute terms and as a percentage of budgeted spending, and (b) the countermeasures available to government to optimize the benefits derived from commercial card use. Specifically, the paper is broken into four sections: The first section identifies the different types of commercial cards and pinpoints the card platform primarily responsible for changes in the benefits being obtained from commercial card use (purchasing cards). The second section looks more closely at purchasing card spending and activity data. The third section breaks out the purchasing card program performance of Military and Civilian agencies and provides a historical timeline of events and policy changes affecting purchasing card use. The final section examines the cost and benefits of current changes to the purchasing card program and how the government can optimize the benefits derived from the use of purchasing cards.

HISTORICAL PATTERNS OF COMMERCIAL CARD USE AND BENEFIT

Figure 1 shows that U.S. Government commercial card spending increased steadily from \$17.7 billion in 2000 to its zenith of \$30.8 billion in 2008. In 2009, commercial card spending fell to \$29.4 billion, but bounced back to \$30.8 billion in 2011. After 2011, commercial card spending dropped by \$1.5 billion (to \$29.3 billion) in 2012 and dropped another \$3.3 billion in 2013 to \$26.1 billion. Figure 1 also shows that U.S. Government commercial card transactions increased from 78.7 million in 2000 to the high point of 102.1 million transactions in 2008. In a pattern similar to spending, the number of commercial card transactions fell by 17.6 million transactions (to 84.5 million) by 2013.

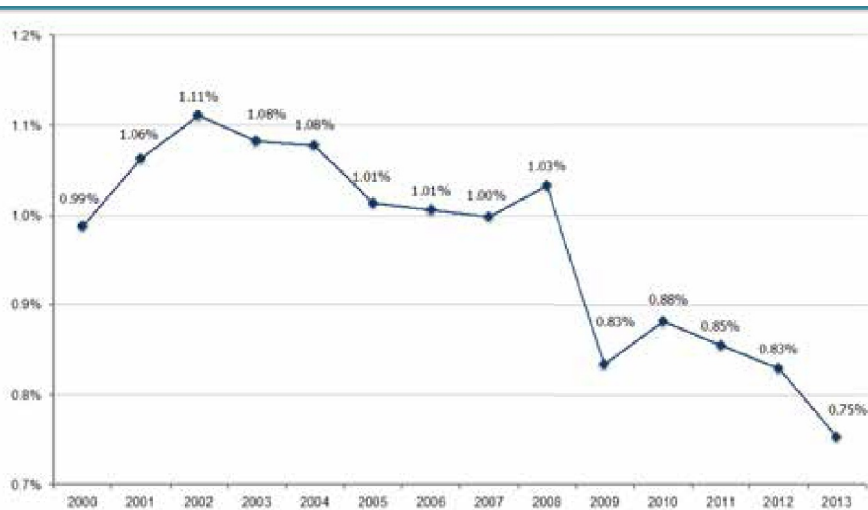
² Total savings reflects a combination of card issuer rebates and internal transaction processing cost savings associated with purchasing card activities (to be discussed in greater detail later in this paper).

FIGURE 1
Total U.S. Government Commercial Card (Purchasing, Travel, and Fleet)
Spending and Transactions, 2000-2013



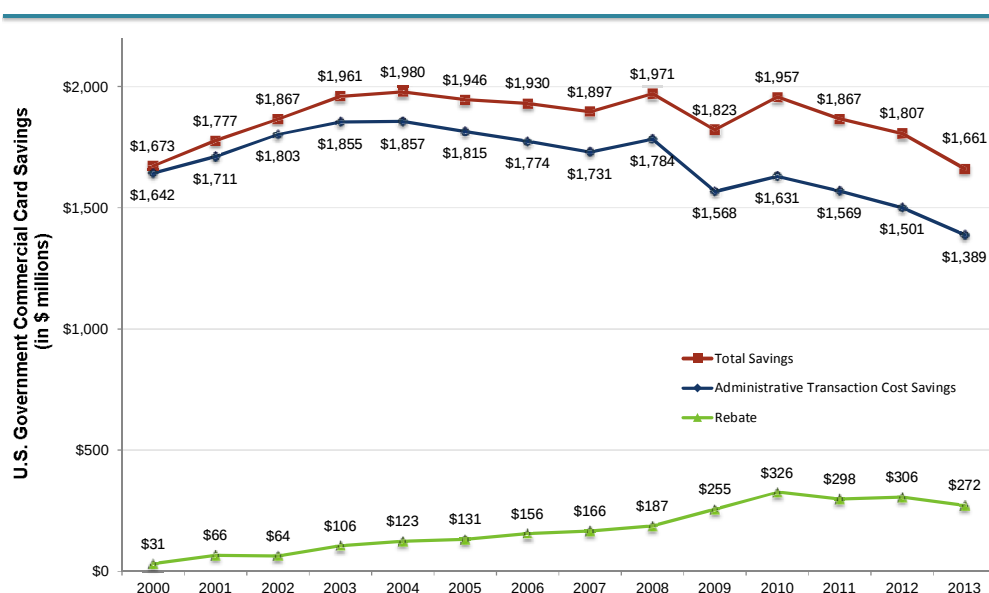
To put commercial card spending in the larger context of the governmental operations, Figure 2 displays commercial card spending as a percent of budgeted spending by Federal government agencies. Figure 2 shows that, excepting 2008 and 2010, the pattern of U.S. government commercial card spending as a percentage of the government budget has trended downward since the high water mark of 1.11% in 2002, falling to 0.75% in 2013.

FIGURE 2
Commercial Card Spending as a Percentage of Budgeted Spending by the U.S.
Government, 2000-2013



Based on a combination of spending and transaction activity, Figure 3 presents overall cost savings to the U.S. Government generated from commercial card spending and a breakdown of those savings into two key components: administrative cost savings associated with purchasing card transactions and card issuer rebates related to spending across all card platforms.³ As shown in Figure 3, overall cost savings steadily increased from \$1.673 billion in 2000 to \$1.980 billion in 2004, remained relatively flat between 2004 and 2010, and has since fallen every year since to its current level of \$1.661 billion. Administrative cost savings--which are driven by the number of transactions paid with purchasing cards--have been falling (albeit unevenly). In 2004, administrative cost savings peaked at \$1.857 billion; by FY 2013 those saving were \$1.389 billion. By contrast, the U.S. Government has reported steady increases in card issuer refunds between 2002 (\$64 million) to 2010 (\$326 million). Since 2010, card issuer refunds have trended lower to the FY 2013 level of \$272 million.

FIGURE 3
Total Cost Savings, Administrative Transaction Cost Savings, and Card Issuer Rebate from Commercial Card Spending by U.S. Government, 2000-2013*



* Administrative cost savings are calculated by multiplying \$70 per purchasing card transaction (as per GSA estimate found at <https://smartpay.gsa.gov/about-gsa-smartpay>). Likewise, card issuer refund data (\$272 million in FY 2013) may be found at <https://smartpay.gsa.gov/program-refunds>.

³ Card issuers bid for the business of providing commercial cards to U.S. Government agencies. Part of the contractual arrangement with a bid winner is a pre-negotiated “rebate” (cash back incentive) which is primarily based on the amount of spending conducted on the cards. The refund percentage is renegotiated at the beginning of each contract period.

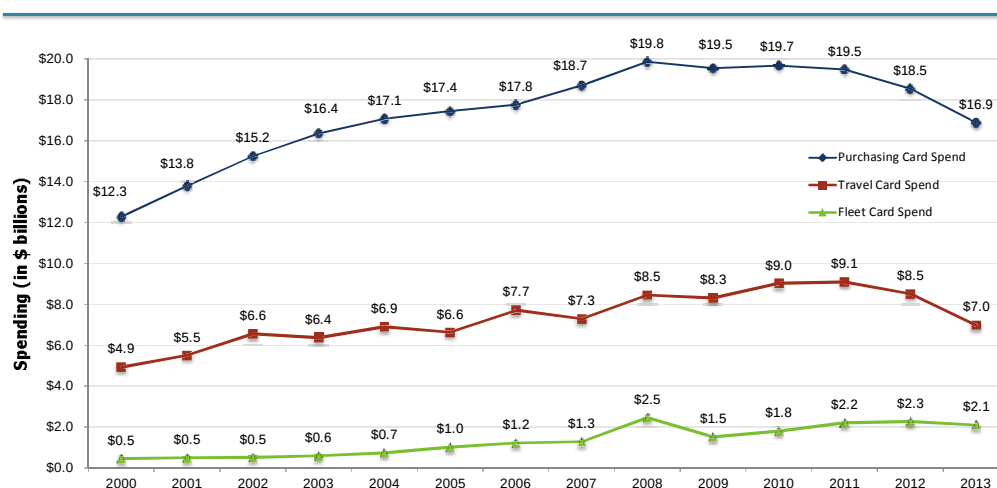
Benefits and Use of Different Card Platforms

As noted above, benefits derived by commercial card use vary by type of card used, manner of card use, and degree of integration with the procedural and technological fabric of the acquisition process. To understand the drop in overall commercial card spending more clearly, a breakdown of the spending by type of card is shown in Figure 4, which indicates that:

- Purchasing card spending rose steadily from \$12.3 billion in 2000 to \$19.8 billion in 2008, but has since fallen by \$2.9 billion to its 2013 level of \$16.9 billion,
- Travel card spending followed a generally upward trend, rising from \$4.9 billion in 2000 to \$9.1 in 2011, but has since fallen by \$2.1 billion to \$7.0 billion in FY 2013,
- Fleet card spending has risen from \$500 million in 2002 to \$2.2 billion in 2012. In FY 2013, fleet spending dropped modestly to \$2.1 billion, and
- While it has declined recently in its share of total spending, purchasing card spending continues to be the main component of total commercial card spending, accounting for 65% of the \$26 billion of commercial card spending in FY 2013.

Given the spending patterns in Figure 4, it appears that the decline in purchasing card spending is the primary cause of the decline in overall commercial card spending by the U.S. Government. Due to the higher percentage of total spending, changes in purchasing card spending have a greater effect on the benefits of card use that accrue to the U.S. Government. Further, because of the impact on the administrative aspects of the purchasing process, purchasing cards drive all of the administrative cost savings reported by the government and (by virtue of the amount spent) the majority of card issuer rebate incentives. Therefore, the remainder of this paper will focus attention on governmental use of purchasing cards.

FIGURE 4
U.S. Government Spending on Purchasing, Travel, and Fleet Cards, 2000-2013

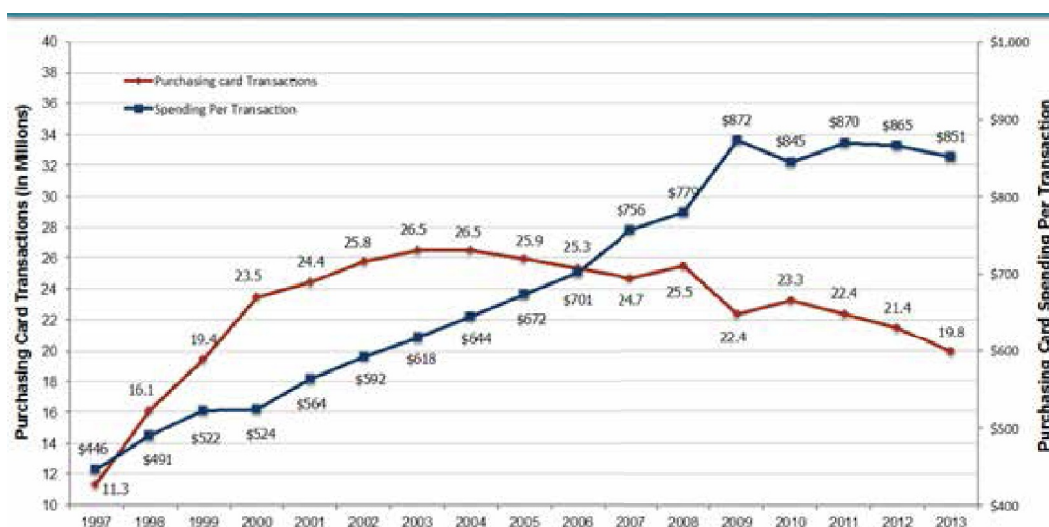


* Spending, transactions, and cardholders at the Department of Interior (a "one card" program where both travel and purchasing applications are paid with the same card) are prorated to match purchasing and travel card spending, transactions, and card distribution across the rest of the U.S. Government.

A CLOSER LOOK AT PURCHASING CARD USE

Figure 4 showed that purchasing card spending by the U.S. Government steadily increased between fiscal years 2000 and 2008.⁴ Purchasing card spending gyrated between \$19.5 and \$19.7 billion in the 2009-2011 timeframe, thereafter falling steadily to the FY 2013 level of \$16.9 billion. Figure 5 below shows that the number of transactions paid with the purchasing card actually began falling four years earlier. The highest number of annual purchasing card transactions was reported in 2004 (26.5 million). Since then annual purchasing card transactions have had headed in a generally downward direction to the FY 2013 level of 19.8 million, a 25% decrease from the FY 2004 peak. Figure 5 also shows that total purchasing spending did not decline in the 2005-2008 time frame because increases in the average amount transaction amount more than offset the reduction in the number of transactions. The average purchasing card transaction amount rose steadily from \$446 in 1997 to \$872 in 2009, but has since fallen to \$851 in FY 2013.

FIGURE 5
Purchasing Card Transactions and Spending Per Transaction by U.S. Government, 1997-2013*

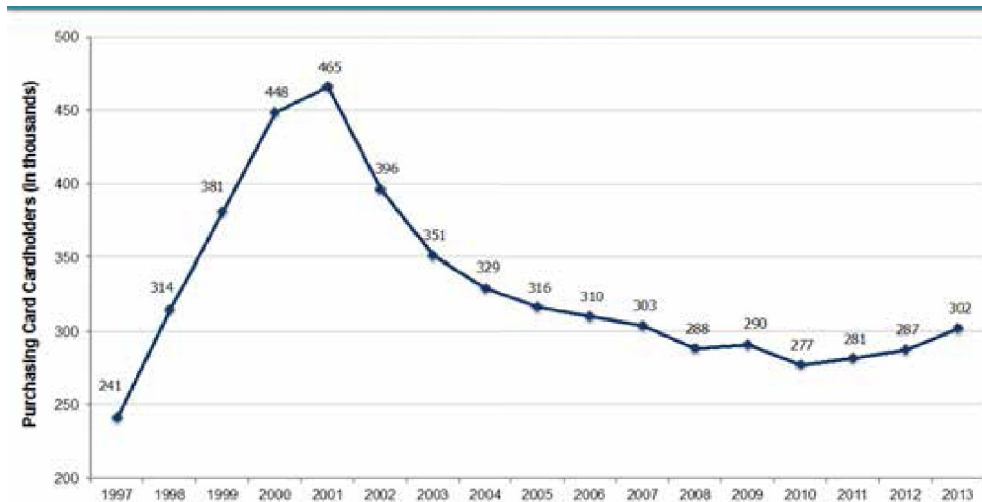


* Purchasing card data is available from the GSA from 1997 forward. Card issuer refunds and travel and fleet card data availability is available only from 2000 forward. Thus, this graph extends the timeframe to suit purchasing card data availability.

Purchasing Card Distribution. One potential contributor to the reduction in purchasing card spending and transactions by the U.S. Government is change in employee access to purchasing cards. Figure 6 shows that the number of purchasing cards distributed to employees of the U.S. Government peaked at 465,000 in 2001 and has since fallen to its current level of 301,926 (a 35% drop). Though not shown in the Figure, the percentage of U.S. Government employees has also slowly declined 12.2% in FY 2001 to 7.6% in FY 2013. The possible reasons for the drop will be discussed below when we examine various audit outcomes and changes in Federal guidelines over the past decade.

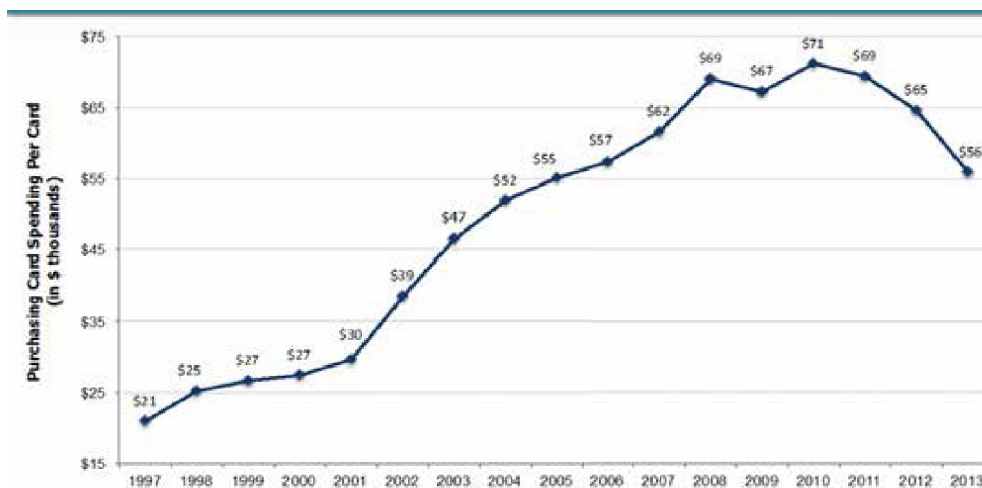
⁴ Actually, purchasing card spending increased consistently from 1990 to 2008. Exhibit 4 was constrained to the year 2000 and beyond because that is when data for all three card platforms was made available by the GSA.

FIGURE 6
Purchasing Cards Distributed to Employees, by U.S. Government, 2000-2013



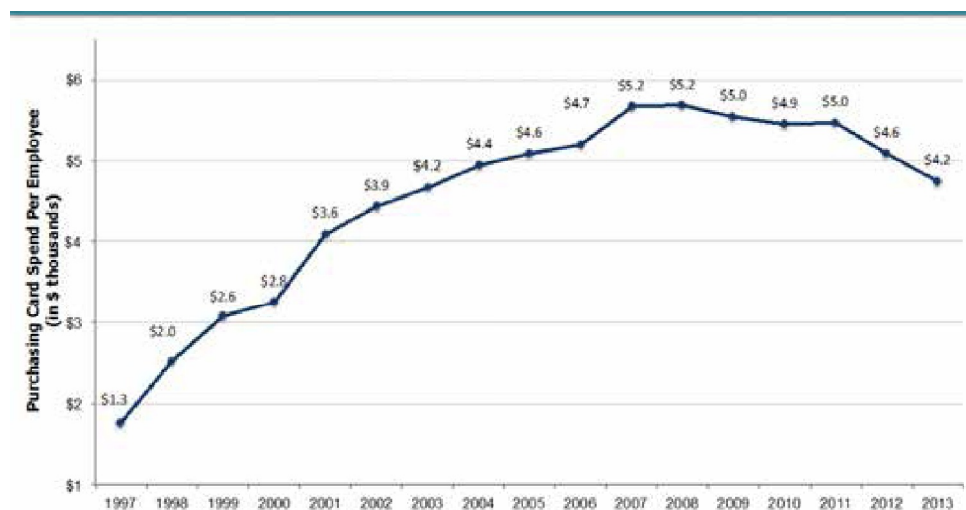
Cardholder Spending Behavior. Changes in card distribution patterns may affect spending at the cardholder level. For example, Figure 5 above revealed that the average transaction amount of a purchasing card purchase had been trending upwards for most of the past sixteen years. Thus, when purchasing cards are in the hands of fewer employees, those cardholding employees tend to make larger purchases (perhaps buying for themselves and others in their department who no longer have a purchasing card). Likewise, Figure 7 shows that the decline in card distribution that began in 2002 has meant that employees with cards are conducting more purchases. Figure 6 showed that (with one exception in 2009) card distribution across the employee base steadily declined from 2001 to 2010. In that time frame, the annual purchasing card spending per card rose from \$30,000 in 2001 to \$71,000 in 2010. After 2010, the level of card distribution rose modestly (9%) while the annual spending per card declined 21% (from \$71 to \$56 thousand per year).

FIGURE 7
Annual Purchasing Card Spending per Card, by U.S. Government, 2000-2013



Size-Adjusted Performance Metrics. While “per card” metrics give an insight into cardholder behavior, size-adjusted metrics provide a more comprehensive view of the impact of the purchasing cards on U.S. Government spending habits. Purchasing card spending per employee is a program performance metric that reflects the extent of the transformation of governmental buying practices away from non-card payment methods to the purchasing card. Figure 8 shows that annual purchasing card spending per employee rose steadily from \$1,300 in 2000 to \$5,200 in 2007 where it plateaued for one year. Since 2008, purchasing card spending per employee has fallen to \$4,200 in 2013.

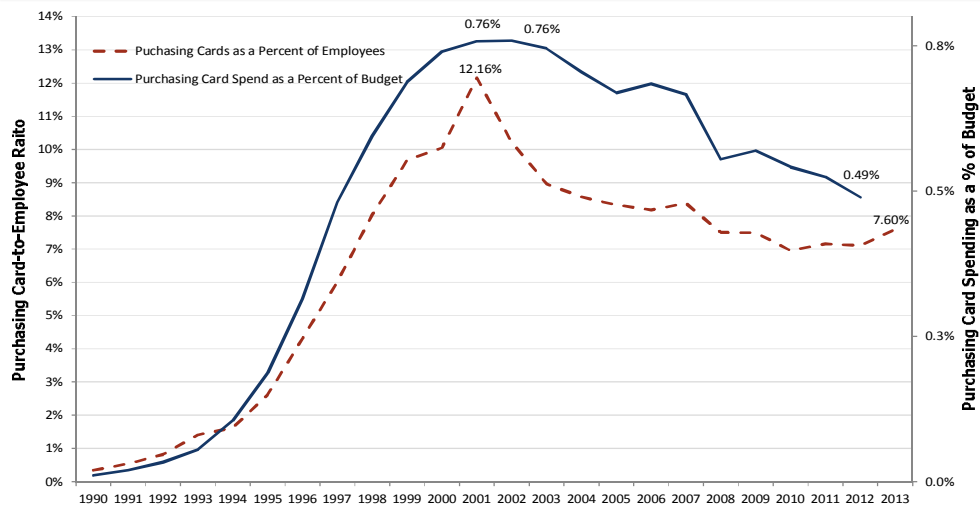
FIGURE 8
Purchasing Card Spending Per Employee, by U.S. Government, 2000-2013



Another size-adjusted performance metric which reflects the relative influence of purchasing cards on governmental buying practices is purchasing card spending as a percent of total budgeted spending. Figure 9 presents U.S. Government purchasing card spending as a percentage of the U.S. Government budget (lagged on year) in relation to the purchasing card-to-employee ratio for the 1997-2013 time period.⁵ The Figure reveals that purchasing card spending as a percentage of budget was highest when card distribution was most liberal. Thus, the Figure shows the high point of card distribution (in 2001 at 12.16% of the employee base) is associated with the highest level of purchasing card spending as a percentage of the budget (in 2002 at .76%). Since 2001, both card distribution and purchasing card spending as a percentage of budgeted spending have tracked downward.

⁵ Purchasing card spending as a percentage of budget is lagged to allow for cardholder adaptation to card spending policies and procedures.

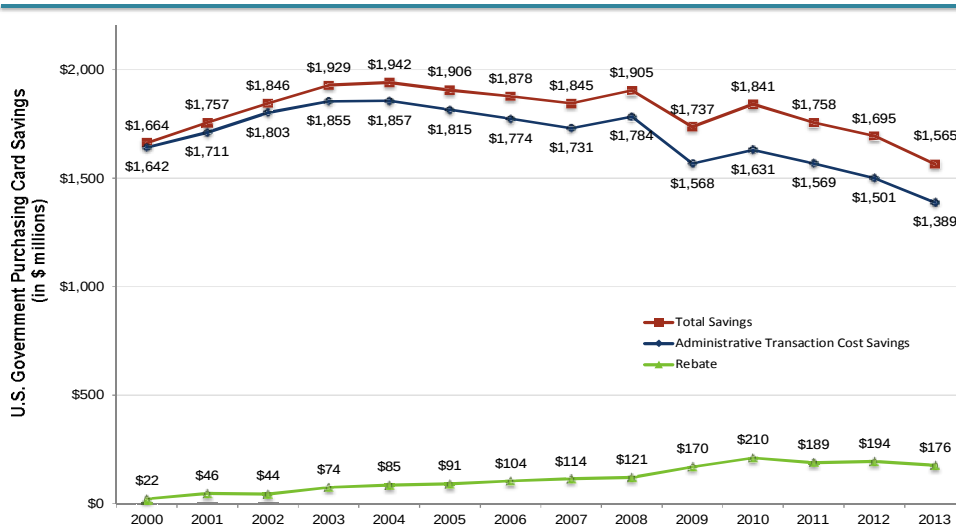
FIGURE 9
Card to Employee Ratio with Spend as a Percent of Budget (one year lagged), 1990-2013*



* Budgeted spending data from the Department of Treasury Financial Management Service Monthly Treasury Statements of Receipts and Outlays of the U.S. Government. Government headcount data available at Federal Civilian Workforce Statistics: Employment and Trends available at the Office of Personnel Management. Purchasing card spending data from 90-96 is taken from McHarg (2002).

Cost savings. The net effect of changes in purchasing card distribution and cardholder usage patterns associated is reflected in the savings experienced by the U.S. Government. Figure 10 shows that the benefit derived from purchasing card use peaked in 2004 (at \$1.942 billion in combined rebates and transaction cost savings), primarily due to the record number of purchasing card transactions conducted in that year (26.5 million). With the exception of 2008 (where transaction activity spiked up to 25.5 million), total cost savings associated with purchasing card use drifted downward to \$1.565 billion in FY 2013. Figure 10 also shows a FY 2010-2013 decline in administrative cost saving (a 15% drop from \$1.631 million to \$1.389 million) and a 16% drop in card issuer rebates associated with purchasing card spending (from \$210 million to \$176 million).

FIGURE 10
Total Administrative Transaction Cost Savings and Card Issuer Rebates from Purchasing Card Spending by U.S. Government, 2000-2013



* Administrative cost savings are calculated by multiplying purchasing card transactions by \$70 as per GSA estimate found at <https://smartpay.gsa.gov/about-gsa-smartpay>. Card issuer rebate data is calculated by multiplying the percentage rate of the rebate experienced in each fiscal year times the purchasing card spending in that year. Presentation is limited to the years after 1999 due to availability of refund data.

In sum, we find five key points associated with U.S. government use of purchasing cards, as follows:

- Purchasing card spending peaked in 2008 at \$19.8 billion, was flat between 2008 and 2011, and dropped significantly in both 2012 (to \$18.5 billion) and 2013 (to \$16.9 billion).
- Annual purchasing card transactions peaked in 2004 (at 26.5 million) and have declined (albeit unevenly) to 19.8 million in 2013. Purchasing card spending (and corresponding card issuer rebates) did not decline immediately upon reduction in transaction volume because the average card transaction amount was rising rapidly.
- The percentage of employees with purchasing cards fell from 12.2% in 2001 to 7.0% in 2010 (from 465,000 to 277,000 cards). Since 2010, the number of and percentage of employees holding purchasing cards has ticked upward modestly.
- Purchasing card spending as a percent of the budget was highest in 2002 and 2003, years in which card distribution was at high levels.
- The cost savings from purchasing card use peaked in 2004 (at \$1.942 billion), the year of a record number of purchasing card transactions. While transactions were lower after 2004 the total cost savings were buoyed by rising card issuer rebates in the 2004 to 2010 time frame. Notwithstanding, *all* of the decline in the benefits from U.S. Government commercial card use since 2010 is explained by changes in purchasing card use.

MILITARY VERSUS CIVILIAN PURCHASING CARD ACTIVITY

Palmer and Gupta (2010) observed that marked differences existed between Military and Civilian governmental agencies with respect to the use of purchasing cards.⁶ Unlike Civilian agencies, Military agencies had begun a pattern of movement away from purchasing card use in 2002. The analysis of purchasing card spending in Figure 11 breaks down Civilian and Military purchasing card spending and extends Palmer and Gupta's earlier analysis. The Figure shows that while Civilian purchasing card spending increased from \$2.8 billion in 1997 to \$12.1 billion in 2011, it has since dropped by 4% (\$0.5 billion) to \$11.6 billion in 2013. By contrast, Military purchasing card spending increased from \$2.2 billion in 1997 to the high point of \$8.4 billion in 2008, but has since decreased by 37% (\$3.1 billion) to \$5.3 billion in 2013. In fact, the Military reduction in purchasing card spending between 2010 and 2013 (\$2.4 billion) accounts for 86% of the \$2.8 billion drop in total U.S. Government purchasing card spending (see Figure 4) and 53% of the \$4.5 billion drop in total commercial card spending (see Figure 1) in the 2010-2013 time frame. Military spending as a percentage of total purchasing card spending has also slowly dropped from 47% in 1998 to 42% in 2009. Thereafter, annual Military purchasing card spending as a percent of total purchasing card spending dropped more steeply, falling to 31% in 2013.

FIGURE 11
Civilian versus Military Purchasing Card Spending, 2000-2013

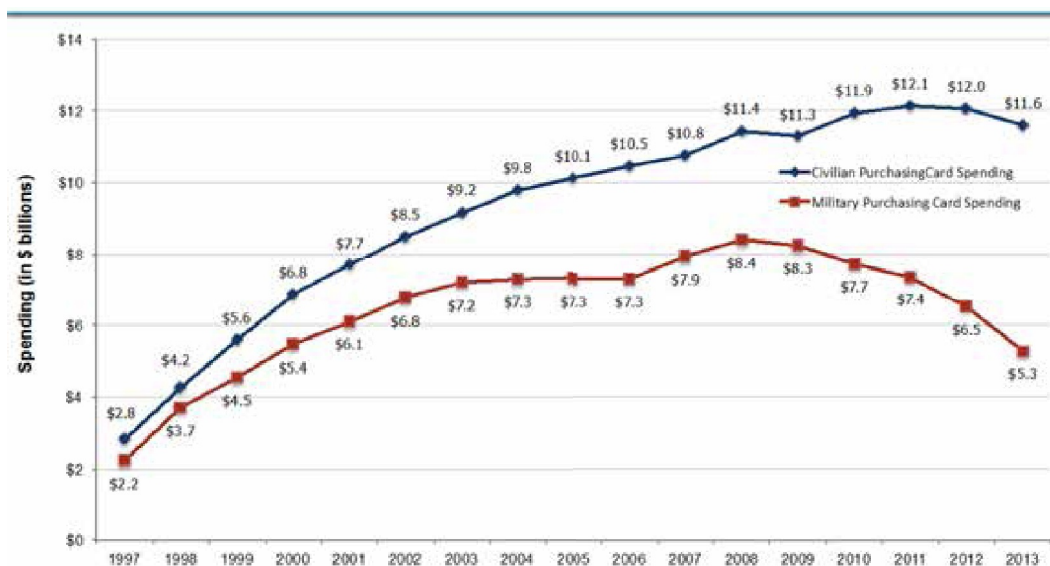
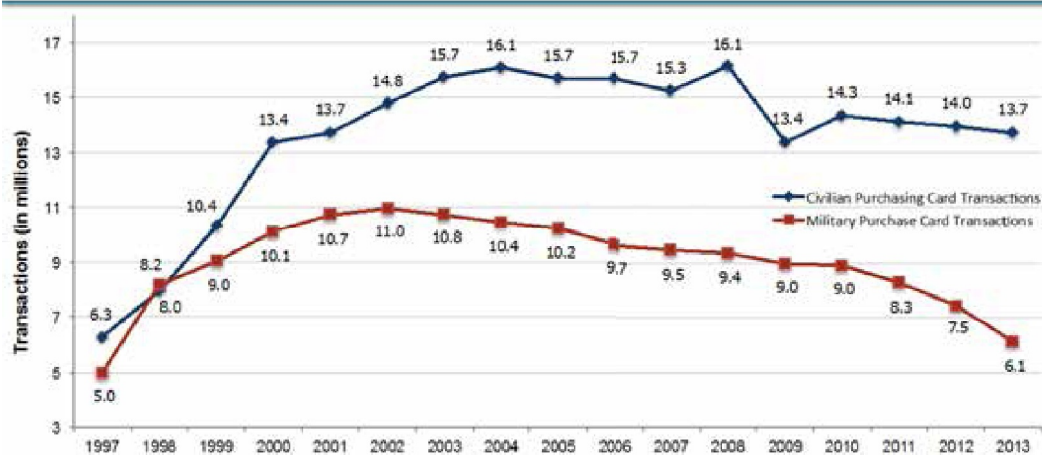


Figure 12 presents purchasing card transaction activity in the 1997-2013 time frame by Military and Civilian agencies. The Figure shows that annual Civilian purchasing card transactions increased from 6.3 million in 1997 to 16.1 million in 2004, remained relatively flat through 2008, dropped to 13.4 million in 2009, and then rose again to 13.7 million by 2013. By contrast, annual Military purchasing card transactions increased from 5.0 million in 1997 to 11.0 million in 2002, thereafter steadily decreasing to 6.1 million in 2013.

⁶ Military is defined as the Department of the Army, Navy, Air Force, and DOD-other. All other agencies are considered civilian in nature.

FIGURE 12
Civilian versus Military Purchasing Card Transactions, 2000-2013



Purchasing Card Distribution. Figure 13(a) presents the number of purchasing cardholders among Civilian and Military U.S. government agencies. The Figure shows that the number of Civilian purchasing cards rose from 150,000 to 233,000 in 2000, but fell sharply in 2002 to 189,000. After a brief uptick in 2003, the number of Civilian purchasing cards generally fell between 2003 and 2010 (where it landed at 174,000). It has since risen back to 202,000 in 2013, 13.3% off of its peak level in 2001. By contrast, the number of Military purchasing cards rose dramatically from 90,000 in 1997 to 235,000 in 2001, followed thereafter by an equally dramatic decline to 133,000 cards four years later in 2004. From 2004 to 2013 the number of purchasing cards declined by another 33,000 cards to 100,000, 57% lower than its peak level in 2000.

Figure 13(b) shows the changes in the percentage of the Civilian and Military employees provided with purchasing cards between 1997 and 2013. Civilian cards started at 6% in 1997 and increased to the high point of 11% in 2001. Thereafter, the percentage of Civilian employees given purchasing cards dropped to 9% by 2002 and has remained relatively constant since that time. The percentage of Military personnel given purchasing cards, by contrast, started at 6% in 1997 and increased to the high point of 14% in 1999, and then dropped significantly to 7% by 2004. Since 2004, the percentage of Military personnel given purchasing cards has gradually decreased to its 2013 level of 5%.

FIGURE 13(a)
Civilian versus Military Number of Purchasing Cards, 2000-2013

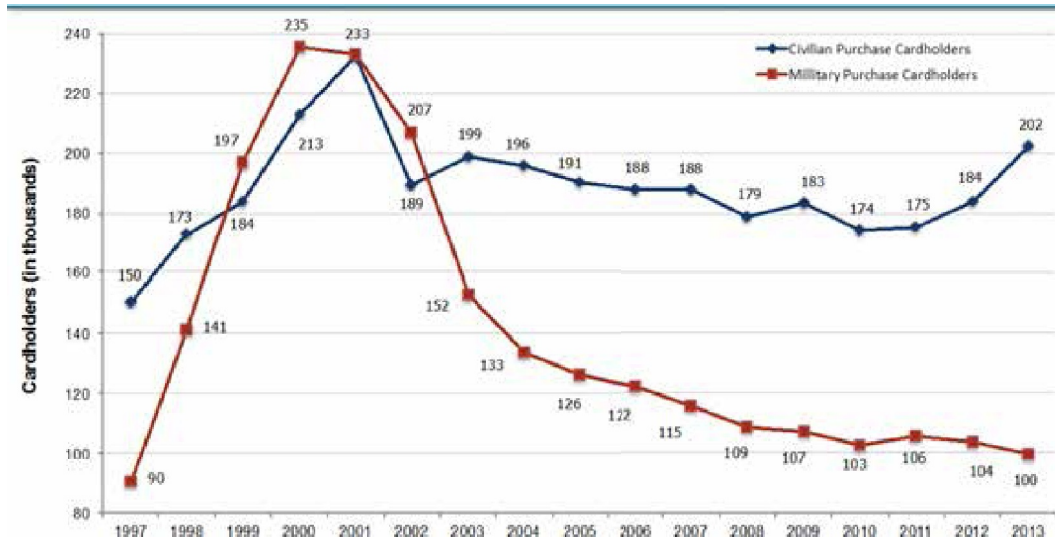
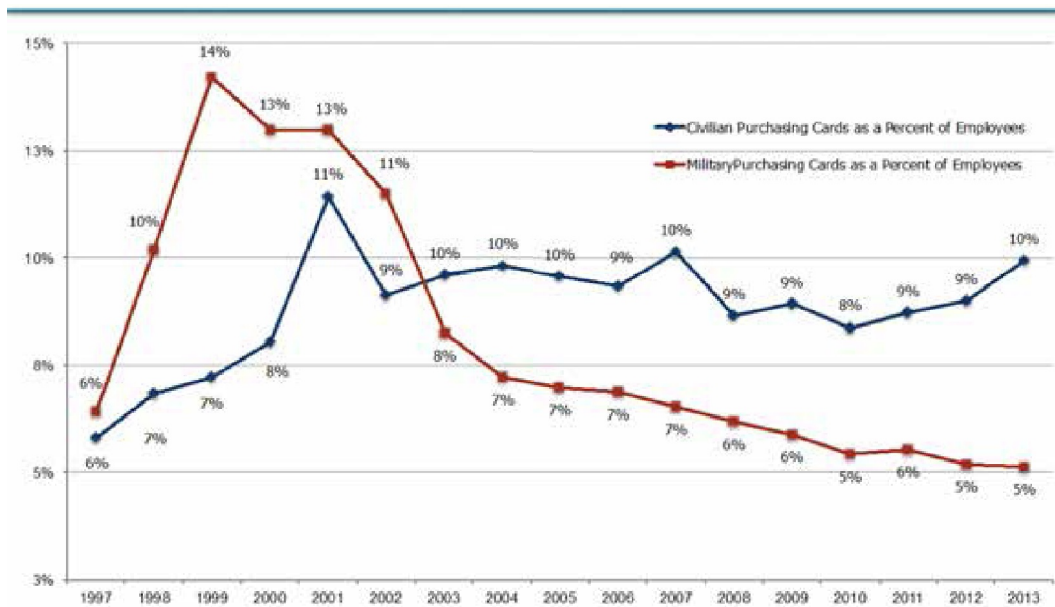
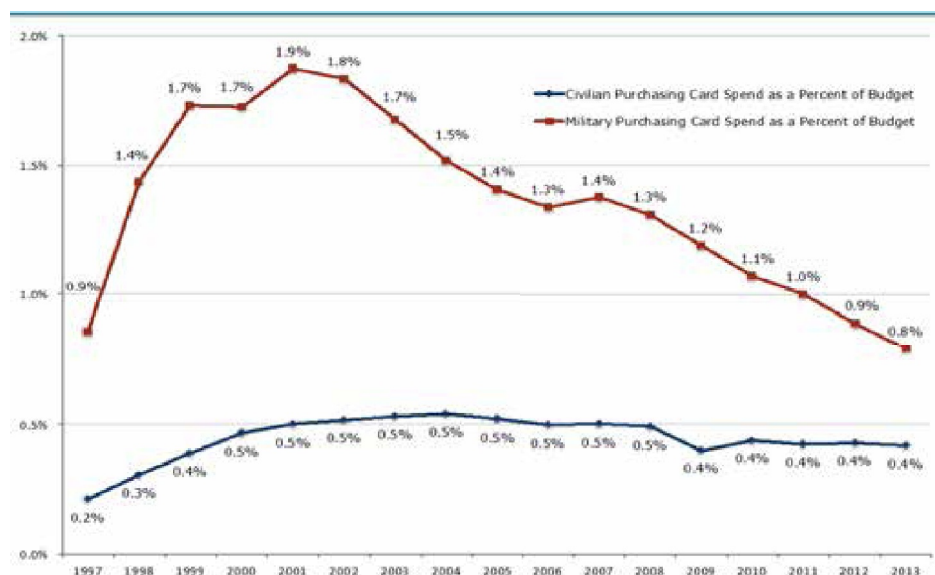


FIGURE 13(b)
Civilian versus Military Purchasing Cards as a Percent of Employees, 2000-2013



Purchasing Card Spending as a Percent of Budgeted Spending. Figure 14 presents Civilian and Military purchasing card spending as a percentage of their budget. The Figure indicates that Civilian purchasing card spending as a percent of their budget increased from 0.2% in 1997 to 0.5% in 2000 where it has remained relatively consistent, dropping to 0.4% in 2009 and staying at that level through 2013. By contrast, Military purchasing card spending as a percentage of budget has changed dramatically, increasing from 0.9% in 1997 to the high point of 1.9% in 2001, thereafter falling every year (except 2007) to its 2013 level of 0.8%.

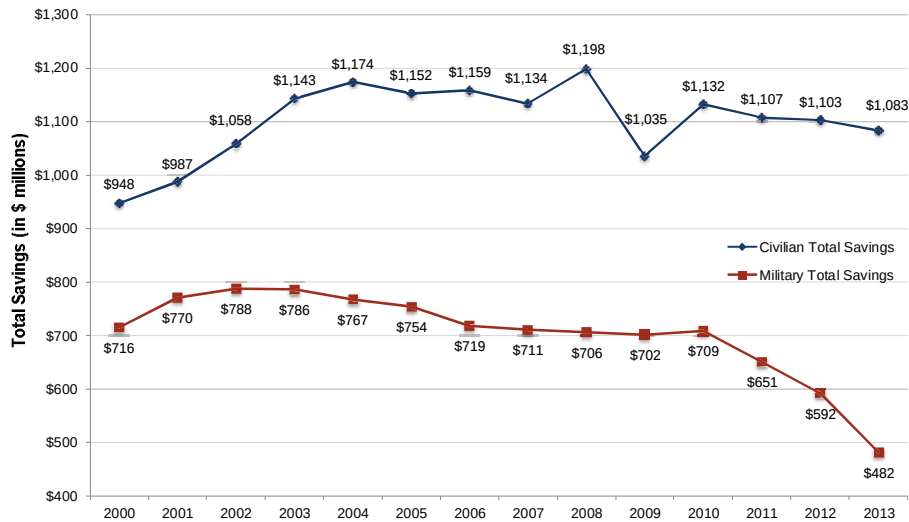
FIGURE 14
Civilian versus Military Purchasing Card Spend as a Percent of Budget, 2000-2013



Cost Savings from Purchasing Card Use. In a manner corresponding to spending, Figure 15 shows the estimated total cost savings (including card issuer rebates and administrative cost savings) to the U.S. Government by Military and Civilian agency use of the purchasing card.⁷ The annual cost savings to Civilian agencies increased from \$948 million in 2000 to \$1.198 billion in 2008, and has since dropped by 10% (to \$1.083 billion) in 2013. Annual cost savings attributable to Military agency use of purchasing cards remained relatively flat between 2000 and 2010. Military cost savings attributable to purchasing card use peaked in 2002 (at \$788 million), but have since dropped 39% to its 2013 level of \$482 million.

⁷ Card issuer rebate data for analysis of cost savings over time is available only for 2000-2013. Further, the percentage rebate obtained by the U.S. Government (in part of function of negotiations between the government and card issuers) has changed over time. The total card issuer rebate as a percentage total commercial card spending has risen from .175% in 2000 to 1.045% in 2013.

FIGURE 15
Total Military and Civilian Cost Savings Due to Purchasing Card Use, 2000-2013



In Summary. As shown in Table 1 below, the changes in purchasing card use by the Military agencies has been more volatile than that experienced by Civilian agencies over time, explaining how Military purchasing card spending as a percentage of total U.S. Government purchasing card spending has fallen from 47% in 1998 to 31% in 2013 (as shown in Figure 11(b) above). What would be more troubling to the U.S. Government (in terms of cost savings) is if the pattern set by the Military is now at the nascent stage of duplication among Civilian agencies.

TABLE 1
Summary of Differences in Military and Civilian Purchasing Card Statistics 1997-2013

	Military	Civilian
Annual purchasing card spending	Peaked in 2008 at \$8.4 billion, <i>falling by 37%</i> thereafter to \$5.3 billion in 2013.	Peaked in 2011 at \$12.1 billion, <i>falling by 4%</i> thereafter to \$11.6 billion in 2013.
Annual purchasing card transactions	Peaked in 2002 (at 11.0 million) and has since fallen steadily to 6.1 million in 2013 (<i>a 45% decline</i> in transactions).	Peaked in 2008 (at 16.1 million) and has since fallen to 13.7 million in 2013 (<i>a 15% decline</i> in transactions).
Number of cards	The number of purchasing cards given to Military employees has been <i>reduced by 57%</i> since its high point in 2000, falling from 235,000 (14% of employees) to 100,000 (5% of employees) in 2013.	The number of purchasing cards given to Civilian employees has been <i>reduced by 13%</i> since its high point in 2001, falling from 233,000 (11% of employees) to 202,000 (10% of employees) in 2013.
Purchasing card spending as a percent of budget	Rose to its high point in 2001 (1.9%) and has since <i>dropped by more than half</i> to its 2013 level of 0.8%.	Has <i>remained steady</i> between 0.4% and 0.5%.
Annual cost savings attributable to purchasing card use	Peaked in 2002 (at \$788 million), but has since <i>dropped 39%</i> to its 2013 level of \$482 million.	Peaked in 2008 (at \$1,198 million), but has since <i>dropped 10%</i> to its 2013 level of \$1,083 million

UNDERSTANDING CHANGES IN MILITARY PURCHASING CARD USE: THE COST OF CONTROL AND PROGRAM TRANSFORMATION

This section seeks to explore potential explanatory factors for the changes in purchasing card spending, transactions, and cost savings by the Military (and to a lesser extent, Civilian) agencies of the U.S. Government. To that end, we examine (a) alternative payment tools supplanting card use, (b) changes in Military budgets, (c) the history of policy and legal changes that might affect card program structure or performance, and (d) the changes in card distribution patterns that might influence agency use of purchasing cards.

Alternative Payment Models

Differing methods of purchasing goods within the Military may explain the changing patterns of purchasing card use. For example, “Wide Area Workflow” (WAWF) is a secure web-based system for electronic submission and processing of receiving reports and invoices in order to support the Department of Defense’s goal of moving to paperless acquisition processes (Defense Logistics Agency, 2013). WAWF provides the technology for government contractors and authorized DoD personnel to generate, capture, and process receipt and payment-related documentation. The 2009 Defense Authorization Act directed a plan to enable capture of acceptance data for items bought with a purchasing cards by modifying the WAWF to enable receiving reports for card transactions (Public Law 110-417, 2008). Because the system has not been previously compatible with purchasing cards, its ability to support purchasing card use could be or become a cause for a decrease in card use.

Another potential factor that could alter purchasing card is the Federal Strategic Sourcing Initiative (General Services Administration, 2014). The General Services Administration, through the FSSI, has been implementing strategic sourcing solutions for the government since 2005. The primary goals of FSSI are increase total cost savings, value, and socioeconomic participation by collaborating with agencies across the Federal government to strategically source goods and services widely needed across federal agencies (office supplies, delivery services, print management, telecommunications services). Greater use of FSSI will result in more bulk purchases of items that were previously under the micro-purchase threshold and purchased with a purchasing card.

Changes in Military Activities and Funding

Military activities and readiness may have had an impact on purchasing card use in the timeframe under review. The war in Iraq began in March of 2003 and ended in late 2011. The war in Afghanistan has been active since 2001 but is beginning a winding down process as of this writing.

In 2013, the Congress agreed to “sequester” discretionary spending levels. The sequester began in March of 2013 and could have significantly influence the more recent decrease in purchasing card spending in the Military (since defense is the largest component of discretionary spending by the U.S. government and is expected to absorb a 10% budget reduction). In 2014, the Military is expected to absorb a \$52 billion cut from its budget.

History of Policy Changes

A variety of audit findings, laws, and policy changes have influenced the growth of purchasing card spending since its initial use in 1982. We separate the chronology by Military and Civilian agencies into four time periods and discuss each time period below.

The Developmental Years. Palmer and Gupta (2007) summarized the developmental years of purchasing card use in the U.S government. Briefly, the government's interest in purchase cards began in 1982 as a procurement reform initiative embodied in Executive Order 12,352 (Exec. Order No. 12,352, 1982). The Executive Order called for federal government agencies to reduce administrative costs connected with procurement and that purchase cards be implemented to cut the cost of buying goods and services. Three years later, the Department of Commerce initiated a pilot program to test the use of a credit card program from the Office of Federal Procurement Policy (Poole and Welch, 2002). The pilot program results indicated that purchasing cards were a more efficient way to buy goods and services that enabled end-users to acquire items directly from vendors instead of running the gauntlet of supporting procurement offices. The analysis of pilot program results indicated that instances of card abuse were negligible and, in some circumstances, purchase cards offered the potential to implement controls in areas where sufficient controls had not previously existed. As a consequence of the positive results of the pilot program, the GSA introduced a government-wide purchase card system in 1989.

Despite the potential for increased productivity, agencies resisted large scale use of purchasing cards in the early years (McHarg, 2002). Purchasing card use got a boost in 1993 when the Clinton administration launched the National Partnership for Reinventing Government. As part of this initiative, Vice President Gore led a review which resulted in a report that recommended that all federal agencies increase the use of the purchase cards (Gore, 1993).

Responding to the recommendation, the OFPP took the lead in advancing card use through a “pledge” program among members of the Procurement Executives Association (Poole and Welch, 2002).⁸ The Procurement Executives Association asked members to volunteer managers with the ability to authorize employees to buy small-dollar items directly and to double card spending over a one year period.⁹ By September 1994, the Procurement Executives Association presented a report to the Director of the OMB, which read, in part:

“by the end of the tenth month (after signing the pledge), [our agencies] had increased purchase card usage by 119%, making 82,000 purchases per month worth almost \$19,000,000 Since starting this project, the ten agencies have made 750,000 purchases faster, better and at less cost with the card. Plus, they report virtually no waste or abuse.”¹⁰

⁸ The Procurement Executives Association was a group of senior procurement executives from the U.S. Departments of Commerce, Treasury, Interior, Health and Human Services, Transportation, Energy, State, and GSA.

⁹ Later, other agencies, including the Office of Personnel Management (OPM), the Federal Emergency Management Agency (FEMA), the Drug Enforcement Agency (DEA), and Federal Prison Industries, joined in the effort. An interagency work group, the Purchase Card Council, was chartered to lead the effort under the Treasury Department.

¹⁰ Procurement Executives Association. 1994. *The Government Purchase Card*. Report to Alice Rivlin, Director, OMB. September, 2004.

1994-2000: Rapid Growth and Expansion. The pace of change in the use of purchase cards accelerated when Congress passed the Federal Acquisition Streamlining Act (FASA) of 1994 (FASA 1994). FASA encouraged the use of purchase cards by removing certain restrictions and shifting micro-purchase (purchase transactions of less than \$2,500 at that time) authority to personnel other than government procurement professionals. Specifically, FASA reduced restrictions that required purchases from small businesses when certain conditions and competition standards were met and raised the Simplified Acquisition Threshold from \$25,000 to \$100,000. Thus, after FASA, micro-purchases could be awarded non-competitively (and acquired via purchase cards) if the item being purchased was a non-recurring purchase of a competitively priced off-the-shelf item.¹¹ As part of FASA implementation, an interim Federal Acquisition Regulation was issued in December 1994 (Federal Acquisition Circular, 1994) that identified the purchase card as the *preferred* method for micro-purchases and enabled their use for payments above the \$2,500 threshold.

An Executive order (Executive Order 12,931, 1994) issued late in 1994 further promoted the opportunities made available by FASA by instructing agencies to take maximum advantage of the new micro-purchase authority by delegating the authority, to the maximum extent practicable, to the offices that would be using the supplies or services to be purchased. The order focused on micro-purchases partly because these purchases account for the bulk of government transactions (but only a fraction of spending), do not require extensive procurement knowledge, and are often available for immediate delivery. The Executive Order also promoted spending by front-line employees, eliminating the need for contracting officials to be involved in purchases where their expertise was not required.

Military agencies were particularly supportive of purchasing card programs. In a 1997 memo to the Military agencies, Under Secretary of Defense John Hamre stated that the Army Audit agency had found that, when compared to using purchase orders, the use of purchasing cards provided a savings of \$92 per transaction (Hamre, 1997). Further, Hamre stated that purchasing cards are “now considered by the Army organizations as the preferred method of obtaining goods and services valued at or less than \$2,500.” Within two years of the letter, Military purchasing card spending doubled (going from \$2.2 billion in 1997 to \$4.5 billion in 1999). By the year 2000, Military agencies used 235,465 purchasing cards to pay for \$5.4 billion of goods and services while Civilian agencies used 212,705 purchasing cards to pay for \$6.8 billion of goods and services.

2001-2002: Troubling Audit Findings Focus on Level of Card Distribution. A series of General Accounting Office (GAO) reports beginning in 2001 were to have a strong impact on the purchasing card program configuration and use for the next twelve years. In 2001, a GAO audit of the Navy card program (U.S. GOA, 2001a) reported significant breakdowns of internal control over purchasing card use. These breakdowns included a lack of:

- key policies regarding the issuance of purchase cards, establishing credit limits, and minimizing the federal government’s financial exposure,
- employee training on card use policy,
- appropriate purchase documentation related to card purchases, and
- internal review to ensure that internal controls were being effectively implemented.

¹¹ Notwithstanding the relaxation in procurement requirements, employees are required to “equitably distribute [purchases not greater than \$2,500] among qualified suppliers (41 U.S.C. §428(d)(2004).

The weak control environment led to many cases of alleged fraud and abuse. The GAO connected many of these internal control issues to the high number of cards, recommending that the two Navy commands under review “establish specific policies and strategies governing *the number* of purchase cards to be issued with a focus on minimizing the number of cardholders” (p. 5, emphasis added) and that they “develop criteria for identifying employees eligible for the privilege of cardholder status” (p. 5).

Due to the concerns raised in the Navy audit, the scopes of a subsequent Army (U.S. GAO 2002a) and Air Force (U.S. GAO, 2002b) audits in 2002 were expanded. The GAO audit of the Army found that the purchasing card program had significant benefits, but a weak overall control environment and breakdowns in key internal control activities left it vulnerable to fraud, improper use, and abuse. As with the earlier Navy audit, the GAO pointed to the level of card distribution as a causal factor, stating that the audit failures “...illustrate that the Army as a whole *may also need to reduce its active cards*” (p. 22, emphasis added) and that the Army “...can reduce the government’s exposure to fraud, waste, and abuse by monitoring cardholder account activity and determining *whether issued cards continue to be required.*” (p. 20, emphasis added).

The GAO audit of the Air Force held to the same pattern as the Navy and Army, with weaknesses in the control environment and breakdowns in key controls. Among its recommendations, the GAO also called on the Air Force to change its card distribution policy, specifically recommending that it:

- “establish specific policies and strategies governing *the number of purchase cards* to be issued with a focus on minimizing the number of cardholders” (p. 54, emphasis added),
- “direct all ... agency program coordinators to review purchase card use with a view toward *eliminating unneeded purchase card accounts*” (p. 54, emphasis added),
- “eliminate purchase cards used to facilitate line item accounting.” (p. 54),
- “deactivate purchase card accounts of alternate cardholders and approving officials when primary cardholders and approving officials are available.” (p. 55), and
- “require cardholders and/or approving officials to reimburse the government for any unauthorized or erroneous purchase card transactions that were not disputed.” (p. 55)

The GAO findings associated with Military agencies engendered significant political criticism and drove the OMB to issue a memorandum in 2002 to executive branch agencies stating that card misuse identified by the GAO and Inspectors General was unacceptable and required prompt remedial action if the purchase card programs were to continue (Office of Management and Budget, 2002).¹² The memo requested that each agency review the adequacy of internal controls used to manage risk associated with purchase card programs, including an examination of the number of cards issued at each agency. The OMB recommended that agencies deactivate all purchase cards at that time and reactivate them selectively for a smaller number of cardholders.

¹² The problems in Military agencies were so acute that Senator Charles Grassley (R- Iowa) concluded that the Department of Defense’s (DoD) purchase card program did little more than “create an army of spenders. With a DoD credit card in hand, they have almost unlimited authority to spend money. There are no controls, no responsibilities, and no accountability . . . Pentagon credit cards are being taken on a shopping spree, and taxpayers are footing the bill.” Senator Grassley further asserted that charge cards had given the Pentagon a “short-cut to the cash pile” and that Pentagon leaders were “giving everyone a big scoop shovel and telling them to rip into the national money sack at both ends,” found in *The Use and Abuse of Government Purchase Cards: Is Anyone Watching?: Hearing Before the H. Comm. on Gov’t Reform, 107th Cong. 3 (2001) (statement of Sen. Grassley).*

Congress also responded legislatively to the unflattering audit outcomes of Military agencies. The Bob Stump National Defense Authorization Act for Fiscal Year 2003 (2003) required the DoD to take actions to improve the management of the purchase card program. Specifically, the Act required the DoD to limit the number of purchase cards, train purchase card officials, monitor purchase card activity, review purchase card activity to better aggregate purchases and obtain lower prices, establish guidelines and procedures to discipline cardholders who misused the purchase card, and assess the credit worthiness of cardholders. The 2003 DOD Appropriations Bill was more specific—requiring the DOD to limit the combined number of purchasing and travel cards to 1.5 million for FY-03.

2003—2007: On-Going Evaluation of Purchasing Card Programs. The 2003-2007 timeframe was a period of on-going evaluation of purchasing cards. In this time frame, the GAO engaged in two major initiatives. First, the GAO followed up on the Military audits of 2001 and 2002. Second, they performed initial audits of purchasing card programs at the FAA (GAO, 2003a), HUD (GAO, 2003b), Forest Services (GAO, 2003c), VHA (GAO, 2004), and the DHS (GAO, 2006).

In December of 2003, the GAO completed a review of the actions taken by the Department of Defense to implement provisions included in the Bob Stump National Defense Authorization Act as well as evaluate the status of the response to recommendations and disciplinary actions taken against individuals identified in the prior GAO report (U.S. GAO, 2003a). In this second audit review, the GAO reported that the DOD and the Military services had taken strong actions to improve the controls over the purchase card program and had responded to nearly all of 109 recommendations made in its four reports on the purchase card program. The GAO noted that the DOD had issued key policy giving guidance to field activities to (a) perform periodic reviews of all purchase card accounts to reestablish a continuing bona fide need for each card account, (b) cancelled accounts that were no longer needed, and (c) devised additional controls over infrequently used accounts to protect the government from potential cardholder or outside fraudulent use. These policy, the GAO observed, resulted in a substantial reduction in the number of purchasing cards in Military agencies – going from 239,000 in 2001 to 145,000 in 2003 (as shown in Figure 13(a) above).

Audits of Civilian agencies by the GAO in the 2003-2007 time frame resulted in many similar concerns over internal control but no recommendation to significantly change card distribution policies. As with Military agencies, the GAO found remarked on Civilian agency purchases of a questionable nature, the proper accounting for asset acquisitions made with the purchasing card, split purchases, and lack of timely reconciliation by cardholders. Some GAO issues--non-closure of accounts, use of card by someone other than the authorized cardholder, inadequate segregation of duties, and disputed purchases not being tracked-- occurred slightly more frequently in Civilian agencies than in the Military. Other issues--problems related to lack of training, excessive span of control, purchases made from "non-preferential" sources, allocation of inadequate resources to manage and monitor program, and improper purchases--were found slightly more frequently in Military agencies. In spite of the similar results between the Civilian and Military agencies, the GAO did not recommend that Civilian agencies reduce the number of cards. Nevertheless, apparently taking their cue from earlier GAO recommendations to the Military, the number of purchasing cards issued at Civilian agencies did drop from 213,000 in 2000 to 196,000 in 2004, a decline far less precipitous than that undertaken by their Military counterparts.

Going forward, the GAO declared its focus would turn to the establishment of procedures to enhance accountability for purchase card spending, including the monitoring the results of

purchase card reviews conducted by the agencies, tracking whether agencies were consistently applying disciplinary guidelines to those who made and/or authorized improper or abusive acquisitions, and notifying the appropriate officials if disciplinary guidelines were not being consistently applied.

2008-2013: Tightening Control over Purchasing Cards. Given the range of findings over the preceding seven years, the GAO was asked to analyze government-wide purchasing card transactions in 2008 to determine whether internal control weaknesses existed in the government purchase card program and, if so, to identify examples of fraudulent, improper, and abusive activity (U.S GAO, 2008). To examine these issues, the GAO extracted samples from two populations—one covering the population of purchasing card transactions over \$50 from July 1, 2005 through June 30, 2006 (over 16 million transactions totaling almost \$14 billion) and a second of about 600,000 purchase card acquisitions (totaling nearly \$6 billion) over the micro-purchase threshold during the same time period.¹³ From these two populations, two samples of 96 transactions each were extracted and examined for (a) proper authorization¹⁴ and (2) independent receipt and acceptance.¹⁵ Additionally, the GAO drew a non-representative sample of 550 transactions “data mined” from purchasing card activity from July 1, 2005 to September 30, 2006. The transactions were extracted because their “profile” matched that of a purchase of “highly pilferable” goods or services (e.g., the purchase was from a vendor or a vendor in a merchant category that offered goods or services found on restricted/prohibited lists, personal in nature, or of questionable government need).

In summarizing their analysis, the GAO recognized that purchasing cards could play a large part in adding to efficiency to government operations by reducing the amount administrative time required to process a purchase and increasing flexibility to meet a variety of government needs. If used properly purchasing cards can be a very effective tool to save time and money. However, since 2001 the GAO had found a number of agencies that demonstrated that when card programs are not properly controlled and managed, the use of purchasing cards results in fraud, waste, and abuse. Their 2008 analysis also showed that the government-wide purchasing card program overall internal control “failure rate” to be unacceptably high. An estimated 41% of all transactions were not properly authorized, or had no evidence that the goods or services were received by an independent third party.¹⁶ For purchases over the micro-purchase threshold (\$2,500 at the time) an estimated 48% of transactions did not have proper authorization or

¹³ The second sample was selected because of additional requirements associated with purchases over the micro-purchase threshold and the higher dollar amount associated with these transactions. Specifically, while only 3% of government-wide purchase card transactions from July 1, 2005 to June 30, 2006 were over the micro-purchase threshold, they accounted for 44% of the dollars spent during that period.

¹⁴ To determine if a transaction was properly authorized, the GAO review documentation to ascertain if an individual other than the cardholder was involved in the approval of the purchase. Such documentation might include (in the case of under \$2,500 purchases) purchase requests from responsible officials, requisitions, e-mails, or other documents of government need. Transactions exceeding \$2,500 required prior purchase authorization, such as a contract, a requisition, or other approval document. Additionally, the transaction had to comply with the Javits-Wagner-O'Day Act for sourcing.

¹⁵ To determine whether goods were independently received and accepted, the GAO compared the quantity, price, and item descriptions on the vendor invoice and shipping receipt to the purchase requisition to verify that the items received and paid for were actually the items ordered. In addition, they sought evidence that a person other than the cardholder was involved in the receipt of the goods or services purchased. Independent receipt and acceptance existed if the vendor invoice, shipping documents, and receipt materially matched the transaction data, and if the signature or initial of someone other than the cardholder was on the sales invoice, packing slip, bill of lading, or any other shipping or receiving document indicating receipt;

¹⁶ The GAO noted that the 41% rate was actually a significant improvement of earlier audits from 2002 to 2006 (some of which had 85% appropriate authorization failure rate and 60% independent receipt failure rate).

independent receipt and acceptance. It was also found that agencies could not provide evidence showing possession or otherwise account for a significant amount of pilferable items.¹⁷

The GAO made thirteen recommendations to improve internal control over the government purchasing card program, and to strengthen monitoring and oversight of purchasing cards. Of these recommendations, three were clearly directed at purchasing card programs. First, the GAO recommended enhanced financial accountability from agency employees. Specifically, the GAO recommended that cardholders, approving officials, or both should reimburse the government for any unauthorized or erroneous purchase card transactions that were not disputed. Further, if and when an official directed a cardholder to purchase a personal item for that official, and management later determines that the purchase was improper, the official who requested the item should reimburse the government for the cost of the improper item.

Second, to address the internal control failure rates, the GAO recommended that the General Services Administration provide agencies guidance on how cardholders can document independent receipt and acceptance of items obtained with a purchase card. Specifically, the GAO called on the GSA to promulgate guidelines to encourage agencies to (a) identify a “de minimus” purchasing card purchase amount that would not be subject to internal control testing for independent receipt or acceptance and (b) indicate that the approving official or supervisor took the necessary steps to ensure that items purchased were actually received. In response to the recommendations, the GSA argued that it was not within the scope of its authority to issue guidance of this nature.

Third, the GAO recommended that the GSA provide agencies guidance regarding what should be considered sensitive and pilferable property. Pilferable property (i.e., iPods, digital cameras, computers) is easily converted to personal use and the GAO recommended that the GSA remind agencies that purchases of such nature should be subject to property accountability controls (e.g., tagging and logging equipment in the property records) and that property accountability officers promptly record sensitive and pilferable property that is obtained with a purchasing card.

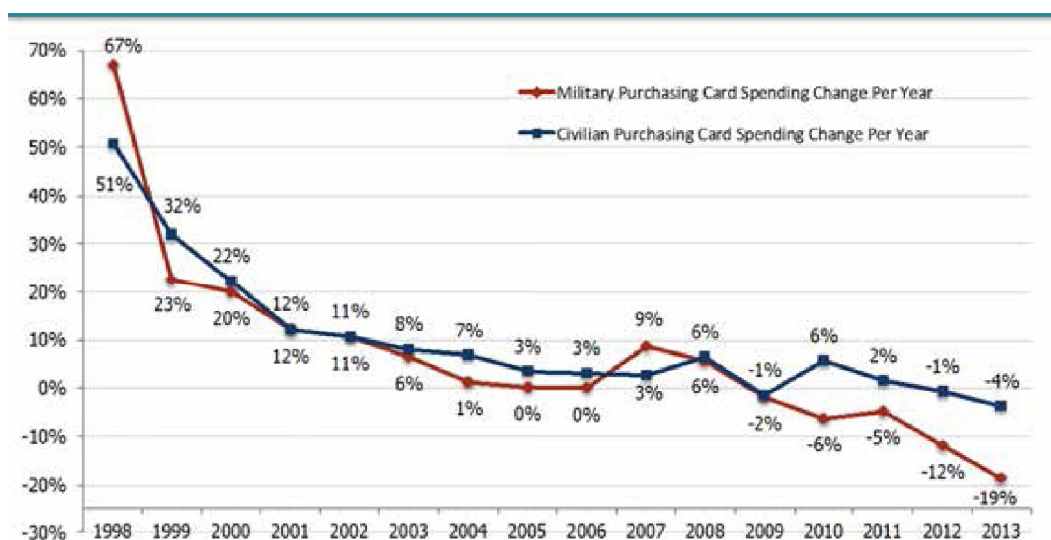
The Military was an early adopter of GAO recommendations, attaching financial liability for purchasing card spending not only on to cardholder but also to departmental accountable officials and certifying officials. A memo from the department of the Under Secretary of Defense on November 7, 2008 stated, “a certifying officer is pecuniarily liable for illegal, improper or incorrect payments resulting from improper certification” (Under Secretary of Defense, 2008). The memo also stated that “accountable officials may be held pecuniarily liable for erroneous payments resulting from their fault or negligence...” Military agency implementation of enhanced accountability may have been a driving factor in the increased decline since 2009 of (a) purchasing card spending (Figure 11(a)), (b) purchasing card spending as a percentage of budgeted spending (Figure 14), (c) the percentage of Military personnel provided with purchasing cards (Figure 13(b)), and (d) purchasing card cost savings as a percentage of budgeted spending (Figure 15). Declines of this nature have not been experienced by Civilian agencies.

¹⁷ Specifically, the results of the GAO analysis indicated that estimated 15% of transactions did not have appropriate authorization and for 34% of transaction independent receipt and acceptance could not be verified. We believe that these failure rates to be misleading. Purchasing cards are generally used for low-dollar purchases where independent receipt is not feasible (an employee purchases a good at a hardware store while in the field) or economically irrational. We also disagree with the measurement of proper authorization. By its nature, when an agency provides an employee with a purchasing card it is “pre-approving” their purchases with that card. The technology of card will control much of their use of it (per transaction and monthly spending limits, restricted merchant category codes, etc.). If an employee must go through all the same steps to get approval from a supervisor it reduces the benefits to be derived and purpose of issuing the employee a card.

In January 2009, the OMB drafted a memo in response to the recommendations made by the GAO. The OMB memo discussed four changes made to their Circular A-123 guidance, including (a) raising the micro-purchase threshold to \$3,000, (b) expanding descriptions for erroneous and improper purchases and the practices for minimizing such purchases, and (c) adding a requirement for charge cardholders, approving officials, or both to reimburse the government for any unauthorized transactions or erroneous purchase card transactions that were not disputed, and (d) guidance on disciplinary actions for fraud and other abuse of a government charge card

GAO recommendations with respect to employee financial accountability (and the recovering costs for erroneous or improper purchases) on purchases cards found their way into Congressional discussions and became law in October of 2012 when President Obama signed the Government Charge Card Abuse Prevention Act (Public Law 112-94, 2011). The Act, which is consistent with the existing guidance in OMB Circular No. A-123 (OMB, 2014), addresses the requirement of recovering costs for erroneous or improper purchases on purchasing cards.¹⁸ Since the Act became law, Figure 16 shows that purchasing card spending by Civilian agencies has shrunk by similar increments as experienced by Military agencies when they began implementing their enhanced accountability in 2009.

FIGURE 16
Military and Civilian Annual Increase in Purchasing Card Spending, 2000-2013



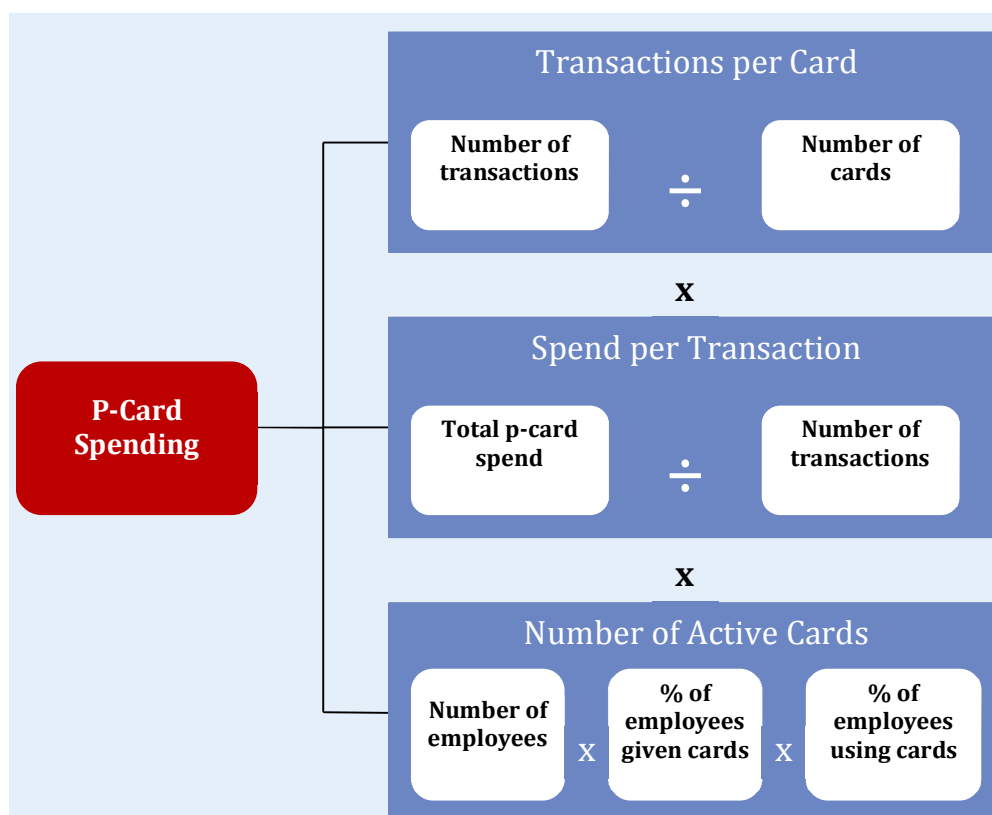
Despite the heightened sensitivity to control issues and the criticisms of overly liberal distribution of purchasing cards, some governmental reports have strongly supported expanded purchasing card use. In 2004, the GAO (U.S. GAO 2004(b)) remarked on how agencies generally did not take advantage of opportunities to obtain more favorable prices on purchase card buys with frequently used vendors and that “automating” the discounts through card technology could save hundreds of millions of dollars. In 2013, the VA Office of the Inspector General (2013) issued a report that chided the VHA for its failure to use maximize purchasing card use and “...miss[ing] opportunities to decrease procurement processing costs by about \$20 million and obtain additional rebates of about \$4 million.” (p. 2).

¹⁸ Such requirements relating to employee misuse of government travel cards have already been established.

Decentralized to Centralized “Transformation Failure”

As shown in Figure 17, three key performance measures form the framework necessary to understand Government purchasing card spending. They are the number of active cards, card transaction activity, and average transaction (or “ticket”) size. The multiplication of these elements yields monthly purchasing card spending and provides insight into card program performance. The framework illustrates how agencies can make trade-offs to improve their purchasing card program. The key performance measures are derived from intermediate calculations which, in turn, are composed of basic organizational data. For example, the number of active cards in an organization is a function of the number of employees, the percent of employees given a purchasing card, and of those employees given a purchasing card, the percent who use the card to acquire goods or services. Thus, increases in the raw number of active cards can be accomplished by either giving a larger percentage of employees a purchasing card or by taking measures to insure that employees actually use the purchasing cards already in their possession. Similarly, the number of transactions per card and the average transaction amount can be influenced by restrictions on the types of goods and services that may be purchased, the vendor from whom goods and services may be purchased, and the transaction dollar amount of a purchase.

FIGURE 17
A FRAMEWORK FOR UNDERSTANDING PURCHASING CARD SPENDING



The framework provides insight into why successful agency purchasing card programs may differ in their approach to card program management. Because the key performance measures are multiplicative, agencies make trade-offs to achieve their purchasing card spending goals. For example, an organization can have a relatively large base of cardholders who individually engage in a modest number of transactions. Collectively, this can add up to a high dollar value of organizational spending. We call this the *decentralized card distribution* model. This model maximizes the potential for work reduction in Purchasing and moves low dollar purchasing out of the Purchasing function. By contrast, an agency can give cards to a relatively small number of employees. In this case, the agency may distribute fewer cards, but each card is associated with a high number of transactions and/or high average ticket amounts that ultimately increase overall organizational spending. We call this a *centralized card distribution* model.

Though in theory both models can generate similar card program spending, the evidence indicates that the Military agencies have not made an effective transition from a decentralized to a centralized purchasing card program model. The first row of Table 3 shows the actual Military (and Civilian) number of cards, spending per card, transactions per card, average transaction amount, and total purchasing card spending in 2001. The rightmost column of the second row of Table 3 shows the purchasing card spending that would have occurred in 2013 had the Military (Civilian) agencies spent at the 2001 level of purchasing card spending as a percent of agency budget. The second row also presents the actual number of Military (Civilian) purchasing cards in 2013, a 2001 average transaction amount (CPI-adjusted to the 2013 level), and calculated amounts for annual spending per purchasing card and the annual number of purchasing card transactions per card.

Table 2 shows that Military agencies have conceded cost savings by failing to direct the same level of spending to a shrinking number of purchasing cards. The Table shows that if the Military had captured 1.87% of its budget on purchasing cards (as it had it 2001), then 2013 purchasing card spending would have been \$11.5 billion instead of the \$5.3 billion it actually spent on purchasing cards (a \$6.2 billion transformation failure). If the Military had shrunk the number of cards but maintained its 2001 level of spending, it would have spent (on average) \$115,193 per year on each card instead of the \$52,930 per card it actually experienced in 2013. Further, if the Military had shrunk the number of cards but maintained its 2001 level of spending, it would have conducted (on average) 153.1 transactions per year on each card instead of the 61.1 annual transactions per card actually experienced in 2013. These differences are offset by a modestly higher average transaction amount, to wit: a CPI-adjusted average transaction amount in 2013 would be \$752.28, but Military agencies actually report a higher average transaction amount in 2013 (\$865.60), indicating that the reduction in cards is pushing up the amount of goods purchased when the cards are used.

Civilian agencies, by contrast, have maintained more of their cost savings despite changes in their level of purchasing card distribution. Table 2 shows that if the Civilian agencies had captured 0.5% of their budget on purchasing cards (as they had in 2001), then 2013 purchasing card spending would have been \$13.9 billion instead of the \$11.6 billion actually spent on purchasing cards (a \$2.3 billion difference). If the Civilian agencies had shrunk the number of cards but maintained their 2001 level of spending, it would have spent (on average) \$68,914 per year on each card instead of the \$57,369 per card it actually experienced in 2013. Further, if the Civilian agencies had shrunk the number of cards but maintained their 2001 level of spending, it would have conducted (on average) 93.5 transactions per year on each card instead of the 68 annual transactions per card actually experienced in 2013. As with the Military, Civilian agencies report a 2013 average transaction amount (\$844.02) that is higher than a CPI-adjusted average

transaction amount of \$737.32, indicating that the reduction in the number of cards is pushing up the amount of goods purchased when cards are used.

In sum, Table 2 indicates that Military agencies have had less success at maintaining purchasing card spending in light of reductions in the number of cards than their Civilian counterparts. For the Military to generate the same purchasing card spending as a percent of their budget as in 2001, their 2013 cardholders would need to more than double their current annual spending (going from the current \$52,930 to over \$115,000). By contrast, for Civilian agencies to generate the same purchasing card spending as a percent of budget as in 2001, their 2013 cardholders would only need to increase their current annual spending by only 20% (going from \$57,369 to \$68,914).

TABLE 2
Projected versus Actual Military and Civilian Purchasing Card Spending Based on 2001
Purchasing Card Spending as a Percent of Budget and 2013 Actual Purchasing Card
Distribution

	Number of Cards	Spend Per Card	Transactions Per Card	Average Transaction	Total Spend
Military Agencies					
2001 Actual	232,928	\$26,230.16	46.0	\$570.43	\$6,109,745,552
2013 Projection based on 2001 P-card Spending as a Percent of Budget, the 2013 Actual Number of P-cards, and a CPI-adjusted Average Transaction Amount*	99,754	\$115,193.45	153.1	\$752.28	\$11,490,978,130
2013 Actual	99,754	\$52,930.40	61.1	\$865.60	\$5,280,006,248
Military Transformation Failure		(\$62,263.04)	(92.0)	\$113.32	(\$6,210,971,882)
Civilian Agencies					
2001 Actual	232,505	\$33,022.61	59.1	\$559.08	\$7,677,923,124
2013 Projection based on 2001 P-card Spending as a Percent of Budget, the 2013 Actual Number of P-cards, and a CPI-adjusted Average Transaction Amount [#]	202,172	\$68,913.99	93.5	\$737.32	\$13,932,496,127
2013 Actual	202,172	\$57,368.77	68.0	\$844.02	\$11,598,374,012
Civilian Transformation Failure		(\$11,545.22)	(25.5)	\$106.70	(\$2,334,122,116)

* Projection is of Military spending is calculated based on a 1.87% of the budget as was the case in 2001. The number of cards is based on total actual cardholders in 2013. Average transaction is based on 2001 figure adjusted for changes in the CPI.

[#] Projection is of Civilian spending is calculated based on a 0.50% of the budget as was the case in 2001. The number of cards is based on total actual cardholders in 2013. Average transaction is based on 2001 figure adjusted for changes in the CPI.

CONCLUSION

The U.S. Government and its agencies acknowledge significant administrative cost savings and cash rebates based on its spending on commercial cards. However, since 2008, commercial card spending (both in dollars and as a percentage of budgeted spending) has been lower than the 2008 level and dropped sharply in 2012 and 2013. An analysis of U.S. Government commercial card spending indicates that the changing patterns of purchasing card spending are primarily responsible for the overall decline in commercial card spending.

U.S. Government spending on purchasing cards reached its zenith in 2008 (at \$19.8 billion) and has to \$16.9 billion in 2013. The highest number of annual purchasing card transactions (26.5 million) harks back to 2004, 6.7 million more than the 16.9 million transactions paid with purchasing cards in 2013. The number of purchasing card distributed throughout U.S. Government agencies has fallen from 465,000 in 2001 to 302,000 in 2013. Even among employees given purchasing cards, the average number of transactions for which they are used in a year has fallen from 89 in 2008 to 65.7 in 2013.

An examination separating Military and Civilian agency purchasing card use provides some insight into the changing patterns of purchasing card use across U.S. Government agencies. Our analysis shows that Civilian purchasing card spending increased from \$2.8 billion in 1997 to \$12.1 billion in 2011, but dropped by 4% (\$0.5 billion) to \$11.6 billion in 2013. By contrast, Military purchasing card spending increased from \$2.2 billion in 1997 to the high point of \$8.4 billion in 2008, but has since decreased by 37% (\$3.1 billion) to \$5.3 billion in 2013. In fact, the Military reduction in purchasing card spending between 2010 and 2013 (\$2.4 billion) accounts for 86% of the \$2.8 billion drop in total U.S. Government purchasing card spending and 53% of the \$4.5 billion drop in total commercial card spending in the 2010-2013 time frame. Military agency transactions with purchasing cards have fallen steadily from a zenith of 11 million in 2002 to 6.1 million in 2013. Card distribution in the Military has been cut by more than half since 2001.

A historical analysis of Governmental card use indicates that several factors may have influenced the trends revealed in the record of Military purchasing card spending. First, Military purchasing card programs grew rapidly in the early years with the support of top leadership. By 2001, Military agencies had distributed purchasing cards to 13% of their employee base and paid for 1.9% of their budgeted purchases with the purchasing card, figures that far outpaced their Civilian counterparts (11%, 0.5%). GAO audit recommendations in 2001 to the Navy and in 2002 to Army and Air Force to reduce the number of purchasing cards had a notably negative short and long-term impact on the Military purchasing card program. Military spending as a percent of budget fell from 1.9% in 2001 to 1.3% in 2005 where it leveled off through 2008. In short, the Military was not able to transform its successful decentralized purchasing card model to a more centralized edition -- as the number of purchasing cards fell, the use of the remaining cards did not expand to support previous levels of spending.

A second wave of decline occurred in 2009 when the Military heightened financial accountability for purchasing card spending. Within the new control structure, officers may be held financially liable for illegal, improper or incorrect payments resulting from their improper certification of subordinate cardholder spending. One can argue that this control is not overly onerous. However, being held financially liable for a poor review of cardholder spending may not be viewed positively by certifying officers who may now discourage card use. What is certain is that purchasing card spending and transactions have dropped significantly between

2008 and 2013 (spending falling by \$3.1 billion and transactions by 3.3 million).

Civilian agencies, which got off to a slower start with purchasing cards, have trod a less volatile path and were not subject to a GAO recommendation that they use fewer purchasing cards (though the GAO seemed to identify about the same degree of internal control issues within Civilian agencies as found in their Military counterparts). Civilian agency purchasing card spending has grown at a steady pace and its recent downturn (from \$12.1 billion in 2011 to \$11.6 billion in 2013) has been far less dramatic than that experience among Military agency counterparts (which fell from \$7.4 billion to \$5.3 billion in the same time period). However, Civilian agencies may be soon be affected by the enhanced financial accountability of certifying officers due to recent changes in legislation.

In conclusion, the analysis of U.S. Government purchasing card spending shows that the Government needs to push its agencies to evaluate cost-benefit trade-offs and resolve control concerns to move forward. While fraudulent spending on purchasing cards is not a financial issue (the card issuers absorb fraud loss provided personnel actions are taken by the government), they are a political issue. The loss of \$400 million of taxpayer resources due to failure to properly manage purchasing card program growth is not inconsequential. The GAO has identified the GSA as the appropriate promulgator of “purchasing card program management” directives, a role the GSA does not accept. Leadership is needed among the agencies to sort through and resolve the issues of accountability, control, and structure lest the taxpayer be asked to endure more unnecessary costs.

REFERENCES

Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §1007, 116 Stat. 2623, 2633-34 (2002).

Cohen, William H. (1998). Secretary of Defense; *Annual Report to the President and Congress 1998*.

Defense Logistics Agency (2013). Wide-Area Workflow. Available at <http://www.dla.mil/wideareaworkflow/pages/default.aspx> (last accessed January 2014).

Executive Order No. 12,352 (1082). 47 Fed. Reg. 12,125 (Mar. 22), Section 1(a).

Executive Order No. 12,931 (1994). 59 Fed. Reg. 52,387 (Oct. 17).

Federal Acquisition Streamlining Act of 1994 (1994). Pub. L. No 103-355, §4301; 41 U.S.C. §428.

Federal Acquisition Circular (1994) 90-24, 59 Fed. Reg. 64,786 (Dec. 15, 1994).

Federal Reserve Bank of Philadelphia (2011). Government use of payment card system: Issuance, acceptance, regulation. Payment Cards Center Conference Summary (July 11-12) available at <http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/publications/conference-summaries/2012/C-2012-Government-Use-of-the-Payment-Card-System.pdf>.

General Services Administration (2013a). Benefits (from card use) available at <https://smartpay.gsa.gov/program-coordinators/card-basics/benefits> (last accessed September 2013).

General Services Administration (2013). U.S. Government purchasing card spending statistics available at <http://smartpay.gsa.gov/about-gsa-smartpay/program-statistics> (last accessed September 2013).

- General Services Administration. 2014. Federal Strategic Sourcing Initiative available at <http://www.gsa.gov/portal/content/112561>.
- Gore, Al. (1993). *From Red Tape to Results: Creating a Government That Works Better and Costs Less, Report of the National Performance Review*, available at http://govinfo.library.unt.edu/npr/library/review.html#system_reports.
- McHarg, J. P. (2002). Note, *Doing More with Less-Continued Expansion of the Government Purchase Card Program by Increasing the Micro-Purchase Threshold: A Response to Recent Articles Criticizing the Government Purchasing Card Program*. 31 Public Contract Law Journal, 293-312.
- McHugh, N. (2011). What is driving commercial purchasing card growth. *Journal of Corporate Treasury Management* 4(3): 259-271.
- Hamre, John (1994). Memorandum, Under Secretary of Defense John Hamre, "Purchasing Card Reengineering Implementation Memorandum #4: Use of
- Office of Management and Budget (2002). Memorandum for the Heads of Departments and Agencies: Use of Government Purchase and Travel Cards (M-02-05), April 18, 2002.
- Office of Management and Budget. (2009). Memorandum on Improving the Management of Government Charge Card Programs. (January)
- Office of Management and Budget. (2014). OMB Circular A-123-Management's Responsibility for Internal Control. Available at http://www.whitehouse.gov/omb/circulars_a123_rev (last accessed January 2014).
- Palmer, R. and M. Gupta. (2007). "A Brief History and Review of Purchasing Card Use by the U.S. Government: 1990-2005," *Journal of Public Procurement*, Issue 3, Vol. 7.
- Palmer, R., M. Gupta, and R. Dawson. (July 2010). "U.S. Government Use of Commercial Card Technology and the Case for Change in Military Card Distribution Policy," *Defense Acquisition Review Journal*, Volume 17, No. 3, Issue 55, pp. 313-336.
- Poole, C. and B. Welch, *Purchase Card: Best Practices for a Best in Class Program*, The Acquisition Directions Advisory (Acquisitions Solutions, Inc., Chantilly, Va.), June 2002, at 2, available at <http://www.wifcon.com/analwelch604.pdf>.
- Public Law 110-417. (Oct. 14, 2008). Duncan Hunter National Defense Authorization Act for Fiscal Year 2009.
- Public Law 112-94. (Feb. 8, 2011). Government Charge Card Abuse Prevention Act.
- Under Secretary of Defense (2008). Memorandum: Government Purchase Card Officer (GPC) Certifying Officer and Departmental Accountable Official Responsibilities. November 7.
- Under Secretary of Defense for AT&L Policy. 2012. Department of Defense Purchasing Card Data Strategy. Available at http://www.acq.osd.mil/dpap/pdi/pc/docs/DOD_Purchase_Card_Policy_Log_Summary_2013.11.19.pdf (last accessed January 2014).
- U.S. General Accounting Office. (1996). *Report to Congressional Committees. Acquisition Reform: Purchase Card Use Cuts Procurement Costs, Improves Efficiency* (GAO/NSIAD-96-138).
- U.S. Gen. Accounting Office. (2001a). Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse. GAO-02-32 (November 30).

U.S. Gen. Accounting Office. (2002a). Purchase Cards: Control Weaknesses Leave Army Vulnerable to Fraud, Waste, and Abuse. GAO-02-732 (June 27).

U.S. Gen. Accounting Office. (2002b). Purchase Cards: Control Weaknesses Leave the Air Force Vulnerable to Fraud, Waste, and Abuse. GAO-03-292(December 20).

U.S. Gen. Accounting Office. (2003a). Purchase Cards: Steps Taken to Improve DoD Program Management, but Actions Needed to Address Misuse. GAO-04-156 (December 2).

U.S. Gen. Accounting Office. (2003b). Forest Service Purchase Cards: Internal Control Weaknesses Resulted in Instances of Improper, Wasteful, and Questionable Purchases. GAO-03-786 (August 11).

VA Office of the Inspector General. (2013). Audit of Non-Purchase Card Micro-Purchases. 12-1860-237 (August 9).

U.S. Gen. Accounting Office. (2003c). HUD Purchase Cards: Poor Internal Controls Resulted in Improper and Questionable Purchases. GAO-03-489(April 11).

U.S. Gen. Accounting Office. (2003d). FAA Purchase Cards: Weak Controls Resulted in Instances of Improper and Wasteful Purchases and Missing Assets. GAO-03-405 (March 21).

U.S. Gen. Accounting Office. (2004a). VHA Purchase Cards: Internal Controls Over the Purchase Card Program Need Improvement. GAO-04-737 (June 7).

U.S. Gen. Accounting Office. (2004b). Purchasing Card: Increased Management Oversight and Controls Could Save Hundreds of Millions of Dollars. GAO-04-717T (April 28, 2004).

U.S. Gen. Accounting Office. (2006). Purchase Cards: Control Weaknesses Leave DHS Highly Vulnerable to Fraudulent, Improper, and Abusive Activity. GAO-06-1117 (September 26).

U.S. Gen. Accounting Office. (2008). Governmentwide Purchase Cards: Actions Needed to Strengthen Internal Controls to Reduce Fraudulent, Improper, and Abusive Purchases. GAO-08-333 (March).

Working Paper for the International Public Procurement Conference:

The Benchmarking Public Procurement Initiative

Federica Saliola, Sophie Pouget, Tania Ghossein and Elisabeth Danon

Global Indicators Group
Development Economics
The World Bank Group
2121 Pennsylvania Avenue, NW
Washington, DC 20433, USA

As a key government function, ensuring effective public procurement system is indispensable in order to promote sustainable and inclusive growth. Effective public procurement systems are defined as systems that offer a high level of transparency, accountability and better value for money in the application of a procurement budget (OECD, 2009).

Launched by the World Bank Group in 2013, the Benchmarking Public Procurement initiative measures effectiveness, accessibility and transparency of public procurement systems. It focuses on transaction costs incurred from procurement regulations (regulatory costs) and how their effect on businesses on a comparative basis globally.

The Benchmarking Public Procurement project created and developed four actionable indicators that examine characteristics of laws and regulations (legal indicators) and their implementation in practice, essentially focusing on the time, the procedures and the cost involved (time and motion indicators).

Hence, the main outputs of the initiative are the creation of a Benchmarking Public Procurement database as well as the production of reports presenting and analysing the data. Benchmarking Public Procurement database and reports will highlight areas for improvement and will guide policymakers towards regulatory reforms by serving as a diagnostic tool and a benchmarking instrument against recognized good practices.

This working paper will present the rationale and theoretical framework of the initiative (1). It will further explain the Benchmarking Public Procurement approach, which is tailored to support decision-making by policymakers (2). The paper will then introduce the four key areas measured by the indicators (3) and conclude by providing the current status of the project (4).

1. Promoting open competition is key to an effective public procurement system

For governments, distorted competition is a barrier to obtaining the best offer for the most competitive price, which leads to substantial waste of public funds. For private entities, a defective competitive process is a vicious cycle: it reduces their visibility on the market and deters participation in public tenders, which in turn results in even less competition. Finally, for the civil society, often the ultimate beneficiary of procurement contracts, it means weaker infrastructures and deteriorated public services and goods.

There are at least three avenues through which competition can have desirable effects on procurement markets. First, with free entry and an absence of collusion, prices are driven towards marginal costs. Second, suppliers will have an incentive to reduce their production and other costs over time. Third, competition serves as an important driver of innovation (R. Anderson, W. Kovacic, and A.C. Müller, 2011).

Several factors affect competition in public procurement processes:

- Corruption, by artificially setting unequal opportunities among participants, discourages bidders' participation, in particular of small and medium enterprises. For example, a study done in Colombia on 420 companies which had done business with the government showed that "84 percent of the country's entrepreneurs abstained from participating in public procurement bids or auctions because they considered bidding conditions unfair due to corruption in contracting processes" (G. Ignacio and J. Arteaga, 2009).
- In addition to corruption, the lack of transparency in public procurement has also been identified as a major impediment for private entities to participate in tenders. Increasing transparency will not only help prevent corruption and bidders' collusion but also increase and facilitate suppliers' participation, which will result in greater competition.
- Accountability is complementary to transparency and an essential condition for public procurement systems to operate with integrity. It is key to ensure equal opportunities among bidders and prevent fraudulent behaviors. Holding procuring officials accountable for their actions and decisions curbs the risk of corruption, reduces favoritism and levels the playing field among suppliers.
- Finally, transaction costs based in procurement regulations (and the lack of efficiency) notably affect the level of competition in procurement processes. Unnecessarily complex, costly or time-consuming procurement regulations could cause excessive delays to procurement, create possible opportunities for corruption and discourage enterprises participation (OECD, 2009).

Although public procurement is a vital function of governments worldwide, it especially matters in low-income economies, where markets tend to be dominated by public spending, and companies (both foreign and domestic) aiming to enter these markets often depend on public procurement as a means of participating in the market. Public procurement typically represents a major segment of local demand for services and goods in low-income economies and can make or break a market industry (UNCTAD, 2013). Hence, all parties in the development process, from donors providing aid to low-income economies' governments and civil society in these economies must have a vested interest in promoting this critical pillar of good governance, in the context of a macro-economic framework that promotes open competition, the free functioning of markets and the allocation of resources based on comparative advantages. Evidence shows that economies with competitive domestic markets tend to have higher levels and rates of growth in per capita income (World Bank, 2003 and R. S. Khemani, 2007). Competition in the domestic market, regardless of its origin, begets efficient, productive firms that are better able to compete on global markets, which in turn increases economic growth and standards of living. The World Development Report 2000-2001 states that, "markets work for the poor because poor people rely on formal and informal markets to sell their labour and products, to finance investment, and to insure against risks. Well-functioning markets are important in generating growth and expanding opportunities for poor people."

A recent UNCTAD study revealed that a competitive local IT sector is essential for developing countries to reap full benefits from the world's rapid evolution in information and communication technology (ICT), and that smart public procurement can stimulate development of local information technology sectors. But the growth of IT firms in developing countries is often limited, due to lack of domestic demand. The report adds that the successful application of public procurement for the promotion of local IT sector development can be a powerful policy tool and a thriving local IT sector contributes to increased productivity, employment and innovation. A study on the Uganda public procurement system shows that over 55% of its budget is spent on public procurement. This is equivalent to Shs. 6,000 billion or \$ 2.4 billion of this year's government budget. If the government was able to achieve a 2% efficiency gain in public expenditure through procurement, this could represent \$48 million annually which is sufficient to rehabilitate 10 regional referral hospitals or finance a 17% increase in teachers' salaries. Procurement is therefore central to achieving better value for money in public expenditure and service delivery (Bariira Centenary, 2009).

Given its complexity, the efficient handling of procurement outlays has been a policy and management concern for public procurement practitioners, all the more so as procurement contracts are subject to a series of specific risks that do not always characterize regular contracts, such as corruption and collusion and the involvement of players from both the private as well as public sector. Integrity in procurement has received particular attention especially in the current economic crisis. Billions of dollars in stimulus funds and accelerated procurement procedures raise additional risks of corruption and misuse of funds in the countries.

2. The Benchmarking Public Procurement initiative is based on an approach tailored to support decision-making by policymakers

Evidence shows that a well-functioning public sector, which offers public goods and services in an efficient and effective manner, can lead to poverty reduction. Same evidence shows that this is possible only if effective governance is in place (T. Khi V., 2008). As a key government function, efficiency of public procurement is indispensable to effective governance in the private sector.

Research on the impact of effective and transparent public procurement systems on economic growth has been limited due to the lack of comparable global statistics. This lack of comparable global statistics led the G20 Leaders at the 2010 Seoul Summit to voice their concern and emphasize the need for more transparent and competitive public procurement systems, and the necessary prevention of mismanagement and corruption. To achieve this goal, G20 leaders stressed the need for more research on good practices and challenges in the public procurement sector. Inspired by the Doing Business project, the G20 Anti-Corruption Working Group (ACWG) requested the World Bank to further consider what options exist for developing and using quantitative and actionable procurement transparency indicators to measure and promote anti-corruption activities. In early 2013, discussions within the G20 group of nations, including discussions with business groups, resulted in a new focus on fighting corruption in procurement. Stakeholders from the private sector also expressed the need for a benchmarking tool assessing the alignment of procurement systems with internationally accepted good practices and assessing key components of national procurement systems through new benchmarks. Finally, in February 2013, at an ACWG meeting in Moscow, the B20 emphasized the need for transparency procurement indicators.

Hence, Benchmarking Public Procurement responds to the need for more analytical work to better identify shortcomings in public procurement legal frameworks. Given the magnitude of the public procurement sector, several organizations have developed initiatives assessing public procurement systems and addressing the issue of lack of transparency and accountability hereof. Some of these initiatives aim at promoting comity in procurement law (such as the OECD Development Assistance Committee - World Bank Procurement Round Table initiative, which has developed two sets of indicators to measure public procurement) while others focus on refining government systems' compliance with procurement rules (such as the World Bank's Country Procurement Assessment Reports) or build countries' capacity to maintain transparent public procurement systems.

Unlike most instruments that measure public procurement systems' performance, the Benchmarking Public Procurement data collection focuses on public procurement from the angle of the private sector and assesses the impact of transaction costs in regulations. The Benchmarking Public Procurement initiative could potentially be revolutionary, because while a number of studies had looked at transaction costs in procurement, no one had ever comprehensively assessed regulatory costs – probably the most significant transaction costs in procurement – as a barrier to growth. Previous studies have emphasized the need to reduce transaction costs incurred from public procurement laws and regulations but there has been no global effort to assess (and, over time, reduce) those costs. Finally, Benchmarking Public Procurement has a unique focus on the interplay among public procurement core aspects such as transparency, efficiency and accountability and their impact on 1) bringing more security and certainty to private entities and 2) increasing tender participation and stimulating competition. As a result, the Benchmarking Public Procurement initiative will complement the existing initiatives in several ways by:

- Providing a time-and-motion as well as a legal analysis of the challenges that companies face in a given economy;
- Conducting a yearly standardized assessment that allows for comparison and for capturing changes in practice and reforms over years;
- Covering a wider range of countries from the ones currently measured by various existing studies.

The main characteristics of the Benchmarking Public Procurement methodological approach are:

- Focus on both laws and regulations (de jure indicators) and their implementation (de facto indicators);
- Focus on selected number of policy areas of public procurement (for the pilot year, Benchmarking Public Procurement's thematic coverage is limited to 4 areas and does not provide comprehensive measures of countries' legal and regulatory frameworks for public procurement);
- Annual data collection through a set of questionnaires administered to government officials, public procurement lawyers, consulting firms as well as academics;

- All contributions made by our local contributors are made on a pro bono basis. In exchange of their participation, and with their agreement, they will have the opportunity to have their names and the name of their institution acknowledged on the Benchmarking Public Procurement website as well as in the analytical report;
- Questionnaire data complemented by a desk review of laws and survey responses by government agencies collected for reference and validation purposes;
- Combined evaluation of the laws and policies in the books, and their execution, implementation and enforcement in practice measured through a case study approach of a hypothetical public tender which ensures comparability of responses across countries;
- Focus on public procurement from the angle of the private sector, hence complementing existing initiatives.

Benchmarking Public Procurement is based on an approach tailored to support decision-making by policymakers. Specifically, the project follows the successful approach undertaken by the World Bank Global Indicators Group, which has a recognized track-record for measuring countries' laws and regulations and leveraging reforms. This approach has been implemented by the Doing Business project which assesses the business climate of 189 economies globally. This approach has also been recently successfully duplicated on topics such as foreign direct investment (FDI) (FDI Regulations Database) and business regulations that affect women's prospects as entrepreneurs and employees (with the Women, Business and the Law).

Globally, indicators have been considered and recognized as being critical in contributing to decision-making and shaping public knowledge in global governance. Particularly, indicators are recognized as authoritative, because of their simplicity (K.E. Davis, B. Kingsbury, and S.M. Merry, 2010). Indeed, indicators can be easily communicated to any third parties and therefore "decisions based on indicators are expected to be, *ceteris paribus*, relatively transparent". In addition, indicators provide "unequivocal ordinal data" and therefore more consistency in the decision-making process. Research has shown that, once an indicator is released and debated for a year or two, the indicator is then "presented simply as a fact that describes a country's situation, with virtually no discussion about the source of the data or the nature of the indicator itself (K.E. Davis, B. Kingsbury, and S.M. Merry, 2010).

In that respect, the Doing Business indicators are recognized to be extremely influential and successful in attracting the attention of senior policymakers, government officials and the business community in many of the World Bank's client countries (World Bank Independent Evaluation Group, 2008), thus significantly contributing to benchmarking economies against good practices and motivating policy makers in improving their laws and regulations.

Indicators are also recognized as a new way of governance where the decision-makers, the end-users (such as private firms) and any other participants in the system (such as lawyers, consultants or accountants) can partake. By involving all the possible stakeholders at the stage of the data collection, indicators allow the end-users of the procurement system to have a significant impact on the content of the indicators measuring this particular system, even if they are neither the formal promulgators of the indicators nor the governors (K.E. Davis, B. Kingsbury, and S.M. Merry, 2010). The unique characteristic of the Benchmarking Public Procurement initiative, in that sense, is that it specifically reaches out to private firms which are using the public procurement system of their country.

This approach will allow the collection of comparable data on pertinent laws and their implementation. This approach will also allow the team to complement input from private sector practitioners with feedback from public sector officials who remain the main users of public procurement systems in the measured countries. The Benchmarking Public Procurement initiative plans to collect high quality data therefore providing a unique cross-country analysis. In fact, similarly to Doing Business, the strength of the project's methodology resides in the relevance and reliability of the data.

Additionally, the BBP initiative will conduct a yearly assessment of the regulations and procedures, thus recording each reform and change of practice. This approach will help governments reforming public procurement by providing comparative models of good practice and reliable ways to measure progress over time.

3. The Benchmarking Public Procurement initiative is composed of four key areas and indicators

An extensive consultation was organized with a roster of public procurement experts in order to refine the methodology, the thematic coverage and the final objectives of the initiative. In fact, the design and focus of each Benchmarking Public Procurement indicator and the associated questionnaires have been developed on the basis of the feedback received from periodic consultations with members of the Expert Consultative Group (ECG) comprising leading legal experts and practitioners from many organizations, among which:

- The World Bank Group – including both the World Bank and IFC;
- The George Washington University;
- Organisation for Economic Co-operation and Development (OECD);
- United Nations Commission on International Trade Law (UNCITRAL);
- The American Bar Association (ABA);
- General Electric (GE).

As a result of the extensive consultation process, the focus of the pilot indicators was narrowed down to four thematic areas that will be anchored around three main pillars aiming at promoting a level playing field and fair competition in the public sector arena: transparency, accountability and efficiency.

The four key areas of analysis will be anchored in the pre-tendering and tendering phases of a procurement process. Although the procurement process is divided into five phases, the pre-tendering phase (procurement planning, needs assessment and document preparation) and tendering phase of the procurement process are the most vulnerable to corruption. In the pre-tendering phase, transparency and accessibility of the needs assessment, procurement plan and specifications makes them less prone to manipulation. In the tendering phase, transparency of the award winner, the criteria for selecting the winning supplier, the price offered by this supplier etc., makes it more difficult to hide a fraudulent selection. However, it is important to note that even though the questionnaires developed do not ask about specific anti-corruption measures in place or perception of the impact of corruption, Benchmarking Public Procurement assesses transparency and accessibility of public procurement information, which have a direct impact on corruption and competition.

The Benchmarking Public Procurement indicators measure the characteristics of laws and regulations (*de jure*) and their implementation in practice (*de facto*).

The two legal indicators assess the regulatory framework on transparency and accountability:

First indicator: Accessibility and clarity of public procurement regulations:

The rationale behind measuring the accessibility and clarity of public procurement regulations relies in its close tie to the three pillars mentioned earlier. Transparency in public procurement refers to the accessibility to “laws and regulations, judicial and/or administrative decisions, standard contract clauses on public procurement, as well as to the actual means and processes by which specific procurements are defined, awarded and managed”. Transparency also encapsulates the consistent, timely and user-friendly disclosure of information on public procurement opportunities.

Balancing efficiency and effectiveness of the procurement process with the proper level of transparency to be able to enhance control and deter corruption is a challenging task.

Information should be provided in a user-friendly way. If the rules provide for many sub-regimes and exceptions, potential bidders might feel that bidding is difficult, if not impossible, without counselling from attorneys and other experts. According to the OECD, “new technologies, such as a “one-stop-shop” portal, can play an important role in providing easy and real-time access to information for potential suppliers, track information and facilitate the monitoring of procurement processes (OECD, 2009).” Governments can deal with those challenges to transparency by providing for accessibility and clarity of public procurement laws and policies, disclosure of the procurement contract specifications and management, and recording of the procurement procedures.

Questions capturing the data are chronological, following the typical sequences of a public procurement tender. A first series of survey questions covers access to procurement rules and data in general. They assess whether the regulatory framework provides that these rules and data must be published and accessible. A second series of questions covers access to information during the pre-tendering phase. This section of the survey asks about bidders' accessibility to the procurement plan and pre-tendering consultations. A third series of questions covers the tendering phase and accessibility of procurement opportunities; the terms of the tender; bid submission and bid evaluation.

Second indicator: The oversight mechanisms in place and the extent of public procuring official's accountability:

As a key condition for a public procurement system to operate with integrity, the OECD Principles for Integrity in Public Procurement (2009) emphasize the availability and effectiveness of accountability and control mechanisms. The eighth OECD Principle highlights the importance for governments to establish a clear chain of responsibility, together with effective control mechanisms.

The rationale behind measuring accountability of procurement officials is because it has important economic consequences. The lack of accountability of public procurement officials may lead to:

- Additional costs due to non-commercial actions, such as corruption or favoritism;
- Less competition, as suppliers are deterred from engaging in business with government.

An over-rigorous rule-based approach that reduces discretion of public officials might impair the flexibility needed to achieve the best economic outcome, especially for more complex contracts governments conduct business in the most economically rational way, in order to save public money and ensure long-term growth of the market. A risk-based approach might be a suitable measure to balance accountability and control mechanisms in procurement.

The purpose of procurement oversight and control is to ensure that governments act in a fair and cost-efficient manner in awarding contracts. Internal control systems and external audit and oversight are ideally part of the accountability framework of public procurement. Internal controls range from financial control, internal audit to management control. Internal controls, for example, can be conducted as a preventive measure by tendering authorities, as they are aware of the administrative regulations and often familiar with fraudulent patterns. In addition to internal controls, external audits can be conducted by external experts or supreme audit institutions to reinforce monitoring and control. Their aim is to detect fraud and corruption or, in the case of performance audits, to ensure compliance with rules and review actual benefits of the procurement case. In several countries, parliamentary committees serve as independent oversight bodies to review projects and review investigations. Bidders should be afforded a chance to report suspicious irregularities or appeal a decision.

In the area of accountability, governments can design the strength of institutions in charge of overseeing the procurement process at its different stages that is, essentially, the resources allocated and level of independence and reporting structures. Further, it is important to ensure coordination and communication between the various accountability and control mechanisms.

While the indicators presented in this proposal take primarily the perspective of a private sector company, this particular indicator takes the perspective from a government oversight institution, with the goal to measure the legal provisions applicable for an oversight entity to monitor and control a public procurement office and/or government procuring agency. It assesses the compliance of national legal and regulatory frameworks with international good practices. This topic particularly covers general reporting and recording obligations within local government entities. It collects data on whether public officials are required to provide feedback on procurement activities to the procuring entity or to report suspicions of fraud, misconduct or maladministration (and, if it is the case, if they are protected against retaliation). It also looks at recording obligations (scope and method). Recording of decisions in the procurement cycle is important to enhance transparency by keeping a trail to audit, to challenge the procedure, or enable public scrutiny. Records should be relevant and complete throughout the procurement cycle, from needs assessment to contract management and payment.

In addition, this topic also deals with internal control system and monitoring performance of the system at the procuring entity level. It measures the existence of internal control and management procedures throughout the procurement process, the type and frequency of internal controls, and the relevant recording obligations and whether there is a monitoring system within the procuring entity or, if not, within the central government (and, if they exist, the scope and frequency of internal audits). Finally, the indicator looks at external controls. It covers

routine external controls (the oversight entity, the scope and frequency of the audits, and the obligation to report). Particularly, this indicator asks about external auditors' obligation to report suspicions of fraud and whether they are able to rely on a list of red flags indicators helping them in detecting fraudulent behaviours. It also covers ad hoc external controls, in case there is a permanent parliamentary committee in charge of overseeing high-profile procurement cases or an Ombudsman entitled to conduct investigations and solve matters by conciliation.

In addition, two time and motion indicators examine the bidding process and the complexity to challenge a public procurement tender:

Third indicator: The bidding process and ease of submitting a bid for the public procurement of a particular good or service:

The objective of governments is to run public procurement in a qualitative and fair way, so that they meet both good governance standards and economic effectiveness in terms of good value for money. For the private sector, efficiency in terms of the ease of bidding is key as it is closely linked to transparency and accountability. Transparency of procurement processes can enhance efficiency, because bidders get access to laws and documents thus allowing for easier and an increased participation in tenders. Transparency and efficiency will also lead to a more competitive process. The way procedures and rules are drafted need to be carefully balanced with measures of efficiency, transparency and accountability to avoid excessive burden for potential bidders. However, too loose dispositions may be ineffective in deterring corrupt behaviours. By assessing the bidding process for a typical procurement tender, this indicator offers data on the steps, time and cost associated with bidding for a tender from the point of view of small and medium enterprises (SMEs). The aim is to assess the complexity and efficiency of a procurement system and process in terms of procedural steps, time needed for each step and cost associated with bidding for a standardized contract. In order to capture data on competition, this particular indicator looks at the open competition process, as it includes a range of features such as, for instance, notice of procurement information, use of standards and technical specifications that can promote competition, and the dissemination of opportunities to bid.

This indicator covers the pre-tendering phase. It gathers data on the needs assessment's phase, particularly on the means of exchange of information and the ability of experts and potential bidders to participate in the consultation process.

During the tendering phase, the indicator collects data on the ease for potential bidders to be informed about new public procurement opportunities (through the possibility, for bidders, to sign-up for electronic alerts on new procurement notices or to obtain additional information to determine interest in bidding), to obtain the tender documents (online and in a timely fashion manner), to perform preliminary procedures (to register as a bidder), to prepare, formulate an offer and submit the offer. It looks at the conditions under which a procuring entity may determine the eligibility of a potential bidder to participate in procurement and the legitimate grounds of exclusion, with the underlying assumption that criteria for qualification should be limited to criteria deemed essential (such as the legal and financial capabilities and technical and professional abilities to undertake the relevant procurement). This indicator also focuses on evaluation criteria and basis for the award determining the successful tender and the contract award.

When it comes to the award of the contract, the indicator focuses on the bid opening session and the process to obtain feedback from the procuring entity, when a bidder is disqualified or when a bidder qualified but was not awarded the tender.

Particular attention is given to the question of the price of the contract and whether or not non-price criteria could be taken into account as a basis for the award of the procurement contract (such as, for instance, payment schedule, delivery time, operating costs, ...). This question will be discussed further during the second round of consultations scheduled with the Benchmarking Public Procurement experts in 2014.

Fourth indicator: The complaint mechanism and the ease of filing a complaint:

One important aspect of transparency in public procurement systems lies in effective review and complaints mechanisms. A transparent procurement system gives bidders the opportunity to ask for clarifications and reviews and get timely responses. Thus, well-functioning review and remedy systems are a part of an efficient procurement system and are crucial tools to reach the objectives of transparency and accountability of the public procurement system. Research recognizes that the complaint review system of a country plays a fundamental role in protecting the integrity of the system (D. Gordon, 2005). In light of the significant percentage of countries' government budget spent on procurements, providing an effective domestic review mechanism for vendors who believe that

government procurement officials have not conducted an acquisition lawfully brings an important measure of transparency and accountability to public procurement systems (D. Gordon, 2005). In addition, the ninth Principle of the OECD Principles for Integrity in Public Procurement (2009) stresses that governments should handle complaints from potential suppliers in a fair and timely manner. To ensure an impartial review, a body independent from the procuring agency with the power to enforce its decisions should rule on procurement decisions and provide adequate remedies. Review and remedy systems and mechanisms are important to provide a check against fraud in the procurement process and thus contribute to enhancing transparency and accountability.

This indicator measures the ease of resolving an irregularity in a public procurement process through a complaints review system. It will present data on the time, procedures and cost involved in a complaint process hence measuring the effectiveness of review and remedies procedures, which is fundamental to creating accountability in an institutional framework as well as its amenability to enforcement. Hence, this particular indicator will measure whether the complaints mechanism of a country is timely, efficient, transparent and independent. In addition, this topic also presents legal indicators assessing the quality of complaint mechanism in place and gathers data on:

- Complaints filed before the conclusion of the procurement contract;
- Methods available to file a complaint;
- Different review bodies authorized to hear complaints (first-tier, two-tier or third-tier review bodies);
- Whether the supplier presenting the complaint has to show standing (including time, procedures and cost involved);
- Whether complaints trigger a suspension of the procurement process;
- Various aspects of the review process (including time, procedures and cost involved);
- Alternative Dispute Resolution mechanisms available;
- Complaints filed to challenge the award of the contract;
- The procedure followed and how it differs from the process to file a complaint on the tender process.

Results of this particular indicator are expected to be highly significant, as research has shown that complaints review systems across the world have a lot of similarities and “there are rich opportunities for comparative review” (D. Gordon, 2005).

4. The Benchmarking Public Procurement initiative is currently piloted in 10 pilot countries

Launched in 2013, Benchmarking Public Procurement is in its pilot phase: survey questionnaires were successfully rolled-out in late 2013 to about 1,000 contributors in 10 pilot countries.

The population to which the survey is currently being administered includes a diverse group of public procurement experts: government officials with knowledge of public procurement laws, regulations and practices; consultants; academics and lawyers with extensive professional experience related to public procurement law.

For the pilot phase, the Benchmarking Public Procurement initiative covers 10 countries: Afghanistan, Chile, Ghana, Jordan, Mexico, Sweden, Thailand, Turkey, Uganda and the United States. The main selection criteria for these countries are as follows:

- Countries with high capital expenditure and public procurement budgets;
- Countries representing all 7 regions globally;
- “Good comparator” countries from the high-income OECD list of economies;
- Countries of interest to the study’s main funding donor, USAID;
- Countries where the Global Indicators Group has active working programs (e.g. Sweden).

The team is about to include the Russian Federation to the list of the pilot countries, as the Moscow government warmly welcomed the initiative and expressed interest in the inclusion of the country as the 11th pilot country.

The data collection is still in process. Once the data has been fully received, it will need to be coded, analysed and validated through extensive desktop research as well as consultation with the project's advisors and members of the ECG. During the subsequent phase of refining the indicators, the Benchmarking Public Procurement team will hold consultations on the final results of the pilot. Funding permitting, the Benchmarking Public Procurement approach will be refined and the indicators and their methodology will be reassessed on the basis of the data collected in 2013.

After a subsequent phase of indicators refinement, Benchmarking Public Procurement's geographical coverage will be expanded and data will be collected in 70 additional countries during 2014 and in 109 additional countries during 2015, to reach a global coverage of 189 countries, in line with the Doing Business project. At the end of the second and third years, when data collection has sufficiently progressed, the Benchmarking Public Procurement team will seek additional feedback based on data collection results. A comprehensive database will be maintained and updated on a yearly basis and a synthesis reports will be prepared at the end of each year, which will highlight the findings from the analysis of the data.

References

- OECD (2009): Principles for Enhancing Integrity in Public Procurement. Paris. <http://www.oecd.org/gov/ethics/48994520.pdf>
- R. Anderson, W. Kovacic, and A.C. Müller (2011): Ensuring integrity and competition in public procurement markets: a dual challenge for good governance. In: S. Arrowsmith, R. Anderson, ed. (2011): The WTO Regime on Government Procurement: Challenge and Reform. Cambridge: Cambridge University Press. Ch.22
- G. Ignacio and J. Arteaga (2009): The Private Sector's Role in Reforming Public Procurement: The Case of Colombia. <http://www.cipe.org/sites/default/files/publication-docs/041509.pdf>
- UNCTAD (2013): Promoting Local IT sector Development through Public Procurement. http://unctad.org/en/PublicationsLibrary/dtstict2012d5_en.pdf
- World Bank (2003): Global Economic Prospects and the Developing Countries Report. <http://www.worldbank.org/en/publication/global-economic-prospects>
- R. S. Khemani (2007): Competition Policy and Promotion of Investment, Economic Growth and Poverty alleviation in least developed Countries. FIAS, Occasional Paper 19, 2007. <https://www.wbginvestmentclimate.org/uploads/FIAS+Competition+Policy+final.pdf>
- World Bank (2000-2001): The World Development Report. https://publications.worldbank.org/index.php?main_page=product_info&cPath=&products_id=21660
- H. Bariira Centenary (2012): With efficient Procurement, Government can deliver more with less. The Independent, September 22, 2012. <http://www.worldbank.org/en/news/opinion/2012/09/22/with-efficient-procurement-government-can-deliver-more-with-less>
- T. Khi V. (2008): International Handbook of Public Procurement Boca Raton, FL: Francis & Taylor, 2008.
- K.E. Davis, B. Kingsbury, and S.M. Merry (2010): Indicators as a technology of global governance. Law & Society Review, Volume 46, Issue 1, pages 71–104, March 2012.
- World Bank Independent Evaluation Group (2008): Doing Business: An Independent Evaluation - Taking the Measure of the World Bank-IFC Doing Business Indicators.
- R. Alderman (2013): B20 Task force on improving Transparency and Anti-Corruption – Development of a Preliminary Study on Possible Regulatory Developments to Enhance the Private Sector Role in the Fight against Corruption in a Global Business Context.
- A. Araujo, R.Y. Carter, G. Callender, D. Drabkin, R. Grimm, K. Jensen, R.E. Lloyd, C. McCue, and J. Telgen (2004): Challenges in Public Procurement: an international perspective. Boca Raton, FL, USA: PrAcademics Press, 2004.
- S. Arrowsmith (2005): Public procurement as an instrument of policy and the impact of market liberalization. 111 Law Quarterly Review 235-284.
- D. Gordon (2005): Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make. Pub. Cont. LJ 35 (2005): 427.

For submission to the International Public Procurement Conference

August 2014 – Dublin, Ireland

**The development and application of an international model of public
procurement maturity**

February 2014

Authors:

Karen Beamish – CIPS, UK

Ian Schollar – CIPS, UK

Brent Maas – NIGP, USA

Tina Borger – NIGP, USA

The CIPS and NIGP Partnership for Public Procurement

The Chartered Institute of Purchasing and Supply (CIPS)

The Institute for Public Procurement (NIGP)

www.globalpublicprocurement.org

Abstract

Abstract Title: The development and application of an international model of public procurement maturity

Keywords: procurement maturity, procurement management, assessing procurement maturity

Presenting Author: Karen Beamish

Authors: Karen Beamish, Tina Borger, Brent Maas, Ian Schollar

Corresponding Author: Karen Beamish, karen.beamish@cips.org

Affiliation: Chartered Institute of Purchasing and Supply(CIPS), NIGP, NIGP, CIPS

The development of a contemporary model of public procurement maturity provides an opportunity to develop standards of performance across public sectors in every jurisdiction. The Public Procurement Maturity Framework (PPMF) applies well established management structures (Fayol, 1917) to an analytical framework that is readily understood by senior executives while providing a sophisticated evaluation of the status of procurement in a public agency or entity.

The heart of the PPMF is a detailed analytical tool which assesses the sophistication of procurement policy and practices within a public agency, following a detailed set of themes. The model differs from previous procurement maturity models because is not based around the performance of KPIs, although these will be positively influenced by the application of the PPMF. Rather the Framework provides both a tool of analysis and a diagnostic for public organisations

This presentation outlines the operation of the PPMF and its ability to change perceptions of procurement and enhance procurement practices across public agencies. The authors also present data on the operation of the PPMF with the results of two groups of analysis which address the pre-installation and post-implementation phases of the PPMF.

Contents Page

1.0	Developing the Public Procurement Maturity Framework (PPMF)	-	Page 4
2.0	The background to the development of the PPMF	-	Page 5
3.0	Measuring procurement maturity and why it is important for the public procurement profession?	-	Page 6
4.0	What will the PPMF contribute to the public procurement profession	-	Page 7
5.0	Why did CIPS and NIGP develop this model for maturity?	-	Page 8
6.0	How can the framework be used in practice to change the shape and perception of public procurement?	-	Page 12
7.0	Summary and Conclusions	-	Page 14

CIPS and NIGP – The Partnership for Public Procurement

The Public Procurement Maturity Framework

1.0 Developing the Public Procurement Maturity Framework

The Chartered Institute of Purchasing and Supply (CIPS) and NIGP: The Institute for Public Procurement formalised a long-standing relationship in 2011, by the signing of a partnership agreement, the aim of which was specifically to build a stronger public procurement profession. Together it was agreed that the CIPS and NIGP partnership would become the 'Partnership for Public Procurement'.

The Partnership's aim is to accomplish a common approach to developing the public procurement profession globally and provide frameworks that determine clear and consistent pathways for strengthening the professional practices of the individual and the organisation. In the latter part of 2011, the Partnership commissioned the Asia Pacific Public Procurement Research Group (APPPRG), led by Professor Guy Callender to undertake research into public procurement maturity.

Dr. Callender's effort provided the theoretical underpinnings and empirical evidence that would later be used to build the CIPS-NIGP Public Procurement Maturity Framework (PPMF).

The APPPRG spent over a year examining the nature of procurement maturity including a number of approaches to:

- Defining a profession
- Exploring the parameters of procurement including particular emphasis on public procurement
- Reviewing an extensive range of potential maturity and professional procurement models
- Reviewing the attributes of procurement compared to other professions
- Evaluating options for a designing and developing the maturity model
- Developing a Public Procurement Maturity Model for adoption by the CIPS and NIGP Partnership

The purpose of this paper is to explain the basis for the PPMF, an overview of its structure, content, measures and benefits and how it provides a pathway and a journey to continuous improvement and heightened maturity across public procurement.

2.0 The background to the development of the PPMF

The public procurement profession is diverse geographically, culturally and, in terms of practice, does not align to a single, recognized body of standards. Given the challenges of the public procurement profession in the 21st century, the high levels of visibility, accountability and responsibility, in addition to public procurement being viewed as a key economic driver, there appears to be scope for unacceptable practices to continue.

In the last three years in particular, there has been a rise in the distrust of public procurement with the increasing spot light on the global economic crisis and the inability of governments to manage public procurement effectively. There is also evidence of unethical and inappropriate behaviour in both the developed and developing world. Recent news stories offer ample examples of:

- Negligent procurement and the associated risks and the significant reputational damage arising (example)
- Fraud, bribery and corruption which is inherent in many countries despite the best attempts of governments and professional bodies to enact policies designed to prevent such misbehaviour (example – reference)
- Unethical practices, poor transparency and accountability (reference)
- Misspent public funds (reference)

The public procurement profession is acutely aware of the perception of its role and often exposed inadequacies. While public procurement is doing much to elevate its practice, it needs to undo and overcome a legacy of inappropriate behaviour that has sometimes tainted the perception of public procurement in many parts of the world.

While previous commentators on public procurement on the world stage would have us believe that these issues are something experienced mainly in Africa, it has become clear that in recent times such practices are endemic even in the developed world. The European Commission has recently published a full report on Corruption across the EU, “EU Anti- Corruption Report” published February 2014. The full report, stating that corruption was higher than 120 Billion Euros. There are high levels of bribery in Poland, Slovakia and Hungary, particularly prevalent in Healthcare, however, while bribery appears to be less of an issue in countries such as Italy, Spain and Greece, it is clear that corruption appears to be higher. The EU Commission report highlighted the following:

“Public procurement bodies (that is public bodies forms one fifth of the EU’s total output –GDP) and is vulnerable to corruption, so better controls and integrity standards are needed.

Further examples that these are not just developing world issues come from the UK National Fraud Authority’s (NFA) October 2011 report, “Procurement Fraud in the Public Sector”. The report outlined the current and emerging risks from illegal activity in all aspects of public procurement during the pre-contract award phase through to false invoicing in the post-contract award stage.

The US Department of Justice's National Procurement Fraud Task Force (NPFTF) has pursued more than 400 cases of corruption since its inception in 2006 through to the end of 2010, 27 per cent of which have involved bribery. The NPFTF has also helped secure 300 criminal convictions and "hundreds of millions of dollars" in settlement

It is these facts and many other examples of such issues across the world that brings together CIPS and NIGP under the umbrella of its ‘Partnership for Public Procurement,’ and as the leading professional bodies representing the public procurement profession globally, seek to redress some of those issues. It is the recognition that only by measuring performance against formalised and recognised professional standards that will allow the public procurement to understand how it is performing and how it can continue to improve and overcome such problems.

Looking inwards, however, the profession wishes to redress the balance and in doing so on a significant scale, become highly sophisticated, substantially more commercial in approach and involved in many government-led attempts to drive stronger and more sustainable economic growth.

Concurrently, the public procurement profession is in search of status, value and recognition for practitioners and their public procurement organisations, which would benefit from standards and practices for public procurement,

The partnership has worked with key stakeholders in the profession to develop a 'Public Procurement Body of Knowledge', collaborating to enhance the maturity of public procurement around the world. In doing so the partnership seeks to address four key issues that Callender et al (2012) identified as part of the empirical research, which needed to be considered as part of the work to support the development of the PPMF:

1. Developing a common language for the public procurement profession
2. Developing a functional model for the profession
3. Building opportunities for influence, power and control
4. Building a professional self-consciousness and professional status for public procurement.

An important part of any profession is to develop and own a body of knowledge that is exclusive to the profession. The aim being that the knowledge base is unique to the discipline of public procurement and stands as the foundation upon which all standards of practice for the profession may be developed and professional judgements formulated.

The body of knowledge defines the basis for the practitioner in public procurement to manage the function consistent with determined standards of practice and a defined pathway for professionalism. CIPS and NIGP has already made headway in this area through the development and adoption of Values and Guiding Principles (VGPs) for the public procurement professional as well as developing and publishing key practices. Through the PPMF, the partnership continues its endeavours.

In its latest step, developing a Public Procurement Maturity Framework, the Partnership for Public Procurement seeks to provide structures of accepted and evolutionary practice, which are designed to drive up the standards of public procurement around the world, enhancing the performance and maturity of public procurement. It also seeks to fill a vacuum within public procurement for a single, comprehensive point of reference.

While both organisations in the partnership recognise there are various related procurement maturity frameworks derived from academia and consultancy models, there appears to be no one standard model of 'public procurement maturity' that could provide the foundation formally recognised global model.

Previous research undertaken by Telgen, Lohmann and Uenk (2011) evaluated over 20 models of Procurement Maturity of varying types and from varying sources. Conclusions derived from this work showed there was a significant amount of commonality in terms of the frameworks, but it appears that no one maturity framework has been able to act as the lead framework for *public* procurement. Telgen et al (2012) show in particular, that many consultancy firms apply the frameworks as part of commercial audit and development projects. Often those frameworks are used for commercial means and the criteria and measures for which remain hidden. However, whether commercially driven or not, it appears that no one model has gained a foot hold in the public procurement space.

The difference in the approach by CIPS and NIGP partnership is that it has invested in the Public Procurement Maturity Framework for the public good in order that government organisations around the world have a common, recognised framework that can serve as the reference point for professionalising its practices. In doing so, CIPS and NIGP will assess and recognise those organisations who wish to achieve a standard of excellence and professionalism and to be recognised as being committed to professionalising public procurement.

3.0 Measuring procurement maturity and why it is important for the public procurement profession?

The concept of measuring maturity is very popular and increasingly organisations in the public and private sector are keen to understand their strengths and weaknesses, as well as how they perform compared to other like organisations. The rise in benchmarking studies around the world is evidence of this. This said, Nongwa (2012) noted there is no generally accepted definition of a mature organisation, much less a profession. It is therefore important to consider why it is so necessary for the public procurement profession to develop and evolve in order to significantly improve in the future.

Maturity measurement has its roots in quality management (Albu and Panzar, 2010) and an extensive literature review has shown that maturity models are really inspired by the need to improve organisational processes, performance and functions, something which is increasingly important to public procurement, due to the increasing external scrutiny of its work. Again the EU Commission report shows an increase in the number of Anti-Corruption Programmes to reduce the risks in diversion of public funds for unfair or fowl means.

An interdisciplinary literature review revealed that a maturity model assumes progress towards goal achievement comes in either stages or in a continuous cycle i.e. continuous improvement. The ultimate ideal as highlighted by Lutteroth et al (2007) who described a maturity level as a 'level of organisational capability created by the capability of one or more domains on an organisations process'. It is an 'evolutionary plateau' on an organisation's improvement path or journey from ad hoc practices to a state of continuous improvement. This particular thought is planted in the work undertaken by the CIPS and NIGP partnership.

It is well known that procurement models aim to determine the maturity state of an organisation's procurement function. Most models aim to development characteristics like the degree to which the model:

- Is aimed at development rather than assessment alone
- Builds on previous models as described in the Telgen et al report
- Is scientifically/empirically tested
- Aims at public procurement maturity specifically
- Prescribes the best method or approach

As such the research went on to suggest that the key features of the maturity of any profession and indeed the public procurement profession could be viewed under a number of headings, including:

- Professional values
- Professional standards
- Professional responsibilities
- Inter-professional roles and responsibilities

CIPS and NIGP therefore viewed it as imperative to establish the Partnership for Public Procurement in order that it could ensure that the above aspects of maturity were embedded into Public Procurement. In recent times the Partnership has embarked upon the first stages of this journey through the introduction of the "Values and Guiding Principles" by NIGP in 2010 and adopted by CIPS in 2012 as well as the development of the Public Procurement Principles and Practices, freely available resources for public procurement stakeholders. These initiatives have been collaboratively developed with the public procurement profession in order to improve public procurement standards and practices, now reflected also in the new PPMF.

4.0 What will the PPMF contribute to the public procurement profession?

A significant feature of some maturity models is their capability to report on each maturity level, something the CIPS and NIGP partnership's model provides. For those public procurement agencies using the PPMF, the benefit to the organisation's performance will be significant, particularly when it has independently verified levels of maturity. The investment in time and money ultimately provides public procurement agencies with a prioritised roadmap to get to the next level of maturity and a benchmark on which to gauge their performance

against some standard criteria. The PPMF has in its benchmarking capability identified and segmented all public procurement sectors in order to ensure benchmarking is sophisticated and meaningful. Of course the PPMF has the added benefit of also provided a global bench marking, based again on similar or the same sectors.

Research, (Jugdev & Thomas, 2002, Bourne and Tuffley, 2007. AICPA/CICA 2001) shows that organisations that pursue maturity improvements can expect to benefit from:

- Improved budget
- A measure of value for money and in the private sector profitability
- Improved cycle times
- Increased productivity
- Improved quality
- Customer and stakeholder satisfaction
- Employee morale
- Decreased cost of quality
- Return on investment

Historically, the Office of Government Commerce (OGC) in the UK, now known as Government Procurement Service, cited six of the above factors as a benefit to the UK Government when undertaking a maturity assessment of its project management processes. The OGC suggested the benefit arose from putting in place continuous improvement plans with measurable outcomes based upon best practice. Those benefits are expected to be in public procurement through the development of the CIPS and NIGP Public Procurement Maturity Framework.

When undertaking the research, Callender et al (2012), ultimately made the following general assumptions that the CIPS and NIGP Maturity Framework will seek to address in order to help develop the maturity of the public procurement profession.

1. A need for a common language in the public procurement profession in order that professionals can converse without intra-professional barriers.
2. A learned society of public procurement practitioners which can be developed and nurtured and ultimate recognised in line with other key professions
3. A knowledge base exists from which all procurement professionals can be developed, i.e. a common body of knowledge
4. Public procurement has the potential to possess professional standing in the eyes of the wider community in every country.

The Partnership recognised that the success of its PPMF must seek to achieve the following for government agencies in order to be of value and benefit, a framework that is balanced with key concepts, behavioural characteristics of an organisation, and key enablers and measures which ultimately seek to not only measure maturity but hasten the maturity of public procurement in order to achieve greater public benefit and ultimately work to change the perception of public procurement.

The fundamental principles underpinning the approach of CIPS and NIGP is to allow the PPMF to be an enabler for continuous improvement, enhanced performance and a perspective of a growing and evolving global public procurement profession, in both the ‘developed’ and the ‘developing world’.

5.0 Why did CIPS and NIGP develop this model for maturity?

There is no generally accepted definition of a mature procurement organisation within the public sector (Nongwa, 2012). According to Telgen, Lohmann and Uenk (2011), the characteristics, type and number of elements used within maturity models differ; however, they typically provide a range from ‘Clerical’ through to ‘Strategic’. Maturity models can be compared according to the type and number of elements used, general model characteristics, the number of development phases and the level of measurement detail (Telgen et al, 2011). The newly developed CIPS-NIGP Public Procurement Maturity Framework (PPMF) reflects a broad

range of organisational characteristics to provide a more robust and complete model of maturity grounded by academic research. Specific characteristics that describe the value and underpinnings of the PPMF are as follows:

- Serves as both an assessment model and a prescriptive developmental guide
- Based on previous literature
- Empirically tested
- Supports first-and third-party assessment initiatives
- Defines some optimum phases of procurement maturity Specific to public sector procurement

The PPMF assessment owes much to the “Five Pillars of Professional Standing” (Callender 2012). The “Five Pillars...” examines and defines the qualities of organisational and environment behaviours that shape the maturity of procurement and management practice. Callender’s (2012) Five Pillars are:

- *Technical* – continuously developed knowledge and practice built around the procurement body of knowledge
- *Functional* – stewardship of the body of knowledge, code of behaviour and ethics, formal organisation, specialist knowledge and nominated champions
- *Internal consistency* – common language, standards of practice, continuing search for new methods, an acknowledged and developing procurement philosophy.
- *External regulation* – regulation by the profession body and by independent, legislative-based regulators.
- *External recognition* – achievement and maintenance of societal recognition.

These pillars support the six PPMF maturity phases:

Ad-hoc, Process, Policy, Tactical, Strategic and Professional. The PPMF’s construct is similar to previous maturity models which have also used stages or phases of maturity (Keough 1993; van Weele, 2001; Moller et al, 2006). Each of these models was designed to address procurement maturity, though only Moller’s model was designed specifically for the public sector.

Keough’s Procurement Development Model defines five stages of purchasing evolution. Based on his own experiences, Keough characterises the spectrum of maturity in qualitative terms whereby the purchasing function moves from “Saving the factory” through to providing “World-class supply management”. Keogh focusses on cost reduction as the only benefit of mature purchasing (Telgen et al 2011).

Van Weele (2001) conducted a literature review of maturity models and developed a six-phase Supply Management Maturity Model based on Keough’s model. The difference in van Weele’s model is that Van Weele adapted Keough’s model to apply an enterprise perspective to cost reduction. He also created a Stage Three focussed more on total cost of ownership rather than unit cost; a Stage Four focussed on outsourcing and supplier relationships; and a Stage Five focussed on providing the most efficient and effective value chain possible to serve the end customer (Telgen et al 2011).

Both of these models demonstrate how organisations could realize increasing potential savings by moving through the development stages. However, according to Telgen, et al (2011), Keough’s Model requires cumulative capability whereby jumping a stage or not completing the work for each stage will not fully benefit the organisation. By contrast, the PPMF is premised on the concept that organisations’ procurement-related behaviours reflect degrees of practice maturity. There is no interdependency between each stage of maturity. This can be seen more fully within Section 4 of this paper.

Moller et al (2006), inspired by the European Federation of Quality Management (EFQM) model, developed the SKI Development model for public procurement. Their model was based on the Capability Maturity Model (Software Engineering Institute, USA, 1986) and the five-level maturity scale from Paulk et al. (1993). This framework provided five levels of maturity from Ad-hoc to Optimized (Telgen et al, 2011). Eight dimensions

were assessed via a self-assessment questionnaire including tendering, procurement policy and strategy, processes, reporting and supplier co-operation and management.

The models mentioned above address the technical and functional features of the procurement profession which we know from research have become well advanced (Callender and Nongwa, 2012). However, further research suggests that philosophical and broader knowledge development has suffered due to the focus on procurement functions and techniques. This emphasis on tactical practices leaves “the Profession...somewhat frozen in its own development”. (Callender, 2012).

Rather than focussing on procurement function and techniques, the PPMF uses the POLC Model (Fayol 1916; Daft 1983) to assess the behaviours and management practices used in the procurement process. These provide the foundation principles of procurement management, each of them distinct but dependent functions: Plan, Organise, Lead and Control. (For the benefit of the PPMF we have called Organisation “Process”).

Approaching maturity from a management perspective is not a novel idea, per se. Both the EFQM (1991) and the INK (1992) models use fundamental concepts which include elements of the POLC model. Yet, these models are neither procurement nor public sector specific and focus on assessing the general performance of the organisation using self-assessment methodologies. An example of a procurement specific model which uses the POLC model is Holger Schiele’s Supply Management Maturity Model (2007), however the Schiele model has been developed specifically to prescribe one single supply strategy as more mature than another i.e. has a strategy been defined and documented or not. The level of maturity within the model also strongly correlates with its savings potential within commodities. This is very specific and not the intention of the PPMF, which has been designed around the fundamental view that procurement maturity is not just about procurement practice and processes.

The following provides a brief description of the behaviours and management practices as addressed within our PPMF Maturity Model for each of these four functions:

Plan

Planning is the identification of objectives and development of plans to achieve organisational objectives. Planning should take place at all levels within the organisation. Responsibilities of the strategic, tactical and operational managers should be clear and there should be evidence of preparation for the actions which will help the organisation meet its goals.

Process

Processing (or organising) is the alignment and fair allocation of resources in a way that best meets a government entity’s goals. Process development includes identifying the flow of actions, key stakeholders, and the departments or individuals who are responsible for each action.

Lead

Leading is how the procurement function and/or department guides, motivates and influences stakeholders toward achieving their objectives most effectively and consistently with organisational goals. This includes how procurement staff and those with delegated procurement authority are developed through training and education.

Control

Controlling is how the procurement function and/or department evaluates and modifies its activities to ensure that its objectives are achieved. Efficiency targets are established and results monitored against these targets. Contract outcomes should be clearly identified and staff allocated to manage these contracts. Activity should be adjusted accordingly and reported.

The intent of this section has been to demonstrate how the PPMF was developed for use as a universal standard to assess procurement practice and additionally promote a common language and philosophy for public procurement maturity. It has been created from a basis of management study, a literature review, lessons learned from previous maturity models and from the extensive experience of the two largest professional organisations representing the public procurement profession. The next section of this paper will show how the framework can be used in practice, helping government sector practitioners to optimising the value of their procurement programs.

6.0 How can the framework be used in practice to change the shape and perception of public procurement?

The PPMF has been designed to help public sector agencies identify and understand the consequences of their current state of maturity relative to public procurement's role as an economic enabler and contributor. It is expected that procurement's profile in an agency and the professional recognition of public procurement will also be enhanced. Both the self-assessed feedback and the expert-assessed feedback allows a public sector agency to understand the journey that they need to take to meet their particular agency's goals and targets which include increasing stakeholder demands for public procurement.

Initially, the tool enables the agency to understand whether they practice procurement in an "unstructured" or a "structured" manner.

An "unstructured" assessment indicates that procurement is being carried out without clear process, governance or planning. Although lack of structure provides a degree of agility for the public sector agency, that same lack of operational discipline exposes the agency to greater risk of malpractice. It becomes very difficult for an agency to ensure purchasing decisions have been made rationally, ethically and in the best interests of the agency.

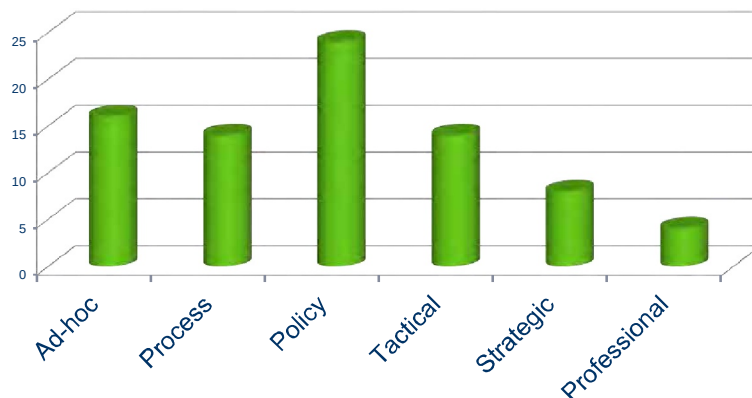
A "structured" assessment indicates that procurement is typically carried out in a manner consistent with best practices and is an integral contributor to setting and achieving agency business goals and outcomes. The agency recognises the importance of procurement and sees it as a distinct function. Procurement policies and processes will have been developed to ensure that procurement activity is carried out in accordance with standard practices across the agency and established methods of mandating approved procurement practice to reduce 'maverick' spend and other anomalous buying behaviour has been developed and implemented.

Within the framework, unstructured is indicated by an 'Ad-hoc' response whereas structured is indicated by any one of the following maturity phases:

- Process
- Policy
- Tactical
- Strategic
- Professional

It is highly unlikely that any agency will consistently reflect a single level of maturity across all procurement behaviours. In fact, as shown here, most organisations will demonstrate aspects of a number of levels of maturity.

Maturity is a Progression



Partnership for Public Procurement

The PPMF works by an agency identifying its current phase of maturity through self-assessment. Once noting the relative maturity of agency practices, the agency can focus on and develop specific areas of function towards its desired level and/or have this verified by a professional assessor.

This next section of this paper sets out to provide an overview of each of the six models of procurement maturity and the consequences of adopting each model.

6.1 Ad-hoc Model of Maturity

An agency carrying out procurement in an Ad-hoc way will not have clearly defined procurement policies, procedures or processes. 'Buying' activity will take place by a variety of individuals in different departments which may or may not have professional credibility. The 'buying' activity will typically be co-ordinated through the accounting system and not by any other control mechanism. There will be no anticipation of the procurement requirements for the agency and suppliers will be easily able to dictate their own terms and conditions. The language and philosophy of procurement will be absent from the agency. 'Buying' will be perceived a simple clerical activity.

The consequence of adopting an Ad-hoc Maturity Model is that it will be challenging to assess whether procurement has met the needs of the agency. Without clear procurement plans, it will be difficult to analyse whether or not the procurement activities were carried out in the most efficient and effective ways.

6.2 The Process Model of Maturity

Agencies approach procurement as a series of actions leading to a set of results reflect a Process Model. Agencies managing procurement in this way will still not have clear policies in place, but will have a set of formal 'buying' processes. Procurement decisions will tend to be made in absence of any formal procurement structure. The language and philosophy of procurement still remains immature with procurement not seen as a core competence, but typically seen as a minor element of finance.

The consequence of adopting a Process Maturity Model is that 'buyers' will be accountable to functional managers, those creating the specifications, and will be constrained by requirements to purely follow the stated procurement process. No clear or consistent policies will exist causing difficulties in monitoring practices and measuring success. It is unlikely that agencies will be benefiting from any consolidation of buy or aggregation

savings. Supply chain risk is also unlikely to be monitored leading to increased costs of acquisition, missed deadlines and quality failures.

6.3 The Policy Model of Maturity

An agency operating within a Policy Model will start to view procurement as a regulated activity. The agency will recognise the importance of procurement as an activity with established procurement plans and policies. At this phase of maturity, there will be evidence of a procurement department managing procurement activity although there will be limited co-ordination. The language and philosophy procurement will be accepted by the agency through formal procurement processes. However, formal training of procurement staff may not be given priority.

The consequence in adopting a Policy Maturity Model is procurement decisions will be left to 'buyers' whose delegations are unclear and therefore 'Maverick' buying may be high. Purchases will typically be made to solve short term problems with little thought for the long term impact on the agency or its stakeholders. This could lead to increased supplier-related costs through price changes, contract scope creep and limited understanding as supplier management is also limited.

6.4 The Tactical Model of Maturity

An agency operating within a Tactical Model will have recognised the importance of procurement and see it as a distinct function. Reliable procurement processes will exist ensuring procurement activity is carried out in accord with standard practices across the agency. There will be established methods of mandating approved procurement practices that reduce the earlier mentioned 'maverick' spending and anomalous buying behaviours. Procurement policies will be established across all major aspects of procurement. The language and philosophy of procurement is increasingly more mature with procurement recognised and referred to as a value-adding function and represented at senior management level by a Chief Procurement Officer or similar titled officer.

The consequences of adopting a Tactical Maturity Model is that procurement decisions will be made according to procedural rules rather than the strategic significance of the buying decisions, although well-defined procurement processes will be in place covering major procurement activities such as tendering, supplier selection and contract management.

Typically, supplier evaluation will focus on just financial analysis and contracts will be awarded to the lowest priced offers as product or supplier market intelligence is unlikely to be fully undertaken and there will be little consideration of the long term benefits or other consequences of the buying decision.

6.5 The Strategic Model of Maturity

An agency operating within a Strategic Model will have a well-designed and established procurement function. The agency will see procurement as a strategic activity clearly aligned with the strategic goals and longer term plans of the agency. Supplier selection procedures, supplier relationship management and contract management processes have been developed to ensure that the outcomes of buying decisions match the strategic intent of the original buying decision.

All positions within the procurement team will be filled with individuals possessing recognisable training and education in addition to relevant experience. Continuous professional development is encouraged throughout the team and cross-disciplinary and cross-functional interactions between staff and end-users will be seen as normal behaviour. The language and philosophy of procurement is mature within the agency with procurement decisions governed by an overarching set of procurement policies and strategies.

There are consequences of adopting a Strategic Maturity Model as it is likely that the procurement process may take longer and be less agile. However the positive consequences of aligning procurement decisions to the agencies strategy will outweigh the negatives. Uniform policies, strategies, procedures and processes adopted across the agency will provide clear data and information in order to make good strategic procurement

decisions. There will be a focus on maximising end-user satisfaction, whilst managing costs and minimising supply chain risk. The procurement function will be strongly led at executive level and will have a clear understanding of its impact on the agency. It is likely at this stage that perceptions of public procurement will be improved internally as greater professionalism is exhibited cross-functionally across the agency, not just functionally within the department. Economically benefits should also be felt as stronger controls and measures are in place.

6.6 The Professional Model of Maturity

An agency attaining the professional level of procurement maturity recognises both the strategic contribution and the need to have a professionalised approach to managing and conducting procurement across the agency. The organisation executive will intuitively recognise the contribution of procurement to commercial decisions by the agency. This knowledge will be supported by the appointment of suitably qualified and educated staff at all levels of procurement that will be expected to maintain professional currency through compulsory continuous professional development. There will be strong evidence of consistent use of supply market intelligence, spend analysis, supplier performance measurement and management and continuous supply chain performance and risk assessment. From a benefit perspective, there is evidence to suggest that those organisations who embark upon spend analysis programmes are more likely to identify potential diversion of funds for unethical means i.e. identify bribery, fraud and corruption.

The language and philosophy of procurement will be fully integrated into management practices within the agency and will be consistently applied by staff in their dealings with end-users and suppliers. This means that procurement senior management and organisation executives act in accord with procurement policies, philosophies and practice. The organisation will typically have a Chief Procurement Officer, appointed at executive level, who along with the senior members of the procurement team will have extensive links into the knowledge community of procurement, its professional bodies and centres of learning. In an agency operating at this level, procurement staff will engage in a constant search for improved methodologies for initiating and managing procurement decisions and suppliers.

The consequences of adopting the Professional Maturity Model of procurement are that the organisation will be taking all the positive aspects of the strategic model and executing them in a highly developed and well governed way. Decisions will be made based on a sophisticated analysis of supply markets and the most appropriate approach to market chosen by the highly educated and experienced procurement team. This should lead to sustainable cost savings and risk mitigation and give enhanced credibility to procurement both internally and externally as a result.

Ethical procurement practices will be embedded into governance rules at Board level leading to the profile of the procurement team being elevated within the organisation. Suppliers will perceive the organisation as a 'buyer of choice' and its procurement operations will be valued as professional and competent. Greater focus on independent and external measures and recognition of ethical and transparent practices will also be evident.

The PPMF framework used correctly and aligned to the agencies mission, vision, goals and targets creates increased professionalism in practice and provides a structure for a positive culture of change and evolution in procurement practice. The CIPS-NIGP partnership will furthermore take the benchmarks from the PPMF to motivate and encourage others to be more aspirational in practice. This again serves to in part improve the perception of public procurement.

7.0 Conclusions

Though a dearth of procurement maturity frameworks derived for different purposes and different circumstances exist, at this time, none appear to be specifically directed to the cause of Public Procurement. Yet, the current focus on public procurement is immense.

CIPS and NIGP have, through the desire to professionalise public procurement, sought to put in place a framework that would create a sense and consistency of measure of Public Procurement Maturity, while at the

same time creating for public entities clearly defined pathways for continuous procurement improvement. The aim of the framework designed is to specifically look not just at the measurement of the maturity, but to look at the *progression* of public procurement maturity, always creating an opportunity for government agencies to up their game. This was at the heart of what the partnership wanted to achieve, particularly in the light of the increasing pressure upon government organisations around the world to be more effective, more value driven and able to respond in innovative, strategic, optimised and ethical ways that meet the needs of stakeholders regardless of where they are located. In essence, this framework gives way to creating an open and transparent benchmark of what good procurement can look like and what stakeholders of public procurement can expect.

The consequences of each stage of the Public Procurement Maturity Framework are clearly defined and, therefore conversely, so are the consequences of not responding to the need for any government agency to improve the state of its procurement practices. It is increasingly hoped that government organisations and agencies will utilise this tool to put organisations on a pathway to improvement, not necessarily defined by achieving a 'Professional Maturity State', but in line with the need of the organisation, its context and the scope of its capability. The added benefit of benchmarking government agencies against others of their type and around the world is significant and encourages a sector approach to continuous improvement rather than just an organisational approach.

Adopting a maturity-based approach supports an improved perception of public procurement and simultaneously serves to strengthen the position of public officers as they rebuild credibility after many years of demanding economic times. It is hoped that each government organisation and agency, wherever they are in the world, will undertake the journey to improve quality, productivity, outputs, value for money, customer satisfaction and a return on investment for the future. Doing so gives stakeholders greater confidence that ethical and effective public procurement practice is open, transparent and maximizes benefits for all.

Bibliography

Callender, G., 2012. *The Five Pillars of a Profession: From a Functional to Aspirational Model for the Procurement Profession*, IPPC Conference, Seattle, WA August 2012

Daft, R.L., 1983. *Organization theory and design*, The West series in management., West Pub. Co., cop

Values and Guiding Principles – NIGP (The National Institute for Public Procurement) 2010

Report from the Commission to the Council and the European Parliament – EU Anti Corruption Report – Brussels 02.02.2014 http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf

European Foundation for Quality Management, 1991. EFQM Excellence model. Retrieved (date). Available on-line at <http://www.efqm.org/efqm-model/model-criteria>

Fayol, H., 1916. *Administration industrielle et generale*, *Bulletin de la Societe de l'Industrie Minerale*, , Vol. 10 No. 3, pp. 5-162.

Institute of Dutch Quality Care (Instituut voor Nederlandse Kwaliteitszorg – INK), 1992. Retrieved (date). Available on-line at www.ink.nl in Dutch.

Keough, M., 1993. *Buying your way to the top*. McKinsey Quarterly (3) pp.41-62

Moller, H, Petersen, V and Jakobsen, ?. 2006. Development model for public procurement in a Danish context. Proceedings from 4th IPPC, part 18-1. Cited in Telgen et al., 2011. *A survey of procurement maturity models*, unpublished, Lunteren, The Netherlands.

Schiele, H., 2007. Supply-management maturity, cost savings and purchasing absorptive capacity: Testing the procurement-performance link. *Journal of Purchasing and Supply Management* Vol. 13 No. 4, pp 274-293

Telgen, T., Lohmann, W., Uenk, N., 2011. *A survey of procurement maturity models*, unpublished paper, Lunteren, The Netherlands.

Van Weele, A., Rozenmeijer F. and Rietveld, G., 2000. *Professional purchasing in organisations toward a purchasing development model*. Publication Source?

FEDERAL GOVERNMENT OF NIGERIA VERSUS THE STATE: A COMPARATIVE ANALYSIS OF BPP'S PROCUREMENT ACT 2007 AND JIGAWA DUE PROCESS AND PROJECT MONITORING BUREAU'S PROCUREMENT LAW AND GUIDELINES

By

Jibo Nura¹, Shuaib, M.R²

¹Building Department, Due Process and Project Monitoring Bureau,
Office of the Executive Governor, Jigawa State, Nigeria.

² Department of Quantity Surveying, School of Environmental Technology, Abubakar Tafawa Balewa University, Bauchi-Nigeria.

E-mail: jibonura@yahoo.com

Being an abstract submitted to the International Public Procurement Conference 2014

Dublin, Ireland.

August, 2014

Abstract

Background:

This paper examines the procurement methods of the Federal Republic of Nigeria's Bureau of Public Procurement (BPP) and Jigawa State's public procurement under the established national Due Process and Project Monitoring laws and guidelines. It critically explains the public procurement regulations based on public procurement Act 14 of 2007. Procurement of goods, works and consultancy services and even national shopping of Federal Government and Jigawa State's ministries, extra-ministerial offices, departments, agencies, parastatals, corporations and all other public entities set up by the Constitution or Act of the National Assemblies (federal and state) whose funding is originally derived from the Federation Accounts and internally generated revenues in the national budget are reviewed and compared with the international procurement implementation strategies and contract administration's rules and guidelines.

The Federal Government's Bureau of Public Procurement process of awarding contract is, indeed, faulty when compared to Jigawa State's procurement under its Due Process and Project Monitoring Bureau (DP&PMB). Some of the fault lines that this paper seeks to address heavily rest on the modus operandi of the procurement budgetary implementation of the Federal Government and Jigawa State government whereby at the Federal level, the budget is operated at 70 per cent recurrent expenditure and 30 per cent capital expenditure, which is the reverse, and is inversely proportional to Jigawa State's procurement budget provision and implementation. The paper argues that a sound procurement system must be operating on relatively balanced budget and must have the desired impact to inspire the confidence and willingness-to compete with well-qualified vendors.

Methodology:

Content analysis is used as a methodology where existing literature on procurement are reviewed and analyzed more succinctly.

Result:

The paper observes that there is a clear demarcation line between the requirements of international public procurement best practice(s) where efficiency implies practicality, especially in terms of administrative/ professional capabilities of the purchasing entities and the Nigeria's

public procurement laws, policies and practices. The success story in Jigawa State is on efficiency, fairness, transparency, accountability and ethical standards in contract award and execution. Other direct negative results at the Federal level include bribery by frustrated or unscrupulous vendors and purchasing entities, which gives non value for money, betrayal and abuse of the public trust for personal gains.

Conclusion:

The paper concludes that a procurement system that fails to comply with international best practice is a menu for unprecedented corruption and bad procurement disaster, because it is to be done on submission of inflated and deflated tenders followed by delayed and defective performance.

Key words: Procurement Act 2007, Procurement law, Due Process and Project Monitoring Bureau, Bureau of Public Procurement, Jigawa, Federal Government, Nigeria.

1. INTRODUCTION

The Bureau of Public Procurement (BPP) of the Federal Government of Nigeria (FGN) and Due Process and Project Monitoring Bureau (DP&PMB), Jigawa State, Nigeria have established general policies and guidelines relating to public sector procurement. The conceptualization, planning, design and implementation of projects at federal and state levels in Nigeria, particularly in Jigawa State, provides room for proper delivery of services, goods and consultancy.

Public procurement laws give opportunity(s) for award of contract with due diligence and procedure. The procuring entity (PE) needs to adhere to the public procurement Act provision, including certifying all federal and state procurements subject to the Bureaus approval and award of contracts (Office of the Head of Civil Service of the Federation, 2012: 1-17).

The Federal Government of Nigeria's method of procurement, though traditional in nature, has made enough provisions and suggested requirements, which the procuring entities (PEs) must comply before they are given contracts. This is similar to what the Jigawa State Due Process Law and guidelines enabled with the hope of obtaining the best possible value for money on behalf of the client and government of Nigeria (Bureau for Public Procurement Manual, 2011:1-5).

2. AIM

The aim of this paper is to investigate the public procurement planning and implementation by Federal Government of Nigeria and Jigawa State to see whether they are done in accordance with the laid down laws and guidelines.

3. OBJECTIVES

The objectives of the paper are:

- To identify areas of common engagement between the FGN and Jigawa State public procurement laws.
- To determine whether there are violations or breach in procedure in the procurement implementation strategy.
- To observe the lapse that is in public procurement between Jigawa State and Federal Government of Nigeria.
- To suggest possible ways of improving public procurement principles based on its existing laws and guidelines.
- To compare and contrast between Jigawa State Due Process procurement Law No. 14 and guidelines and the FGN's Bureau for Public Procurement 2007 Act No. 14.

4. METHODOLOGY

This paper used content analysis as a method where data was collected and analyzed based on the existing literature on public procurement in Nigeria. Primary source of data such as textbooks, journals and reports on procurement were read and analyzed while constructing this paper. Secondary source of data such as Newspapers and articles on internet were used as reference material that helped in analyzing data. The paper is limited to the existing literature on procurement laws in Nigeria by comparing it with international public procurement rules.

5. AN OVERVIEW OF FGN's BBP Act 2007 NO. 14

The preamble to 2007 public procurement Act No. 14 provides the regulatory framework that is responsible for the monitoring and overseeing of public procurement. It harmonizes the existing government policies and practices by regulating, setting standards and developing the legal basis and professional capacity for public procurement in Nigeria (Federal Republic of Nigeria Official Gazette 2007: 209).

The scope of application of the Act encompasses all the procurement entities in Nigeria from the federal to state governments.

All entities outside the foregoing which derive at least 35% of funds appropriated or proposed to be appropriated for any type of procurement described in the Act from the Federation share of the Consolidated Revenue Fund.

The limitation to the 2007 procurement Act is on special goods, works and services involving national defence or national security unless President's express approval has been sought and obtained (Bureau of Public Procurement, 2011: 5).

The hallmarks of proficient public procurement are: economy; efficiency; fairness; reliability; transparency; accountability and ethical standards.

Procurement as a purchasing activity is to give the purchaser the best value for money. For complex purchases, however, value may imply more than just price, for example, since quality issues also need to be taken into consideration (Paschal, 2013: 1-47).

Any procurement system that fails to comply with the principal hallmarks of the above elements stimulates hesitation to compete, submission of inflated tenders containing a risk premium or submission of deflated tenders followed by delayed and defective performance. Indeed, negative direct results include bribery by frustrated or unscrupulous vendors and purchasing entities, bad value for those entities and their constituents and betrayal and abuse of the public trust for personal gain.

In other word, proficient public procurement is not difficult to describe in principle or to distinguish from its antithesis in practice (Bureau of Public Procurement, 2011).

The public procurement Act 2007 puts Nigeria in the league of countries with legislation on how public funds would be expended.

Prior to now, Nigeria was among the few African countries without legislation on public procurement. However, the genesis of why procurement Act 2007 came to light was to institutionalize the operations of public procurement Bill that was sent to the National Assembly in 2003/2004 and on May 31, 2007 the two Houses (upper and lower) passed the Bill and on June 4, 2007 President Umaru Musa 'Yar Adua signed it into law.

Why is sound public procurement important? The quality, timeliness, suitability and affordability of the procured inputs can largely determine whether the public investment will succeed or fail. So the beneficial impact and contribution of the input, particularly in the case of technical assistance services, can exceed their direct costs. Yet procurement costs can be substantial, consuming scarce resources of tightly constrained government budgets. Here, five basic concerns that govern procurement policies need to be mentioned.

- To ensure that goods and services needed are procured with due attention to economy and efficiency;
- To ensure that public funds is used to buy those goods and services needed for national development;
- To give all qualified bidders an equal opportunity to compete for contracts;
- To encourage development of local contractors and manufacturers; and
- To ensure that procurement process is transparent.

6. AN OVERVIEW OF JIGAWA STATE DUE PROCESS AND PROJECT MONITORING BUREAU REVISED LAW NO. 14 AND GUIDELINES

The Jigawa State Due Process and Project Monitoring Bureau Law states clearly the function of the Bureau based on the following:

- To regulate and set standards to enforce harmonized bidding and tender documents for all the state contracts;
- To ensure full compliance with the laid down guidelines and procedures on procurement;
- To develop, update and maintain system wide database for the state on various procurements at the MDAs;
- To uphold professional ethics and report erring procurement personnel, state and local government functionaries, department and private sector companies and their personnel to relevant authorities for appropriate sanctions;
- To monitor prices of tendered items and provide price database advisory services to the procuring entity;
- To perform pre-procurement audits;
- To evaluate and monitor government projects from point of award until completion and issue certificate accordingly;
- To coordinate training to promote capacity building of procurement personnel of the state;

- To sensitize, promote and educate the citizens and other stakeholders in the state on public procurement issues;
- To provide relevant procurement and budget performance information to interested parties;
- To publish the details of major contracts awarded in the state periodically;
- To undertake procurement research and surveys;
- To set and update standard bidding and contract documentations
- To perform all things and carryout such other activities as are necessary and expedient for the full discharge of its functions under or pursuant to this law.

These are the main functions of the Bureau. It therefore has the vested power to certify contracts procedures of every entity to which this law applies subject to thresholds as may be set by the council. The Due Process Bureau also has that power to stimulate guidelines to all procuring entities the procedures and documentation required for such certification from time to time (Due Process and Project Monitoring Bureau, 2012; Office of the Head of Civil Service of the Federation ,2012).

It can also call for such information, documents, records and report in respect of any aspect of any procurement proceedings where a breach, wrong doing, default, mismanagement and/or collusion has been alleged, reported or proved against a procuring entity or service provider.

Indeed, the Bureau has the power to report and recommend disciplinary action against accounting officers of any procuring entity to the council for appropriate actions. It can also nullify the whole or any part of any procurement proceeding which is in contravention of the law (Due Process and Project Monitoring Bureau, 2012: 3).

The Due Process and Project Monitoring Bureau has the power to enter into contract or partnership with any company, firm or person in order to discharge its function subject to approval by the Jigawa State Council.

Part 4 of the Law subsection (g) and (h) give the Bureau the liberty to register all categories of contractors and issue certificate thereof. The Part stipulates a code of conduct for all public officers, suppliers, contractors and service providers involving the procurement and disposal of public assets.

7. DISCUSSION ANALYSIS AND PRESENTATION

The difference and similarities between the Federal Government of Nigeria BPP's procurement Act 2007 No. 14 and Jigawa State DP& PMB's Law No. 14 is that the BPP 2007Act is purely meant for procurement purpose whereas the Jigawa Due Process Law No. 14 encompasses all aspect of procurement, project management and administrative guidelines. The Jigawa Due Process Law No. 14 does not limit itself to only

procurement. It covers other matters related to training and development of public officers from all the state MDAs and the Due Process staff.

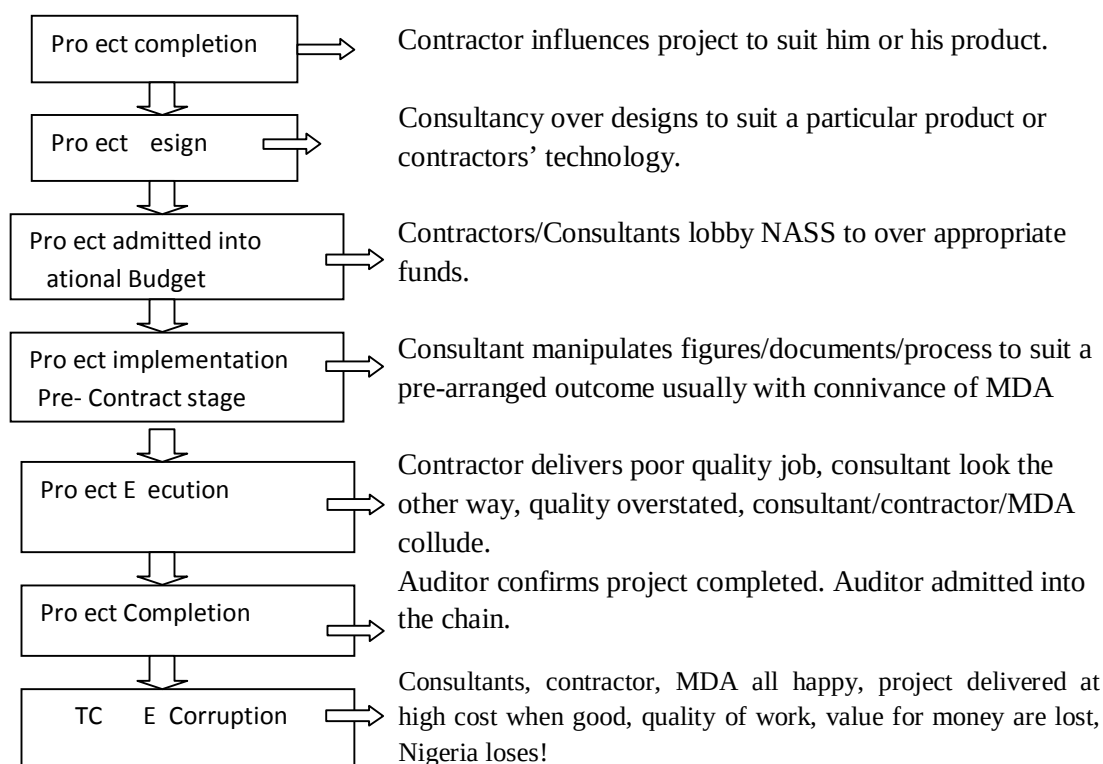
Under the 2007 FGN-BPP 2007 Act No. 14, there is no provision for registration of all categories of contractors with the BPP. It only provides for registration of certain categories of contractors for mega projects with the FGN and BPP on procurement of goods, small works and national shopping.

While the Jigawa state Law on procurement provides room for 30% mobilization payment, the BPP procurement Act 2007 provides room for 15% mobilization payment to contractors.

However, the major similarities between the duo(Jigawa DP&PMB Law No.14 and Guidelines and the BPP's 2007 procurement Act No.14) is that they are all coded as Law No.14 and Act No. 14; apparently discharging the same responsibility as legal entities in charge of procurement at national and state government levels.

8. SETBACKS TO PROPER PUBLIC PROCUREMENT AT THE FGN

The chain of corruption that constitutes a major threat and setback to effective public procurement at the federal government level can be schematically described thus:



Source: Public Procurement Act 2007 as it affects contractors and consultants, Bureau of Public Procurement, Nigeria , Page 7.

9. DEVELOPMENTS IN PUBLIC PROCUREMENT AND PROJECT EXECUTION IN JIGAWA STATE, NIGERIA

The Jigawa State Government's budget is operating at 75% capital and 25% recurrent expenditures whereas the Federal Government's budget is the reverse. It operates a budget that is 70% recurrent and 30% capital, which is a menu for unprecedented bad procurement disasters (Federal Executive Council, 2013).

Even though, the FGN has adopted most of the World Bank's best practice documents, but it lacks the courage to soundly implement its public procurement system the way it is done in Jigawa State. Therefore, the success story in Jigawa is that ethical standards in contract award and execution are strictly adhered to, based on efficiency, fairness, transparency and accountability. The fact that Jigawa State Due Process and Project Monitoring Bureau partners with DfID under its State Partnership for Accountability, Responsiveness and Capability (SPARC), it is now carrying its procurement activities in accordance with the international best practice. Every contract that is awarded, the contract sum, name of contractor, location and progress of work done are all properly documented, distributed and pasted on internet for all those that care to see. Below is a table showing the contract progress and work done by some contractors in Jigawa State.

JIGAWA STATE DUE PROCESS AND PROJECT MONITORING BUREAU

CONTRACTS AWARDED FEBRUARY TO JUNE, 2012.

S/N	DATE	PROJECT	CONTRACT NO.	CONTRACTOR	AMOUNT (N)	EXECUTING MINISTRIES	COMP. PERIOD
1	7/2/2012	Construction of External works at State High Court Complex, Dutse	FGPC/21/2012/VOL 1/5	Dantata & Sawoe	597,900,000.00	DCDA	4 months
2	5/3/2012	Additional works on the Construction of Office and Official Residence of His Excellency the D/Governor	FGPC/34/2009/VOL 1/27	SKY Tech. Constr. Co.	326,891,094.52	DCDA	14 months
3	26/03/2012	Construction of external works at the new office complex for the Min. of Land & Housing, Dutse	MLG/INSP/8/50V.1	FORET Nigeria Ltd.	38,899,850.00	Ministry for Local Govt.	5 months
4	5/4/2012	Consultancy supervision of 9km Spur road from Tudu Babba-Kawa and Yama Village	FGPC/101/2009/VOL 1/53	Wuro Associates	20,082,794.00	Ministry of Works	8 months
5	3/5/2012	Construction of Asphalt Overlay road at Rasheed Shekoni Hospital, Dutse	FGPC/2/2012/VOL 1/6	Dantata & Sawoe	80,675,326.70	DCDA	8 weeks
6	3/5/2012	Remodelling of Executive Governor's Office, Dutse	FGPC/3/2012/VOL 1/7	Dantata & Sawoe	660,716,373.94	DCDA	8 months
7	3/5/2012	Constr. of Aluminium Office Partition to the New Office Complex for Ministry of Land	FGPC/4/2012/VOL 1/6	UC Great Service Ltd.	37,656,802.57	Ministry of Land	12 weeks
8	24/05/2012	Constr. of Estem bye-pass road, Arawa-Kubayau-Masama-Gatta-Baturiya-Una(Spur to Yalwa-Musan)-Chacharan-Abunabo-Chapchapno-Lafiya-Kadira-Arinjasko-Matara-Abir-Guri road (104km)	FGPC/5/2012/VOL 1/39	CGC Nigeria Ltd.	11,146,281,267.60	Ministry of Works	40 months
9	1/6/2012	Supply of 1No. 14,000 litres SNO truck Howo Water Tanker	FGPC/7/2012/VOL 1/6	Babandoki Gen. Ent.	16,176,562.50	Ministry of Education	6 weeks
10	1/6/2012	Supply of Furniture to Deputy Governor's Office (additional works)	FGPC/34/2009/VOL 1/31	Rana Tahir	25,820,550.00	DCDA	8 weeks
11	1/6/2012	Consultancy supervision for the Constr. of Estem bye-pass road, Arawa-Kubayau-Masama-Gatta-Baturiya-Una(Spur to Yalwa-Musan)-Chacharan-Abunabo-Chapchapno-Lafiya-Kadira-Arinjasko-Matara-Abir-Guri road (104km) (phase II) 32km	FGPC/6/2012/VOL 1/20	LandBase Engineering		Ministry of Works	14 months
12	7/6/2012	Constr. of 1.9km Access road to the College of Islamic and Legal Studies, Ringim (Additional works)	FGPC/33/2011/VOL 1/38	Triecta Nigeria Ltd.	271,638,911.25	Ministry of Land	2 months
13	7/6/2012	Consultancy supervision of Additional works at College of Islamic and Legal Studies Ringim (1.5km)	FGPC/28/2011/VOL 1/32	LandBase Engineering	8,758,482.00	Ministry of Land	2 months
14	12/6/2012	Constr. of Classrooms, Labs., Functional halls and Admin. block at Jigawa State College of Remedial and Adult Education, Dutse	FGPC/13/2012/VOL 1/8	Datum Constr. Nig. Ltd.	1,062,208,645.68	Ministry of Education	14 months
15	14/6/2012	Urban Town Streetlight project in K/hausa (additional works)	FGPC/42/2011/VOL 1/28	Babandoki Gen. Ent.	73,043,538.60	Ministry of Works	4 months
16	15/6/2012	Supply of Equipment and Materials for (SNO.) centres across the state. 9Skill Acquisition centre)	FGPC/12/2012/VOL 1/7	Atamfa Marketing Ltd.	83,228,588.00	Min. of Economic Emp.	6 weeks
17	15/6/2012	Procurement of fertilizer for 2012 Wet season programme (3000mts) tons.	FGPC/4/2012/VOL 1/7	M.B.S. Merchants Ltd.	358,830,000.00	Ministry of Agriculture	12 weeks
18	15/6/2012	Completion of Urban town Streetlight project in Kiyawa	FGPC/44/2011/VOL 1/34	Khanadi Nig. Ltd.	94,615,610.00	Ministry of Works	6 months
19	15/6/2012	Demarcation, Survey and Production of Legal Maps for 50Nos. Grazing Reserves	CONC/4/2012	Median Surveys & Gen Services	72,951,367.50	Ministry of Agriculture	3 months
20	18/06/2012	Urban Town Streetlight project in Gwaram Tsohuwa town (additional works)	FGPC/41/2011/VOL 1/29	Mushab Investment	33,823,597.50	Ministry of Works	2 months
21	18/06/2012	Urban Town Streetlight project in Maigatari town (Additional works)	FGPC/45/2011/VOL 1/28	Saby Integrated Project	29,859,460.30	Ministry of Works	3 months
22	18/06/2012	Urban Town Streetlight project in Babura town (Additional works)	FGPC/40/2011/VOL 1/29	Stratrade Nigeria Ltd.	108,021,560.50	Ministry of Works	6 months
23	18/06/2012	Upgrading/Renovation of Jigawa State Governor's Lodge, Abuja	FGPC/15/2012/VOL 1/5	Ujat Nigeria Ltd.	96,580,271.67	Cabinet Office	4 months
24	19/06/2012	Constr. Of additional works at NYSC Orientation Camp Fariasa, Dutse	FGPC/109/2009/VOL 1/44	Konoha Enterprises Ltd.	93,726,143.55	Ministry of Information	12 weeks
25	19/06/2012	Procurement of Organic Fertilizer for 2012 wet season programme (1000 mts)	FGPC/9/2012/VOL 1/26	Excel Standards Nig.	94,000,000.00	Ministry of Agriculture	12 weeks
26	21/06/2012	Upgrade of Kazaure Stadium	FGPC/19/2012/VOL 1/6	H & M Nig. Ltd.	391,139,151.00	Ministry of Information	6 months
27	21/06/2012	Construction of Broadcasting House, Dutse	FGPC/16/2012/VOL 1/9	A.G. Ferrero & Co. Ltd.	1,050,500,000.00	Ministry of Information	8 months
28	25/06/2012	Upgrade of Dutse Stadium	FGPC/18/2012/VOL 1/6	Lodjani Nigeria Ltd.	351,853,465.25	Ministry of Information	6 months

Source: Due Process and Project Monitoring Bureau, Jigawa State, Nigeria.

The above table is an extract from the main table of the contracts awarded from January-December, 2012. This kind of table is done to all contracts awarded and executed in Jigawa State since 2007 to date

10. CONCLUSION

In view of all the above therefore, the paper concludes that any procurement system that fails to comply with international best practice is a recipe for unprecedented corruption and bad procurement disasters, because it is certainly going to be carried out on inflationary tendencies and deflated tenders plus defective performance and delayance.

REFERENCES

Bureau of Public Procurement (20012) . “Public procurement Act 2007 as it affects contractors and consultants”, State House, Abuja, Nigeria:1-25

Bureau of Public Procurement (2011). “Procurement Procedures Manual”, Federal Republic of Nigeri:5

Due Process and Project Monitoring Bureau Law (2012). “ A law to provide for the establishment of Due Process and Project Monitoring Bureau 2012”. Fifth Schedule, Law No. 14-Revised Edition, Jigawa State, Nigeria: 1-26

Federal Executive Council (2013). “ Budget Implementation Handbook”, Federal Republic of Nigeria: 1-12)

Federal Republic of Nigeria Official Gazette (2007). “Public Procurement Act 2007 No. 14”, Lagos, Nigeria: 209

Office of the Head of Civil Service of the Federation (2012). “Understanding procurement planning principles”, Office of the Senior Special Assistant to the President on MDGs, Abuja, Nigeria: 1-17

Office of the Head of Civil Service of the Federation (2012). “Procedures for Bid Evaluation of Works”, Office of the Senior Special Assistant to the President on MDGs, Abuja, Nigeria:1-8

Paschal, E. (2013). “Project Monitoring and Evaluation”, Kaduna State, Nigeria: 1-47

www.bpp.gov.ng (accessed on 12/01/:2014: 1-4).

www.jigawadueprocess.org (accessed on 12/01/2014:1-5).

In-house Public Service Delivery in Liberalized Markets: Improving a Dutch Paradox?

Willem A. Janssen

PhD Candidate, Europa Instituut, Utrecht University
Achter Sint Pieter 200, 3552HT
Utrecht, the Netherlands
Email: w.a.janssen@uu.nl

This working paper considers a situation in which private actors may desire to safeguard public interests through the provision of services, but are not allowed to contribute to them. Such becomes even more relevant due to the fact that public authorities in the Netherlands are increasingly internalizing public service provision. This trend is stimulated by the Dutch government's policy combined with a diminished belief in competition, but it is also facilitated by the exemptions to public procurement law. From a public procurement law perspective, public authorities can choose between *internal* or *external* performance, a discretion that allows them either to internalize its performance by carrying it out themselves, possibly in collaboration with other public authorities; or, to externalize the delivery of a services of general interest (SGI) by approaching a third party. [1] The internal performance alternatives are legal exceptions to the European public procurement regime and are therefore exempted from a duty to tender which without such an exemption would be compulsory. European law and the jurisprudence from the Court of Justice of the European Union (ECJ; the Court), thus, facilitates this freedom, but leaves open undesired possibilities of inefficient and ineffective public service delivery (paragraph 1-3).

In this paper, such a development is contextualized by considering Dutch sectors in which the state's decision to externalize or internalize the delivery of SGIs has become paradoxical. The term 'state' includes the various levels of government and public authorities. SGI and public service are used interchangeably. This paradox concerns a situation in which, despite the initial introduction of competition by ways of public procurement procedures, the performance of an SGI is internalized by a public authority, or, is excluded by the legislature from competition. To illustrate these developments, four sectors are considered in which this paradox occurs. Firstly, waste collection and supportive services such as IT illustrate the state's discretionary power in relation to SGI performance and the consistent application of these exemptions by Dutch courts (paragraph 4.1-4.2). Secondly, public transport and social support show a situation in which the legislature (partially) reversed its obligatory tendering policy (paragraph 4.3-4.4). [2] It concludes by discussing three elements which can improve decision-making relating to this paradox and *the choice between internal or external performance*. It considers the European internal market reforms, the Dutch Public Procurement Act 2012 (PPA 2012) [3] and the US Federal Activities Inventory Reform Act of 1998 (US FAIR Act) to further improve decision-making in relation to public service provision (paragraph 5-6).[4] The introduction of a legal framework which governs this policy decision should identify internal and external service delivery modalities as *equal alternatives*, with their own advantages and disadvantages.

1. The Freedom to Define and Perform SGIs

In order to fully understand this Dutch paradox, it is important to begin by discussing the freedom that European Member States have to define SGIs. In recent years, the academic debate in Europe has focused on what SGIs are and to which kind of services the internal market rules should apply. Despite this extensive debate, the Member States have thus far kept their discretionary power to define their public interests and SGIs. This freedom also allows Member States to decide how these interests should be safeguarded and organized, and if they involve a service; by who the service should be performed. [5] In this respect, the Protocol on Services of General Interest further complements this statement by recognizing:

"[...] the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; [...]"[6]

Despite this distant role of the European Union, the European Commission (Commission) attempted to further clarify the various forms of SGIs in 2011. [7] The Commission considers SGIs to be "services that public authorities of the Member States classify as being of general interest and are therefore subject to specific public

service obligations.” These services can be divided into two groups; non-economic and economic activities. Services of general economic interest (SGEI) are seen as economic activities which deliver outcomes that benefit the overall public good that would not, or not sufficiently enough, be supplied by the market without public intervention. Such economic activities are subject to specific European legislation and are therefore covered by the internal market rules (i.e. Lisbon Treaty, state aid, competition and public procurement rules.). Social services of general interest (SSGI) also can be either economic or not and include “social security schemes covering the main risks of life, such as those linked to health, ageing and disability, and a range of other essential social services provided directly to the person, such as occupational training, rehabilitation and language training for immigrants”.

As a consequence of these discretionary powers, Member States have the power to exempt services from the internal market rules by labeling them as a non-economic SGI. [8] Whether this decision is made at national, regional or local level depends on the division of powers in the respective Member State. In the Netherlands, it is left to the democratic processes to decide *what* kind of public interests should be safeguarded, and *how* it intends to promote these interests. [9] In addition, this process decides upon *who* should perform a certain service derived from the public interest. These questions are part of an older and broader debate on the extent of the state’s responsibilities, and their relation with the market. It is clear that the influence of the law is limited to situations in which the market is approached for the provision of SGIs.

2. The Performance of SGIs: Internalize or Externalize?

Dutch public authorities have various ways of performing SGIs. European public procurement law adheres to this discretionary power by providing the legal basis for these alternative performance options. In recent years, many of these exemptions to public procurement law have been developed by the ECJ. The following provides a brief overview of these alternatives:

- (1) *In-house performance* – a public authority decides to perform a service by using its own resources, which is thus completely ‘internal’. This means, for instance, that it uses one of its own divisions to collect waste. [10]
- (2) *Quasi in-house performance* - a public authority can entrust the performance of a service to an entity over which it exercises control similar to its own departments, and that entity carries out the essential part of its activities for the controlling public authority or authorities. [11] In the Netherlands, this can be done on the basis either of private law (e.g. a Dutch *B.V.*, *Coöperatie* or *Stichting*) or of public law (e.g. a Dutch *Openbaar Lichaam*, provided by the Dutch Inter-municipal Statutory Regulations Act). [12]
- (3) *Inter-municipal collaboration* – a public authority can arrange the provision of a SGI by cooperating with other public authorities completely within the public domain. Such performance is exempted from public procurement law based on the criteria derived from the *Stadtreinigung Hamburg* jurisprudence. [13]
- (4) *Exclusive right* – a public authority chooses to grant another public authority an exclusive right, after which that entity decides on questions of performance. Such a right can, for instance, be granted through a Ministerial Regulation, a local bylaw regulation or is included in the statutory documents of a separate entity. [14]
- (5) *Concession* - Public authorities can grant a concession for the performance of a service. [15]
- (6) *External performance* – a public authority decides to completely externalize a service to a third party. To achieve the best quality-lowest price ratio, such externalization is often done through a transparent and competitive procedure.

Consequently, public authorities have multiple alternatives to internalize or externalize the provision of SGIs. [16] This variety of legal alternatives is not problematic as such, because Member States and their public authorities should be able to perform a service themselves in certain policy fields. On the one hand certain functions, such as the administration of justice or democratic decision-making, may not be externalized, and on the other hand building maintenance and food services can. More troublesome is to identify the status of services, which are not as ‘black and white’ as the previous examples. The grey area of this categorization is where decisions on public service delivery causes difficulties. In relation to these services, good decision-making is even more important to be able to achieve the best outcome for society in relation to public service provision.

3. Explaining Internalization of SGI Delivery

As stated before, internal performance of services, and especially public-public collaboration, has gained importance in recent times. [17] In the Netherlands, an increase of collaborations between (local) public authorities has occurred, which consists of 698 collaborations based on public law, and 1022 collaborations based on private law. [18] Such collaboration within the public domain, can first of all be explained by a leading vision document of the former Dutch government, which is still being implemented. It demonstrates the thoughts of former Dutch minister, Piet Hein Donner, who advocated a ‘compact’ government. The role of ‘compact’ refers to a strong and small government, which is able to swiftly respond to changing circumstances. It focusses on more efficiency and lower administrative burdens by intensifying collaboration amongst public authorities, which has its effect especially on a decentralized level. [19] This desire for more collaboration can be explained by the need to spend public funds efficiently. More collaboration amongst public authorities for efficiency gains becomes even more relevant in times of financial crisis. [20] Additionally, the Treaty of Lisbon has increased the role of regional and local self-governance which enforces this development. [21]

Secondly, internalization of SGI delivery in general is influenced by the current views on the public and private divide. It is fair to say that Member States have become more critical in relation to the role of the market as a performer of SGIs. The advantages of introducing competition into markets are not as commonly accepted, and thus applied throughout Europe, as they were in the 1990s. In those times, liberalization and privatization were introduced in various areas, and public procurement procedures were often introduced if public authorities were to decide to externalized services. Monti described the current situation as ‘market fatigue’, which represents a loss in confidence in the market and has thus led to lower acceptance of the market and its actors involved. This is, to some extent, caused by the fact that the limitations of the market, and the services it can provide, have become more visible. In the Dutch public debate, the market is often seen as unfair and the cause of inequality. In this regard, Monti stated that those who propose, instead of oppose, are forced to defend their views on the liberalization of markets and the introduction of more competition. Such views enhance the idea that government performance is vital in order to safeguard public interests and can obstruct clear views on the advantages and disadvantages of performance alternatives. [22]

4. Paradoxical Performance Internalization in Four Dutch Markets

The internalization of SGI performance, which has been described in the paragraphs before, and the loss in confidence in market performance which often accompanies it, can be exemplified by assessing the waste collection, supportive services, public transport and social support market. Public procurement law’s exemptions play an important role in these markets. Waste collection and supportive services such as IT exemplify the government’s discretionary power in relation to SGI performance, and the consistent application of these exemptions by Dutch courts. The cases of the public transport and social support consider situations in which the legislature (partially) reversed its obligatory tendering policy, after which internal performance can gain importance again. These situation can also be seen as an example of Monti’s ‘market fatigue’.

4.1 The Waste Sector: Courts Uphold Internal Performance Exemptions

In the Netherlands, municipalities have been granted the responsibility to perform the collection of household waste. [23] In order to fulfill this duty, municipalities have, as previously described, various performance alternatives. In the last decade, the Dutch government has attempted to introduce, or further expand, competition in the waste management sector. It aimed at full liberalization of this market by 2050. The introduction of more competition is desired in order to maximize the positive effects for the environment at the lowest cost. [24] Despite the fact that a greater part of the market is now in the hands of third parties, it can be argued that in recent years public authorities have limited their contribution to this liberalization. The collection of waste is historically performed by using the recourses of public authorities, which in 2007 accounted for 25% of all cases. It is performed in alternative ways in 75% of the Dutch municipalities. From this part, 35% of these municipalities leave performance up to market parties. [25] The remainder is performed through a collaboration of public authorities. More recent studies show a similar situation in other European Member States. [26] Internal performance is, thus, substantially present in the waste collection market, which is intended to be entirely liberalized.

Market parties in this sector have not hesitated to file court proceedings against these internal performance alternatives by claiming that these contracts should have been tendered under European public procurement law. Two cases before Dutch courts illustrate such actions. In the first case *AVR/Westland*, the High Court confirmed the Court of Appeal’s ruling by granting the municipality of the Hague permission to join in the public collaboration of local public authorities. This entity, called ‘HVC’, was established to collect and dispose of

household waste. [27] In the years before this, Appellant AVR had been contracted for the waste disposal via a public procurement procedure. After the expiry of the contract, the government was allowed to not externalize performance, based on the exclusive right exception. [28] The second case involved a situation whereby the public authority of Friesland contracted *Afvalsturing Friesland N.V.* for their waste collection and disposal services. This local government was exempted from using a public procurement procedure for a different reason as it could rightfully rely on the in-house exception. [29] This in-house exception also led to proceedings before the Court of 's-Hertogenbosch, which rejected the claims of appellant *Shanks*, relying on the fact that this exception was no longer rightful due to a substantial change in supervision of *Attero-Zuid*. Shanks was unable to sufficiently prove this, which resulted in the fact that this collaboration between municipalities could continue. [30]

Despite intended liberalization, many municipalities in previous cases chose to perform the collection of waste entirely within the public domain. Third parties tried, but were unsuccessful in their attempt, to break open these internal performance structures, because the Dutch courts have been consistent in their assessment of these legal exemptions to public procurement law. It also shows that due to the legal alternatives similar services are performed in different ways.

4.2 Supportive Services: Internal Performance Outside The Public Interest

Services that *support* the provision of SGIs, such as IT, can also be performed entirely within the public domain. [31] Briefly noting them is thus justified in this context. In addition to IT, transport, graphic design, and educational services which support the functioning of the state, are also increasingly internalized and are thus also part of the public debate. [32] From a public procurement law point of view, the legality of such a legal construction was confirmed by the Court of Utrecht in relation to IT. In this case, Amsterdam, Rotterdam, The Hague and Utrecht were able to rely on the quasi in-house exemption. This allowed them to continue their collaboration in the form of 'Wigo4it', because it met the criteria of being 'closely connected' and had proper 'supervision'. For that reason, the application of public procurement law exemptions, must be seen in a broader sense. Services, in and outside, the public interest can be exempted from public procurement obligations. [33]

4.3 Public Transport: Inconsistent Obligatory Tendering

The case of public transport exemplifies a partial drawback of competition. Public transport is regulated through concessions as opposed to public contracts. These concessions grant a party the right to perform a mode of public transport for a specific route. Currently, service concessions still fall outside the scope of EU public procurement law [34], but their award or distribution is nonetheless subject to principles of transparency and equality. [35] A *competitive tendering procedure* is thus required, which differs from a public procurement procedure. Such competition allowed third parties, as a rule of thumb, to compete for public transport concessions in the Netherlands.

The Dutch regulatory framework of this sector consists of the Passenger Transport Act 2000(PTA), which was introduced to stimulate the use of public transport and to efficiently utilize public funds. [36] In addition, the European PSO-regulation is in place and provides guidance on how decentralized governments ensure the quantity, quality and safety of public transport for a reasonable price. The Dutch Public Transport Decree 2000 further explicates the obligations of such a competitive procedure. [37] Under the PSO-regulation, local governments are still allowed to apply the in-house exemption to national public procurement rules. [38] However, whilst reforming the PTA in 2010, the legislature decided that local public authorities in the Netherlands will be not be able to apply this exemption. Hence, public transport concessions had to be distributed by using a transparent and objective competitive procedure, and internalization was excluded as a performance alternative. Despite these reforms, another amendment of the PTA was passed by Dutch parliament in October 2012.[39] This amendment exempted the four major cities in the Netherlands (Amsterdam, The Hague, Utrecht and Rotterdam) from the obligation to follow a competitive procedure whilst distributing public transport concessions. The discussion in the Dutch Senate clarified that it was intended to provide freedom of choice and local autonomy. [40] This amendment that allows these cities to apply the in-house exception, has led to the fact that state owned companies, such as HTM in the Hague, RET in Rotterdam, GVB in Amsterdam and GVV in Utrecht, can often continue to operate their services without being influenced by competition. In this regard, it is of interest to consider that the utilization of these concessions is often not economically viable and market parties are compensated by the government. Despite this exemption, the milestone ruling of Altmark in which the Court ruled that subsidies granted to an undertaking providing public transport can be identified as state aid if the price is not the result of a competitive procedure or if the Altmark criteria are fulfilled, is still applicable. [41] An extensive analysis of this situation goes beyond the scope of this contribution, but it does show that state aid rules must nonetheless be complied with. To conclude, this change of legislation in the

Netherlands has led to inconsistent obligatory tendering, to say the least, and exemplifies a call from the major cities to keep a broad discretionary power while deciding upon public service provision.

4.4 Social Support: Obligatory Tendering Pulled Back Entirely

In relation to the healthcare market, a similar situation occurred regarding the performance of the Social Support Act. [42] This Act incorporates a compensation duty, which means that local authorities have to compensate citizens for the provision of equipment or services in various areas related to the consequences of their impairments. Examples of possible compensation are, ‘assistance with running a household’ and ‘means of transportation’. The Act obligated local governments to externalize the performance of these services via public procurement procedures. [43] It is important to note that such a duty to tender is derived from EU public procurement law which identifies two types of services: IIA and IIB services. For IIA services, a strict public procurement regime applies, and for the second, no specific duty to use public procurement procedures exists. The Dutch government stated that assistance with running a household was to be predominantly classified as ‘cleaning services’, which led to a classification under IIA-services. Others claimed the contrary, that it should have been classified as a IIB-service. In 2010, the Dutch parliament adopted three proposals to change the Social Support Act. [44] The most important amendment abolished the duty for municipalities to use public procurement procedures. As a consequence, assistance with running a household is now classified as a IIB-service. The legality of this amendment can be questioned in light of European law. In this regard, the Commission responded to questions posed by the Dutch government and stated that most of these services should be performed by market parties after the use of public procurement procedures. [45]

In the overall assessment of this sector, it is of importance to consider whether the healthcare market in general, and this sector in specific, can benefit from competition. The need to safeguard the basic principles of this market, namely quality, accessibility and affordability, ensures a continuous debate in relation to this topic. The vehement discussions in the European Council and Parliament involving the reforms of the Public Procurement Directives exemplify this. It is clear that the healthcare market is a special market, whereby the clash of safeguarding public interests and competition is very clear. [46] However, such a debate is less relevant for contractible cleaning services, which are able to benefit from competition.

5. Towards a New approach for SGI Provision Decisions

As stated before, the public debate in relation to competition and the Dutch government’s compact government policy influences the decision to externalize or internalize the performance of SGIs. Despite the possible advantages of external performance, public authorities and the legislature have full discretionary power to decide upon such performance questions and can go against initial or intended liberalization. The previously described markets have shown that the relation between public procurement law and public service provision is affected and makes a new approach to the public procurement framework worth considering.

In response to these developments, it has been suggested to introduce a transparent and objective legal framework that governs this ‘internal vs. external’ decision. [47] The introduction of such a test can result in an improved provision of public services, as it answers the question of *who is most suitable to perform a service*; the market or the state. Such an approach, relies on economic analyses of markets to determine who should perform a service. It has been suggested to take an approach in which ‘social welfare’ is the key criterion to analyze whether the market or the government should perform an SGI. [48] Sanchez adds to such considerations that the legal dimension of public procurement law is often not aligned with the economic restrictive approach “towards public make-or-buy decisions”. [49] A thorough discussion relating to who should perform a specific service lies beyond the scope of this contribution, and seems an impossible exercise. [50] Therefore, the following considers the internal market reforms, the Dutch PPA 2012 and the US FAIR Act which can contribute to constructing an more transparent and efficient framework for public procurement whilst deciding upon public service provision.

5.1 Internal market reforms = Internal Performance Reforms?

The internal market, based on thoughts that aim to open up Europe by removing internal barriers and enforcing cross-border competition, finds itself at a turning point and is currently being restructured and reformed. For the purpose of this contribution, it is important to describe the recent European developments in relation to these developments, because internal performance alternatives as exemptions to public procurement law are also under scrutiny.

Monti initiated these reforms by his report "A New Strategy for the Single Market" (Monti report), which strived to initiate a re-claiming process of the internal market; a new start. The Monti report identified the internal market's achievements, but mostly notes its future challenges, and subsequently proposed possible actions in numerous areas of the European Union, such as the free movement principles, public procurement, SSGIs, regional and industrial policy, and coordination of taxation policies. The report identifies that these areas are the "building blocks for reconciliation between the single market and the social and citizens' dimension in the Treaty logic of a highly competitive social market economy". [51] Monti's opening statement, in relation to the internal market, is strikingly clear by claiming that it is less popular than ever, but more needed than ever. [52] In his search for solutions, public procurement finds itself, in the spotlight of Monti's report. The vision brought forward by Monti in relation to public procurement clearly shows its importance; "EU public procurement law plays a key role in the creation and maintenance of the single market." [53] This statement is underpinned by a twofold reasoning. Firstly, the procurement of goods, works and services by public authorities, make up 17-18% of the European GDP. All public procurement in Europe amounted to approximately 2155 billion Euro in 2008, out of which 389 billion Euro fell under the ambit of the EU Directives on public procurement. Hence, there is a powerful economic drive that goes hand in hand with public procurement. Secondly, it stimulates and allows suppliers and service providers to compete in all Member States, which only enhances the strength of the internal market. The Monti report proposes a number of recommendations to reclaim the internal market. Firstly, it proposes to simplify public procurement policy and to make it more effective and less onerous for authorities involved. In this respect, it notes the need to clarify the rules applicable to 'in-house' procurement and to make public procurement more accessible for SME's. Secondly, Monti expresses the idea of putting public procurement to work for innovation, green growth and social inclusion. Since its publication, the Monti report has been a catalyst of change and many initiatives to 'reclaim' the internal market have unfolded. Following these European developments, new proposals for Directives on public procurement have been published. [54] On the one hand, these Directives intend to increase the efficiency of public spending to ensure the best possible procurement outcome in terms of value for money. The Commission claims that this is best achieved by modernizing the existing public procurement rules. This modernization aims to simplify rules and to provide further flexibility in applying these rules. On the other hand, it enables public authorities to put public procurement to better use and to thus achieve societal goals such as, the protection of the environment, stimulation of innovation and the betterment of social inclusion. [55]

Following the example of Monti, the Commission also chose to include rules in relation to in-house and public collaboration exemptions. [56] Such rules predominantly codify the existing exemptions based on case law of the ECJ. The codification itself exemplifies the importance of these exemptions to public procurement law. [57] Article 11 of the recently adopted Classic Directive codifies the jurisprudence line of Teckal and Commission/Hamburg, but restrained itself from going the extra mile and clarifying them further. It did clarify the percentage of commercial activities which a separate -Teckal-like- entity is allowed to perform, which is set at 20%. [58] Also, contracts awarded to a controlling 'mother' entity or a controlled 'sister' entity are included in this doctrine. The new Directive also confirms that collaboration between public authorities does not necessarily have to involve services derived from the public interest, also supportive services can be included. In addition, the Commission's initiative to abolish the exclusive right exemption was taken out on initiative of the Council, leaving a commonly used exemption in place. [59] No further guidance is provided on what can be identified as SGIs or their relation with public procurement law. Therefore, a standard European approach to this subject will also remain absent in the future. [60]

5.2 Dutch PPA 2012: Motivating Public Procurement Choices

Due to the lack of European improvement on this matter, the following considers the importance of the Dutch Public Procurement Act 2012 (PPA 2012) which has introduced a further emphasis on motivating procurement choices for contracting authorities. This can be necessary in the call for tenders, the relevant documents or the proposed contract. [61] However, two choices made *before* the start of a procedure can also possibly impact the need to motivate the decision to internalize or externalize performance. According to article 1.4 PPA 2012, contracting authorities must base the choice for the type of procedure, and the choice for tenderers or candidates in this procedure on objective criteria. [62] Such a motivation must be provided by the contracting authority upon the request of undertakings. [63] This *duty to motivate* has the potential to improve the choice between internal or external performance, because it could force contracting authorities to examine which performance alternative is most suitable for the performance of their public tasks. In addition, article 1.4 PPA 2012 proposes to improve the decision-making process of contracting authorities by focussing on the 'societal value' of tenders. [64] Societal value is described as the proper allocation and possible saving of public funds in an economic sense. [65] It is unclear what the exact meaning of this term is. The Dutch term 'maatschappelijk' indicates a 'social' notion in the Dutch language. However, the achievement of societal goals, such as social inclusion and sustainability, are seemingly not necessarily intended by this article. If a market party would

decide to contest the internal performance of a service before a Dutch court in the future, the assessment of the court may be different than the cases previously described in which the courts upheld internal performance arrangements. Hence, due to this duty to motivate, not only legal considerations, but also economic consideration can potentially play a role in the court's assessment.

Additionally, the introduction of the Commissie van Aanbestedingsexperts ('Committee of Public Procurement Experts') can in the future play a role in the coming about of interpretations relating to article 1.4 PPA 2012. [66] Even though their advices are not binding, the Committee aims to provide an alternative to costly litigation by providing advice and mediation for disputes between contracting authorities and applicants. Because the Committee consists of lawyers, public purchasers and economists, their advices can contain a more economic approach instead of a purely legal perspective.

5.3 US FAIR Act: Transparency and Economic Elements

In addition to this duty to motivate public procurement choices, regulation from the U.S. can prove to be an inspiring example. [67] In the United States, a different approach is taken by which the decision to externalize or internalize on a federal level is extensively regulated by the US FAIR Act. It is best described as a, '*may the best man win*' approach. It introduces the obligation to publish a list of all federal governmental activities. [68] This list divides services into 'inherently governmental functions' or 'commercial services'. Inherently governmental functions are those functions that are so intimately related to the public interest that they mandate performance by government employees. [69] As a rule, these functions are performed by government officials and the delivery of commercial services is externalized.

The inherently governmental functions, according to the US FAIR Act, fall into two categories. The first being the act of governing, i.e. the discretionary exercise of government authority; and the second being monetary transactions and entitlements. [70] In general, agencies have considerable discretion in determining whether particular functions are inherently governmental. Factors that should at least play a role in this analysis are listed as well. These factors contribute to the decision of governmental agencies to claim a function as 'inherently governmental'. They include, amongst other things; if an activity is already performed on the market, the degree to which official discretion would be limited and if a statutory restriction that defines an activity as inherently governmental is in place. Federal agencies are also required by law, to give "special consideration" to the performance of functions, "closely associated with the performance of inherently governmental functions". However, they are not prohibited from contracting out such functions.

If a service is considered to be of commercial nature, a "streamlined" or "standard" competitive procedure must be followed. [71] In the streamlined competitive procedure, the governmental agency calculates, compares and certifies costs based on the scope and requirements of the activity, in order to determine whether government agency performance or private sector performance is most efficient and suitable. [72] In the standard competition process, tenderers compete against one another based on objective and transparent criteria such as, a demonstrated understanding of the government's requirements, costs, technical approach, management capabilities or personnel qualifications. [73] Interestingly, the government agency itself can also submit a tender, which truly allows for comparison of public and private performing actors. [74] Challenge and review processes are also in place to give third parties a role in this decision-making process. [75] 'Interested parties' are, according to Section 3 of the Act, allowed to submit a challenge of an omission of a particular activity, or an inclusion of a particular activity on the published list. The scope of this article is broad as it allows private parties and unions to object to the classification of the list. Such procedures can be of interest to the waste sector previously described, as it allows market parties to join the decision-making process of their respective governments.

6. Concluding Remarks and Stabilizing the Balance

To conclude, Dutch public authorities have various alternatives for the performance of SGIs and supportive services. The sectors discussed have exemplified the paradox in which, despite the initial introduction of competition by ways of public procurement procedures, the performance of an SGI is internalized by a public authority, or, further exempted by the legislature from competition. The European reforms in relation to the internal market will not change the discretionary power that public authorities have for this purpose, nor will it sufficiently clarify the exemptions to European public procurement law in relation to internal performance. The hesitation of public authorities to externalize services can be seen in strong contrast with the previous period of extensive market performance. Finding *the right balance* between the two should be the goal of public authorities in order to secure the best performance of a public service. The legality of the performance alternatives, combined with the discretionary power of governments, can lead to outcomes which are not

beneficial for society. To improve the democratic decision-making relating to public service provision, elements of the Dutch PPA 2012 and the US FAIR Act have been assessed. Integrating these elements, such as judicial review and enhanced transparency, in an *integrated framework approach*, which includes the fundamental choice between different service delivery alternatives can result in more efficiency and effectiveness. The goal of such a coherent legal framework should be to objectively identify the advantages of various performance modalities and to come to the *best performance of a public service*.

Acknowledgements

The author wishes to thank prof. dr. E.R. Manunza and dr. H. van Harten for their valuable comments on earlier drafts of this working paper.

References

- [1] E.R. Manunza (2010), 'Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten' [Towards consistent and efficient regulation of the public procurement market], in J.M. Hebly, E. Manunza & M. Scheltema: *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet* [Reflections on the proposal for a Public Procurement Act], Preadvies voor de Vereniging van Bouwrecht, The Hague, p. 49-123.
- [2] In this contribution a distinction is made between public procurement procedures and other competitive procedures. The term public procurement procedures refers to the procedures laid down in the EU Public Procurement Directive 2004/18. The term competitive procedures consists of other forms of competitive obligations that lie out outside the scope of this Directive. These obligations have been introduced by the case law of the ECJ. Examples are the award or distribution of service concessions and the award/distribution of limited authorization schemes.
- [3] Wet van 1 november 2012, houdende nieuwe regels omtrent aanbestedingen [Dutch Public Procurement Act 2012], St. 2012, 542.
- [4] Federal activities Inventory Reform Act 1998, Page 112 STAT. 2382, Public Law 105-270, 105th Congress.
- [5] Wetenschappelijke Raad voor het Regeringsbeleid, 'Het borgen van publiek belang' [Safeguarding the public interest], *Rapporten aan de regering*, nr. 56.
- [6] Consolidated version of the Treaty on the European Union, Protocol (No 26) on services of general interest, OJ C 115, 9.5.2008, p. 308–308.
- [7] The European Commission has, despite its competence derived from article 14 TFEU, not initiated strict regulation on this latter topic. Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final.
- [8] Judgement of 12 February 2008 in *Case 289/03, British United Provident Association Ltd, BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities (BUPA)*, [2008] ECR 81 and Judgement of 22 October 2008 in *Case 309/04, TV 2/Danmark A/S and Others v Commission of the European Communities*, [2008] ECR II-2935.
- [9] Wetenschappelijke Raad voor het Regeringsbeleid, 'Het borgen van publiek belang' [Safeguarding the public interest], *Rapporten aan de regering*, nr. 56.
- [10] The entity is part of its own authority structure. E.R. Manunza & W.J Berends, 'Social Services of General Interest and the EU Public Procurement Rules' in U. Neergaard et al. (eds.), *Social Services of General Interest in the EU, Legal Issues of Services of General Interest*, T.M.C. Asser Press, Den Haag, 2011, p. 365.
- [11] Judgement of 18 November 1999 in *Case 107/9, Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (Teckal)*, [1999] ECR I-8121; Judgement of 13 November 2008 in *Case 324/07, Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale (Coditel)*, [2008] ECR I-8457; Judgement of 19 April 2007 in *Case 295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado (Tragsa)*, [2007] ECR I-2999.
- [12] Wet Gemeenschappelijke Regelingen [Intermunicipal Statutory Regulation Act], St. 1984, 669; see also, Judgment of 9 June 2009 in *Case 480/06, Commission of the European Communities v Federal Republic of Germany (Landkreise)*; Judgement of 29 November 2012 in *Joined Cases C-182/11 and C-183/11, Econord SpA v Comune di Cagno and Comune di Varese and Comune di Solbiate and Comune di Varese (ASL di Lecce)*, [2012], not yet published.
- [13] Judgment of 9 June 2009 in *Case 480/06, Commission of the European Communities v Federal Republic of Germany (Landkreise)*, [2009] ECR 4747.
- [14] Article 18 Directive 2004/18/EC, OJ L 134, 30.4.2004.
- [15] The distribution of concessions do not fall under the scope of European public procurement law, apart from the applicability of the Treaty basic principles. However, on 15 January 2014, the European Parliament casted its vote on a New Directive regulating service concessions. Upon publication, Member States have two years to implement this Directive. See: Proposal for a Directive of the European Parliament and of the Council on the

award of concession contracts ("Concessions" Directive) (First reading), 2011/0437 (COD), Brussel 12 July 2013. See Judgment of the Court of 7 December 2000 in *Case 324/98, Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, [2000] ECR I-10745.

[16] The Dutch *Wet Markt en Overheid* [Market and Government Act] leaves these options untouched, because it exempts services of general interest. *Wijzigingswet Mededingingswet* (invoering regels ondernemingen die deel uitmaken van een publiekrechtelijke rechtspersoon of hiermee zijn verbonden), St. 2010, 208.

[17] See for instance: Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), Brussels, 4.10.2011 SEC(2011) 1169 final and Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP), Brussels 2008/C 91/02.

[18] Ministry of the Interior and Kingdom Relations, Visiedocument 'Bestuur en bestuurlijke inrichting: tegenstellingen met elkaar verbinden' [Vision document 'Administration and administrative design: connecting opposites'], 10 October 2011, p. 5.

[19] *Id.*, p. 5.

[20] *Comptabiliteitswet 2001* [Government Accounts Act 2001], St. 2001, 413.

[21] Manunza 2010, p. 76

[22] Mario Monti, A New Strategy for the Single Market; at the Service of Europe's Economy and Society, *Report to the President of the European Commission José Manuel Barroso*, 9 May 2010, p. 12 (Monti Report).

[23] Article 10.21 section 1 *Wet Milieubeheer* [Environmental Protection Act], St. 1979, 442.

[24] VROM-rapport, *Toekomstig afvalbeleid: Een eerste stap naar een nieuwe lange termijnvisie voor het afvalbeleid* [Future waste policy: a first step towards a long-term vision for waste policy], Den Haag: 2003, p. 5

[25] Van Ommeren 2007, p. 2.

[26] R. Hulst & A. van Montfort (2008), 'The Netherlands: Cooperation as the only viable strategy', in R. Hulst & A. van Montfort (eds.), *Inter-municipal cooperation in Europe*, Springer 2007 and E. Dijkgraaf & R. Radius, *The Waste Market: Institutional developments in Europe*, Springer.

[27] Court of Appeal 's-Gravenhage, 15 December 2009, ECLI:NL:GHSGR:2009:BK6928.

[28] Article 18 *Besluit van 16 juli 2005*, houdende regels betreffende de procedures voor het gunnen van overheidsopdrachten voor werken, leveringen en diensten (Bao) St. 2005, 408.

[29] Court of Appeal Arnhem-Leeuwarden, 9 September 2013, ECLI:NL:GHARL:2013:6675.

[30] District Court 's-Hertogenboch, 24 Oktober 2012, ECLI:NL:RBSHE:2012:BY1110.

[31] District Court Utrecht, 14-01-2009, ECLI:NL:RBUTR:2009:BG9524.

[32] R. de Lange (2013), 'Bedrijfsleven boos over valse concurrentie door bijklussende overheid' [Businessworld angry about false competition of double dipping government], *Het Financieele Dagblad*, p. 3.

[33] Defining the scope of the public interest, and its implications is an onerous and difficult task. This contribution does not consider it as such, but does recognize its importance. See Wetenschappelijke Raad voor het Regeringsbeleid, 'Het borgen van publiek belang' [Safeguarding the public interest], *Rapporten aan de regering*, nr. 56.

[34] On 15 January 2014, the European Parliament casted its vote on a New Directive regulating service concessions. Upon publication, Member States have two years to implement this Directive. See: Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts ("Concessions" Directive) (First reading), 2011/0437 (COD), Brussel 12 July 2013.

[35] Judgement of 7 December 2000 in *Case 324/98, Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG (Telaustria)*, [2000] ECR I-10745, Judgement of 18 July 2007 in *Case 231/03, Consorzi Aziende Metano v Comune di Cingia de 'Botti (Coname)*, [2007] ECR I-060373 and Judgement of October 2005 in *Case 458/03, Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG (Parking Brixen)*, [2005] ECR I-08585.

[36] *Wet Personenvervoer 2000* [Public Transport Act 2000], St. 2000, 314.

[37] *Besluit van 14 december 2000*, houdende vaststelling van een algemene maatregel van bestuur ter uitvoering van de *Wet personenvervoer 2000* (Bp2000) [Public Transport Decree 2000], St. 2000, 563.

[38] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70.

[39] *Wet van 5 november 2012 tot wijziging van de Wet personenvervoer 2000 teneinde inbesteding van openbaar vervoer mogelijk te maken in een plusregio die de gemeente Amsterdam, 's-Gravenhage, Rotterdam of Utrecht omvat (Wet aanbestedingsvrijheid OV grote steden)* [Act altering the Public Transport Act 2000 to allow public transport internalization of Amsterdam, the Hague, Rotterdam and Utrecht], St.2012, 556.

[40] *Parl Docs II 2011*, 32845, nr. 3.

[41] Judgement of 24 July 2003 in *Case 280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)*, [2003] ECR I-07747. E.R. Manunza, 'Enkele problemen bij de toepassing van het Europees aanbestedingsrecht in de Nederlandse (rechts)praktijk' [Some issues with applying European public procurement law in the Dutch jurisdiction], *SEW* 2004, p. 72.

- [42] Wet van 29 juni 2006, houdende nieuwe regels betreffende maatschappelijke ondersteuning [Social Support Act], St. 2006, 351.
- [43] Article 10 Social Support Act.
- [44] Wijziging van de i.v.m. de kwaliteit van de huishoudelijke verzorging, de kwaliteit van de maatschappelijke ondersteuning en i.v.m bekostiging van het gemeentelijk beleid [Ateration of the Social Support Act], St. 2012, 310.
- [45] Parl Docs II 2009-2010, 31353, nr. 10.
- [46] M. Canoy (2009), ‘Marktwerking in de zorg; ondernemende zorg of zorgende ondernemers?’ [Competition in the healthcare sector; entrepreneurial care of caring entrepreneurs?], Inaugural speech, University of Tilburg.
- [47] Manunza 2010, p. 115.
- [48] Manunza 2010, p. 117; Baarsma 2010, p. 10.
- [49] A. Sánchez Graells (2011), *Public Procurement and the EU Competition Rules*, Hart Publishing, p. 232.
- [50] For this purpose, it is also of interest to consider the Impact assessment of the Commission, the Dutch *Maatschappelijke kosten-batenanalyse* [Cost-benefit analyses] and the *Markteffectentoets* [Market effect-test] in this respect. See Sociaal economisch raad, ‘Overheid én markt: Het resultaat telt! Voorbereiding bepalend voor succes’ [Government and Market: the result counts! Preparation decisive for success], Advies nr. 1 - Maart 2010.
- [51] Monti Report, p. 68.
- [52] Id., p. 12.
- [53] Id., p. 7.
- [54] Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors COM(2011) 895 final, 20.12.2011, Proposal for Directive 896, 20.12.2011 and Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts COM(2011) 897 final, 20.12.2011.
- [55] Explanatory Memorandum, Proposal for Directive 896, p. 2
- [56] On 15 January 2014, the European Parliament casted its vote on the renewed Directive regulating public contracts. Upon publication, Member States have two years to implement this Directive. Article 11 Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading), 2011/0438 (COD) Brussels, 12 July 2013.
- [57] E.R. Manunza & R.G.T. Bleeker (2014), “De invloed van het Europees recht op het Nederlandse aanbestedingsrecht” [The influence of European law on Dutch public procurement law], in A., Hartkamp, et al (eds.) *De invloed van het Europese recht op het Nederlandse Privaatrecht* [The influence of European law on Dutch private law], Deventer.
- [58] The more recently negotiated draft Directive sets a larger percentage (80%) than the initial proposal of the Commission (90%) in December 2011.
- [59] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on public procurement: Presidency compromise text, 2011/0438 (COD).
- [60] Preamble nr.11 Proposal for Directive 896.
- [61] Article 1.5 PPA 2012.
- [62] Article 1.4 PPA 2012
- [63] Article 1.4 a and b PPA 2012.
- [64] Parl Docs II 2010/11, 32 440, nr. 46. See W.A. Janssen (2012), ‘Maatschappelijk Verantwoord Aanbesteden’ [Societally Responsible Public Procurement], *Tijdschrift Aanbestedingsrecht*, Sdu Uitgevers 2012, p. 7-17.
- [65] Parl Docs II 2010/11, 32 440, nr. 46.
- [66] Besluit van de Minister van Economische Zaken van 4 maart 2013, nr. WJZ / 3008668, tot instelling van de Commissie van Aanbestedingsexperts [Committee of Public Procurement Experts Decree] See: www.commissievanaanbestedingsexperts.nl.
- [67] Manunza 2010, p. 116-118.
- [68] US FAIR Act Section 2: Annual lists of government activities not inherently governmental in nature (a).
- [69] US FAIR Act Section 5: Definitions (2) (A).
- [70] US FAIR Act Section 5: Definitions (2) (B).
- [71] US FAIR Act Section 2: Annual lists of government activities not inherently governmental in nature (d).
- [72] Circular No. A-76 Attachment B. Public-private competition, C. Streamlined competition procedures.
- [73] Circular No. A-76 Attachment B. Public-private competition, D. Standard Competition procedures.
- [74] Circular No. A-76 Attachment B. Public-private competition, A. Preliminary planning 8.a.
- [75] US FAIR Act, Section 3: Challenges to the list.

PUBLIC PROCUREMENT TRAINING AND EDUCATION IN EAST AFRICA: A PRELIMINARY STUDY

Benon C. Basheka (PhD)¹, Pross N. Oluka^{2*}

Key words: public, procurement, education, approaches, East Africa

ABSTRACT

While it is very clear that the practice areas of public procurement are well known and researched, the teaching of the discipline is hardly known. The research took the form of an exploratory design across universities in four East African countries of Uganda, Kenya, Tanzania and Rwanda. We assessed the approaches used in teaching, using the desk review techniques. Study finding indicate that different universities teach procurement related courses at different levels (Bachelors and Masters) but named differently with very few that offer public procurement courses. There is only one Masters in Public Procurement offered at Uganda Management Institute. This shows there is limited effort being directed to public procurement training and education. The study also notes the most favored approaches/method of teaching, and why they are preferred. Regarding the knowledge base, it was noted that there still exists an uneasy tension in finding appropriate theoretical frameworks for teaching procurement. Regarding specific skills, different and interesting results emerged.

BACKGROUND TO THE STUDY

1.0 Introduction

This study pertains to a preliminary study which was conducted to establish the status of public procurement training in the east African region. Public procurement as a discipline must have a firm theoretical knowledge to guide researchers on the appropriate “focus and locus” of its subject matter. Adopting an interdisciplinary and comparative approach in analyzing public procurement systems in the discipline should identify the similarities and differences in procurement policies and practices. Efforts by professional public procurement associations in various countries have been remarkable in developing the procurement as a discipline. Of course the public procurement policy and regulatory bodies in different countries have done commendable jobs in

¹ Benon C. Basheka (PhD) is a professor and dean of the School of Business and Management
Uganda Technology & Management University Email: bbasheka@yahoo.co.uk

² Pross N. Oluka, is a lecturer in the School of Management Sciences, Uganda Management Institute (UMI). Email: nagittaoluka@gmail.com

promoting the public procurement function. Nonetheless, whether the increased interest in public procurement research is a sign of the maturing academic discipline remains a different matter altogether. There are still some issues concerning the claim of not only the maturity of the discipline but its scientific potential. Academics have not devoted serious efforts in examining the theoretical bases of the public procurement discipline.

1.2 Problem statement and research questions

Public procurement as a field of academic research and a “lucrative” field of practice has increased over the last 10 years or so and it is now a matter beyond contention among policy makers and academics in both developed and developing nations. However, there seems to be unresolved issues that ought to form a nucleus of intellectual discourse among procurement practitioners if any hope of having a well-founded academic scientific discipline of public procurement management and administration is to have a firm foundation. By adopting a comparative approach in analyzing public procurement systems, the discipline should identify the similarities in the curriculum in universities and the exact locus and focus of this discipline which unfortunately to date is still unknown. This is made worse by lack of information on how many public administration courses have a component of public procurement given its historical role in the running of government and the methodological approaches used in its teaching. It is also not clear whether its teaching is more practitioner-oriented or academic-oriented. This could partly be responsible for non compliance in public procurement. We therefore, intend to examine this knowledge gap. The following questions guided the study:

1. What kind of public procurement courses are taught in East African Universities and where are they housed in those universities?
2. What approaches are used in the teaching of public procurement in the East African countries?
3. What should be the knowledge base for public procurement study and what disciplines should inform the study of public procurement?
4. What skills and competence should procurement education programmes aim at addressing within the context of developing countries?
5. Is public procurement education practitioner or academic-oriented?

1.3 THE SCOPE OF THE STUDY

The study was limited to the East African region. It covered universities that were teaching procurement. The content scope was restricted to the issues required in the study as outlined in each of the study questions.

1.4 THE STRUCTURE OF THE REPORT

The report is structured under five main chapters. Chapter one deals with the introduction. In this chapter, the problem statement and research questions that guided the study are discussed. In the next chapter, literature review is conducted and synthesized. Chapter three details the methodology while Chapter four is devoted to the key findings; a task that is done under each of the respective objectives/research questions while chapter five hinges on conclusions and recommendations.

2.0 LITERATURE AND THEORETICAL REVIEW

Public procurement is both an area of practice as well as academic study. Over the past several decades practices of sound public procurement management have become a key milestone for good governance and national progress. Its significance for social and economic development is reflected in the fact that it constitutes a sizeable proportion of the national economy (15 to 30 per cent of national GDP). Public Procurement is, therefore, one of today's fastest growing management disciplines, in terms of both managerial activity and strategic importance. To manage the increasingly complex function of public procurement, procurement personnel need conceptual, technical, and human skills. Procurement personnel operate in a changing environment which demands a high degree of professionalism. Public organizations too are fast realizing that employees are a source of good services (Quayle, 1998; Quayle and Quayle, 2000).

Educating professionals and equipping them with new and higher-level skills have consequently become urgent (Sauber et al, 2008). In support of the foregoing assertion Gelderman (2006) shows that educating and training procurement officials is an effective tool for increasing compliance with the rules and regulations. While it is very clear that the practice areas of public procurement are well known and researched, the teaching of the discipline is hardly known. It is not clear what approaches are used as well as the actual locus and focus of public procurement; if at all it is there in Universities in the East African region. We ask ourselves how public procurement is taught or educated more so when recent studies have reported insufficient levels of compliance with the directive (Eyaa and Oluka, 2010; Netherlands Ministry of Economic Affairs, 2009 and De Boer and Telgen, 1998). The early works of Ramakers & Van Der Vuurst (1995) also mention absence of professional and trained purchasing personnel in the public procurement sector and yet these professionals are vital to the provision of goods, services and works (Hill, 2005).

Kakwezi and Nyeko (2010) contend that the performance of the procurement function has attracted a lot of attention from practitioners, academicians and researchers due to its pitiable performance. Every government utility and agency at any level is supposed to procure according to the international and national rules depending on the case (Arrowsmith, 2005). Such entities are supposed to carry out procurement and must assure the necessary professional skills (Burgi, 2010). Purchasing entities (Caranta, 2008, Della Cananea, 2007) are created to purchase goods, works or services for other public administrations while having to comply with the public procurement rules (Cavallo Perin, Casalini, 2009; Comba, Treumer, 2010). It is also believed that the more professional the procurement, the more funds can be saved. Archer et al. (2008) showed that professionalization has instead led to inefficiencies and more error-prone processes, even in record-keeping. Public entities are characterized by their inflexibility; clumsiness and inability to use ad hoc solutions when necessary (Fee et al., 2002; Lysons and Farrington, 2006). This brings us to the questions; do we lack expertise of procurement practitioners in government entities and how are they educated and trained?

It is generally assumed that professionalism results in more effectiveness and savings. However critics such as Van Der Horst and Van Weele (1992) observe that regulations and professionalization tamper with the development of professionalism in the public sector (Staatcourant, 2008), compared with the private sector (Keough, 1993; Van Weele, 2005a). Since the public seeks high quality services, organizations in the public sector must have a high-

performance. In order to perform highly, persons working in the public sector should have the highest level of competency. Consequently, the institutions that educate and train these persons must always strive for excellence because, most assuredly, better governance is fundamentally related to the more effective preparation of public administrators.

Bandenhorst-Weiss, Callender and McGuire (2010) thus suggested that public procurement practitioners have long existed in a quasi-professional field, not a discipline, not a profession and certainly not a trade. Procurement has been perceived as not meriting significant treatment as a topic of interest or study and has persistently been denied attention within public administration courses (Snider & Rendon, 2012). Despite the importance of procurement in practice, the voices of stakeholders such as procurement practitioners are apparently not yet numerous nor strong enough to influence public administration educators to pay much attention.

While examining the value of procurement certification, one of the professional attributes of a discipline, Prier, McCue and Behra (2010) wondered whether public procurement had been born. Bandenhorst-Weiss, Callender and McGuire (2010) used the absence of standards, lack of separation of members and the professional body to deny procurement a place in the home of professional disciplines. They wrongly use the considerable level of disparity among terms used to describe the profession and its members to conclude that public procurement had been born. This is a charge that would entirely be blamed on the public procurement experts in both developing and developed countries since collectively we have failed to develop a knowledge base of our discipline that could set terms clearly understandable by the procurement fraternity. Those involved in the practice of procurement at whatever level in collaboration with the academics need to agree on what procurement body of knowledge is needed to produce a 21st century procurement manager who has the will and competence to contribute to organisational efficiency.

Public procurement-the acquisition and utilisation of goods and services required by government institutions from conceptualization of the need for the product to its utilisation and ultimate disposal (Callender & Matthews, 2000) is a key function that needs dedicated attention from academics to develop a theoretical framework in which the functions of this critical activity can be discussed. From a democratic point of view, government procurement translates public revenue into goods and services consumed by governments and institutions at various levels to benefit the citizens who in a democracy delegate the powers to political and administrative managers. Due to the suspicion that these officials may misuse their powers, parliaments prescribe procedures designed to assure the public of government's transparency and accountability.

Public administration encompasses a body of knowledge pertaining to the operational processes of the executive functions of government (Hilling, 1966). On its part, public procurement supports all government functions (Coe, 1989; McCue & Gianakis, 2001). If the procurement function fails to deliver quality goods and services in a timely fashion and at an economical price, it is known that the performance of government obviously suffers (Coggburn, 2003). As early as 124 BC, there was a university in China teaching administration (Simcox, 2010). Moreover, by 2BC, there existed a civil service in China with 15,000 employees. Such a solid number needed a team of administrators who had to be trained in the whole "science" of administration (Holzer & Zhang,

2002). This indicates that public procurement was long regarded as an important component of this “science” of administration.

Gladden (1972) conceded that administration became a task of an early chief or leader without his knowing and it gradually emerged as a specialized activity with the growth of civilization. It was not until civilization reached an advanced stage of development that much thought began to be given to the art of administering. True to the public procurement function, its recognition has taken time and to date it is still struggling to attain appropriate recognition in the teaching of public administration. Schools and Departments of public administration in Universities in Africa hardly include public procurement as part of the academic curriculum; a problem that goes beyond Africa. There is a noticeable poverty of procurement content and this partly contributes to its eventual neglect in public administration research. Rarely do public administration conferences throughout the world have presentations and discussions on this subject of public procurement. Until recently the subject of public procurement received little attention by academic researchers and policy makers because it was considered an administrative function too mundane to worry about (Wittig, 1999) and has been an academically neglected area of study (Thai, 2001).

3.0. THE APPROACH AND METHODOLOGY

The methodology entailed the following steps characterized by the highest degree of professionalism and flexibility:-

1.	Preliminary Interviews
2.	Identify critical documents
3.	Formulation of Key evaluation Questions
4.	Development of Review Matrix checklist
5.	Review of literature
6.	Comprehensive review of documents, discussions and interviews
7.	Sampling Methodology
8.	Data collection
9.	Validity and Reliability
10.	Data Analysis
11.	Draft Report on Key Findings
12.	Presentation
13.	Validation Workshop
14.	Final Report

The research took the form of a comparative approach across nations, institutions and processes. A comparative approach or design aims at getting the similarities and differences among study variables. This analysis can be at meso, macro and micro levels. May (2001, p. 9), while defending the use of comparative research approach suggested that “the results of research using cross-national studies can be found in books and journals of sociology, politics, human geography, social research, history, economics, social policy, anthropology, and business studies.” Given this declaration, our hopes of engaging in a science of public procurement based on a comparative approach are supported.

Using desk research, we identified institutions offering procurement education in East Africa. Secondly we were able, through this desk review, to identify under which departments procurement courses were housed, what was taught, the approaches taken, the knowledge and skills imparted, etc. This involved a review of course handbooks and all learning outcomes. Then we systematically assessed the approaches used in teaching, using the desk review techniques. We then designed comprehensive assessment Questionnaires which were sent to universities and practitioners in the East African Countries that were selected for the study. The sampling for the universities was based on the web metrics university rankings criteria.

Four tests were used to establish the quality of the empirical social research. These included; Construct validity, Internal Validity, External Validity and Reliability. To ensure construct validity this research used multiple sources of data. Multiple sources of data ensured that there was agreement on various parameters measured (convergent validity) or there was lack of a relationship (discriminate validity). For internal validity, this research followed up patterns that were emerging during analysis to establish whether or not they impacted on the variables being studied. A comprehensive explanation building was undertaken for parameters being studied together with a follow up of rival explanations.

4.0 PRELIMINARY FINDINGS AND DISCUSSION

In this chapter, we report findings on each of the research questions that guided the study. The findings reported were mainly obtained from a review of documents and website search which was further supported by visits to particular institutions.

4.1. Universities in East Africa that Teach Public Procurement

The first research question of our study required us to identify Public Universities in Africa that did teach public procurement and where it is housed within those universities. The question was also intended to answer the locus and focus questions. We find that different universities teach procurement related courses at different levels. According to the 2013 university webometrics ranking, the following universities appeared among the highly ranked in Uganda. We wished to examine whether such universities offered procurement courses.

Table 1: Universities in Uganda teaching public procurement university

N	Name of University	Course name
1	Makerere University	Bachelor of Business Administration (Procurement Option)
2	Mbarara University of Science & Technology	Bachelor of Procurement and Logistics
3	Makerere University Business School (MUBS)	Bachelors and Masters in Procurement & Logistics Management
4	Uganda Martyrs University	Bachelor of Business Management, Bachelor of Arts in Public Administration (BPAD)

		course unit: Procurement and Logistics Management
5	Mountain of the Moon University	Bachelor of Procurement and Logistic Management
6	Kyambogo University	Master of Science In Supply Chain Management (GMSM) Bachelor of Procurement and Logistics Management, Diploma Procurement and Logistics Management
7	Islamic University in Uganda	Bachelor of Procurement and Logistics Management (BPLM)
8	Uganda Management Institute	Postgraduate Diploma in Procurement and Supply Chain Management 1. Masters in Public Procurement 2. Postgraduate Diploma in Logistics Management 3. Diploma in Public Procurement and contract management
9	Uganda Technology and Management University	Bachelor of Procurement and Supply Chain Management

The above table 1 indicates that majority of universities in Uganda teach procurement and supply chain related courses but there are very few that offer public procurement courses. The table indicates there is only one Masters in Public Procurement offered at Uganda Management Institute. This shows there is limited effort being directed to public procurement training and education.

Several public procurement courses have been independently established in some universities. Thai (2010) reported of a Master's of Science Degree in Public Procurement for sustainable development launched in 2006 by the International Training Centre of the International Labour Organization in partnership with the University of Turin in Italy, the Masters Degree in Public Procurement launched in 2007 by the University of Rome and the Certificate programme in Public Procurement at Florida Atlantic University. The development of an academic field of public procurement needs to have a firm theoretical foundation that should have true hallmarks within the expectations associated with the social sciences.

In Kenya, it was found that several universities offered courses in procurement and different names were used. We found the most common names of courses at different levels in procurement in Kenya included the following: Bachelor of Procurement, Bachelor of Procurement and Supply Chain Management, Public Procurement Law and Practice and Bachelor of Procurement & Logistics Management.

Table 2: Universities in Kenya offering Courses in Procurement		
Ranking	University	Course Name
1	University of Nairobi	Procurement and Supply Chain Management
2	Maseno University	Certificate and Diploma in Strategic Purchasing and Supply Management
3	Egerton University	Bachelor of Purchasing And Supplies Management
4	Jomo Kenyatta University of Agriculture & Technology	Bachelor of Procurement & Contract
5	The Catholic University of East Africa	Diploma in Purchasing and Supply
6	Daystar University	Bachelor of Commerce, Purchasing and Business Logistics
7	Chuka University	Bachelor of Purchasing And Supplies Management.
8	Kisii University	Bachelor of Purchasing And Supplies Management
9	Dedan Kimathi University of Technology	Bachelor of Purchasing And Supplies Management
10	Meru University of Science & Technology	Bachelor of Purchasing And Supplies Management
11	Jaramogi Oginga Odinga University of Science & Technology	Bachelor of Logistics and Supply Chain Management
12	South Eastern Kenya University	Bachelor of Procurement and Supply Chain Management
13	Taita Taveta University College	Bachelor of Purchasing And Supplies Management
14	Muranga University College	Bachelor of Procurement and Supplies Chain Management

There are a few universities in Tanzania offering procurement-related courses as indicated in the table below:

Table 3: Universities in Tanzania offering training in procurement		
Ranking	University	Course Name
1	University of Dar Es Salaam	Masters of Science in International Transport and Logistics (MSc ITL)
2	Sokoine University of Agriculture (Moshi University College of Cooperative and Business	B.A. in Procurement & Supply

	Studies)	
3	Tumaini University Iringa University College	BBA – Procurement Major
4	Mzumbe University	Bachelor of Business Administration in Procurement and Logistics Management (PLM), MSc. Procurement and Supply Chain Management
5	Institute of Finance Management	MBA (International Trade, Logistics and Operations
6	Saint Augustine University of Tanzania	Bachelor of Science in Procurement and Supply Chain Management, Advanced Diploma in Procurement and Logistics Management
7	Mount Meru University	B.A Public Administration and Human Resources; Marketing Option Physical Distribution and Logistics Management
8	Tanzania Public service College	Postgraduate Diploma in Public Procurement

St Augustine University (Tanzania), through its Faculty of Business Administration, offers a Bachelor of Business Administration (BBA) (3 years). This course combined academic and professional training; the three-year programme challenges students to examine the responsibilities of the accountant and other business professionals in contemporary society and to meet the need for significant research in their areas of expertise. They also offer a Bachelor of Science in Procurement and Logistics Management (BSCP) (3 years) which was designed to enable students to know how to manage projects and how to source globally. It facilities students to master skills required in managing the procurement and supply chain cycle.

Table 4: Universities in Rwanda offering procurement-related courses		
Ranking	University	Course Name
1	National University of Rwanda	Bachelor of Science in Business Administration – Logistics and Supply chain Management
2	Umutara Polytechnic	Ordinary Degree with Honours in Commerce (Procurement)
3	School of Finance and Banking (Collaborating with University of Turin in Italy)	Masters of Science in Public Procurement Management for Sustainable Development and Short Courses in Procurement
4	International Management Academy	Chartered Institute of Purchasing and Supply (CIPS)

From the table above, it is clear that Procurement as a discipline has not been given a place of prominence in training and or education.

4.2. Ways and Approaches used in the teaching of public procurement in East African countries

The answer to this second research question was obtained from the review of existing literature. As public procurement scholars, the major condemnation of our discipline's lack of scientific potential revolves around our lack of agreement regarding the methods of studying public procurement and the conclusions arrived at; lack of the ability to conduct experiments on the behaviour of man in the public procurement process yet he keeps changing; and, our lack of continuity in the development of public procurement research. Yet Jayapalan (2000) asserted that the teaching of procurement ought to have been a systematic study of knowledge. Academically, public procurement has been a neglected area of study even though governmental entities and public procurement practitioners have diligently worked its practices (Thai, 2001).

Methods in this context are used to imply procedures and prescriptions that ought to be applied to find solutions to unresolved public procurement problems which may be theoretical or practical. Social theorists have often talked of inductive and deductive methods. Social sciences share two common aspects with all sciences. The first is a commitment to scientific method - a series of logical steps that, if followed, help minimize any distortions of facts stemming from the personal values and beliefs. The second is the use of quantitative techniques, measuring and accounting, for the gathering and analysis of the factual information that is collected (Sirkin, 2006). Public procurement teaching may have no serious issues with the first method. But trenchant disputes are likely to arise with the second criteria that if rigidly applied to persons with an orientation to the qualitative paradigm.

It is believed that an effective instructional strategy for the course might begin with student-centred teaching and that the conduct of various student activities will make learning interesting and meaningful. Opportunities for personal involvement and practical application of knowledge and skills can also be provided by these learning activities. This applies to procurement as well. Apart from presenting the subject contents by teachers with the traditional didactic approach, it is recommended that students should be more actively involved in the process of learning. It is also emphasized that the teaching of Business Studies should be related to real life situations as much as possible. Whenever feasible, teachers should try to relate to the issues at hand to real life situations, so that not only the students' interests are aroused. This will ensure that the students get a sound understanding of the mechanism which sets the motion of East African business activities.

From the review of literature, the following are some of the ways in which procurement courses were being taught:

4.2.1. Lecturing: Most universities teaching procurement in East Africa favoured the lecture method. From interviews, discussions and review of documents, it was confirmed that its preference is high among undergraduate classes when compared to postgraduate classes. A lecture involves a continuous formal exposition of or discourse on some topics by the teacher. Though it is criticized on its autocratic style and the form of one-way communication, it is typically used to introduce subject knowledge and specialized information. Its effectiveness depends very much on its planning, structuring, brevity, the teacher's style of presentation and the use of teaching aids.

4.2.2 Group Discussions: This method was commonly found in use at postgraduate levels. Students are divided into groups to discuss a given procurement-related topic in order to exchange views, develop a concept or to solve a problem. The lecturers are responsible for supplying guidelines for the discussion, eliciting responses among students, stimulating them to interact with each other and evaluating their performance. Each group is required to present an oral or written report summing up the findings and conclusion of the discussion. Due to the large numbers of students in most universities this mode was also preferred for assessment.

4.2.3. Case Studies: We found that most lecturers teaching public procurement courses at postgraduate level use the case study method. A case is a description of an actual problem situation, or a situation which attempts to simulate as far as possible the business environment, in which decisions have to be made. Students are required to examine and analyze the situation in order to identify the problems and recommend feasible solutions. This method attempts to show how procurement knowledge and principles learnt in the classroom can be applied to solve problems in the business world.

4.2.4. Projects and Surveys: Procurement Principles and concepts taught in the classroom are often meaningless unless students have the opportunity to investigate the utilization of such in the business world. We found that in some universities, a project is a planned learning activity that requires students to go outside their classrooms and interact with the business community. This is called internship and community engagement in some universities. Students can work in groups or individually to observe and collect information for a given procurement issue, to analyze and evaluate the information obtained, and to draw conclusions. A report on what the findings is then presented and sometimes assessed.

4.2.5. Field Trips and Visits: We found that some universities teach procurement through field trips intended to examine how a procurement and supply chain business environment operates. There are many business establishments in close proximity to the universities which provide appropriate fieldtrips for students. Field trips to business and commercial institutions help developing better understanding and give far better visual information of many things than can be taught in class. A carefully devised and thoughtfully executed plan is necessary for making the visit educational and successful. The plan includes how to arrange with the organization to be visited, how to brief students for the visit, how to organize them into groups, and how to conduct follow-up activities.

4.2.6. Supply Chain Games/Simulations: We also found out that a few institutions such as Kyambogo University (Uganda) use supply chain games and simulations at postgraduate level. Supply chain simulations enable learners to apply knowledge learned from other courses in a seemingly real world situation (virtual supply chain environment). These games challenge and inspire the students to search for and internalise all the content that they might have ignored or reluctantly attended to; “a simulation is like a kiss, interesting to read about but much more interesting to participate in; and those that do, tend to repeat the experience” (Coote, 1987).

The value of business games in learning is now more vivid than ever yet it was observed many decades ago. Confucius, a Chinese Philosopher (500 BC) once

observed that “a picture is worth a thousand words” whereas Dick Duke (founding father of simulation-gaming, around 1970) concluded that “a game is worth more than a thousand pictures”. Today’s students are of a virtual generation, where online interactive multi-player games, virtual reality and simulations are a part of everyday life, making gaming and simulation a very important catalyst in the learning process. Teaching methods have to be more innovative to help students understand the complexity of decisions within dynamic supply chain and business environments. Interactive simulation games have the potential to be an efficient and enjoyable means of learning.

Using simulation technologies has been proven to be an excellent tool for modelling complex environments (Arisha and Young 2004). It is seen as a competent means of analyzing complex systems, allowing the changes and effects of processes to be understood and predicted more easily (Ismail, Abohamad, and Arisha 2010). The capabilities of simulation software to replicate uncertainty are high, mainly through discrete event simulation as it is capable of manipulating the variability and uncertainty of a system (Mahfouz, Ali Hassan, and Arisha 2010). Yet there have been very few examples of SCM simulation games being used in education. The most popular being the beer game introduced by MIT in 1960 as an exercise in industrial dynamics (Iyer, Seshadri, and Vasher 2009). The use of web-enabling technologies can also be used as a powerful educational tool in SCM to encourage collaborative learning.

We found that different lecturers use different approaches in the teaching of procurement-related courses. The approaches to the study of Public procurement would naturally be related to those of its mother discipline, public administration. It therefore argued that the approaches relevant in teaching public administration apply to public procurement. Conventionally, the following approaches have been applied and are still relevant today.

4.3 APPROACHES TO TEACHING OF PROCUREMENT

4.3.1: Philosophical approach: The Philosophical approach takes within its purview all aspects of administrative activities. It was found out that the goal is to find out and enunciate the principles or ‘ideals’ underlying these activities. This approach is found in Locke’s ‘Treatise on civil Government’, Plato’s ‘Republic’, ‘Hobbes’, and ‘Leviathan’, among others. The philosophical approach is perhaps the oldest approach to public administration as of all other social sciences.

4.3.2: Legal approach: The legal approach is the systematically formulated approach and traces its ancestry to the tradition of rooting Public administration in law. Public administration was considered to be a part of law, concentrating on legally prescribed structure and organization of Public authorities. This approach was formed at a time when the functions of the state were narrowly limited and simple in nature. The legal or juristic method is mostly used in France, Germany, and Belgium. These countries have a long tradition of administrative law. The administrative law is an important branch of Public law and is conceived in quite broad terms so as to include the organization and functions of public authorities and with the problem of their correlation, powers and responsibilities. Public administration is considered to be a part of administrative law and as such it is studied in the legal framework. In India, the administrative study was mainly preoccupied with the legal foundations of administrative authority and its procedures and was narrower in its scope than

that of European countries because their law itself was conceived in broad sociological terms whereas in India, it had a narrow juristic connotation.

4.3.3: Historical Approach: The historical approach to the study of public administration seeks to recreate a segment of history. It studies the public administration of the past with a particular time span, organizing and interpreting the information in a Chronological order. This approach naturally commands a powerful attraction in a society having a rich past and can be valuable in identifying the uniqueness of the administrative system.

4.3.4: Scientific Approach: Procurement like many other social sciences makes use of the inductive method of proceeding from particular to general through observation for collecting the data, classification of data and verification of the hypotheses. The scientific management movement gave a great fillip to the use of this method in the development of effective techniques of organization and management and of budgeting and supply. Administration was separated from politics. It was treated as a mechanical organization and was subjected to the rigours of the laws of mechanics. Although the Study of public administration has now passed the Stage of scientific management fad, many activities of the office management, accounting and control of material and supply are still determined on the scientific principles. Measurement of work, time and motion studies, work flow charts, cost accounting and opinion sampling and polls are the techniques based on the Scientific and technical method for the solution of administrative problems.

4.3.5 Case Method Approach: A case is a narration of what has actually taken place in administration, keeping in fact the context and all relevant dimensions. Aply handled, the case method approach is a sensitive one, seeking as it does to reconstruct the administrative realities and gives to students a flavour of the administrative Process. The case approach has been motivated by a commitment to the objectives and methods of social sciences. It has been shaped also by a considerable sensitivity to traditional concerns of humanities and by practical interest in pedagogy as against research. The case method to the study of public administration began to be popularized in the thirties. The case method has come to stay in public administration, but it cannot become the dominant approach. It is essentially a historical method. It is a method in which an administrative decision, in any given question or issue, is made the focal point for historical exposition. Its aim is to point out as to what factors or considerations, political, economic, and personal or any other, influence the decision of the administrator and also to know the process of decision or policy-making. The case as presented to the student in the file on monograph comprises every possible aspect of the situation. It is best presented as a running account embodying explanations of various procedures as they occur in relation to the circumstances. It provides the student with indications concerning the legislative and institutional framework within which the problem to be solved by the administrative agencies arises.

It also, wherever possible, contains notes to help the analyst understand the psychological background, the characters of the people who took part in the case, the tensions among the staff of the administrative organization concerned, and other factors. The account as a whole is intended to reconstruct and explain, with reference to the greatest number of identifiable factors, the initiation, procedure and conclusion of the operation concerned and more specially, the process of formalizing the administrative decision. The case histories are

prepared with the help of relevant documents and files, inquiries and interviews with officers concerned and all other sources of the case.

4.3.6: Institutional and structural Approach: This approach to the study of public administration is the oldest and in terms of numbers, it has the largest following. However, it is the least homogenous of all schools of public administration as it includes among its protagonists, teachers and research workers with varied training, ranging from political scientists to specialists in scientific management techniques.

4.3.7: Behavioural Approach: This approach examines public administration by studying individual and collective human behaviour in an administrative situation. It brings to bear upon administrative problems on inter-disciplinary approach which includes Sociology, Individual and Social Psychology and Cultural Anthropology. Originated in the United States this approach focuses on the actual behaviour of persons and groups in organisations and has four Characters which are as follows:

1. The increased attention to the individual and his relationship to the administrative organisation in which the scientific-management approach tended to consider him rather as a thing or a means, without taking in to account the different aspects of his personality and his relationship to interests and social group other than the administrative organization in which he worked. Increased attention to the individual in administration is based on more realistic research concerning motivation, decision making process and nature of authority.
2. Administration is studied as a social system with the result that whereas formerly attention was concentrated exclusively on formal and rational relationships of the organization, now informal human relationships in the organizational receive equal attention.
3. On account of these developments, more importance is given to communication. This is understandable because an administration is described as a complex aggregate of human relations. Under the traditional approaches the only recognized means of communication were the formal orders and circulars issued by the superior to the subordinates and reports and returns submitted by the subordinates to their superiors. But under the new approach, the informal means of contact and communication receive as much attention as the formal ones.
4. Replacement of the theory of Sovereignty by that of legitimacy. The concept of political sovereignty had given birth to the theories of hierarchical structure, line of authority, chain of command and delegation, among others. Under the new approach, there is an increasing tendency to analyse the reason why given persons, considered individually and collectively, feel that they must obey orders. Thus emphasis is put on administrative leadership and motivation.

In this method a new approach is followed by comparing the behavioural pattern of public administration in different countries, this comparative method has been used in studying the contemporary system of government and administration. The Behavioural Science and the Case Study approach has impacted a distinct shift in the techniques of comparative approach in which the normative study of comparative administration merged gradually into the empirical and explanatory writings on different administrative systems. The recent trend is towards a nomothetic approach whereas earlier it was towards an ideographic approach.

Ideographic approach showed interest in concrete situations, case studies, area information and particular facts while the present emphasis is on theory or testable propositions which assert regularities of behaviour and correlation between variables. The new trend involves a greater interest in the environmental factors as they interact with public procurement. It is now realized that these factors and circumstances are conditioned by governmental behaviour and hence their study is an essential part of the study of public procurement.

4.3.8: The Consensus Approach: The principles of public administration developed at the time were devices suggested to achieve efficiency. This efficiency-oriented approach coupled with the anti-patronage movement was strengthened by the view that policy making and policy implementing are two different things. Policy-determining was considered to be a field of politics and policy-implementation, the field of administration. It is now accepted that administration is involved in policy formulation also. It is currently wrong to say that policies can be formulated without the advice or assistance of administrative staff. The whole theory of 'delegated legislation' disproved the dichotomy between politics and administration. According to Appleby, "Public administration is policy-making". It is not autonomous, exclusive or isolated from policy-making. It is policy-making in a field where mighty forces contend; forces engendered in any society. Further, public administration cannot be fruitfully studied apart from its political and social setting.

4.3.9: The Structural approach: Concentrates on the description of the administrative structure of the government bodies. The approach emphasizes the study of PODSCORB techniques of administration. But the administrative structure and techniques cannot be studied without proper reference to the environment in which public administration is working as well as the human factor. According to the scientific management approach, the problems of public administration should be studied vide the methods and spirit of science. Taylor concentrated on the work methods, machines and materials. He was concerned with the questions of mechanical efficiency. Scientific management taking efficiency as the objective, views administration as a technical problem concerned basically with the division of labour and specialization of functions. This approach is considered defective because it ignores the human elements in administration.

The socio-psychological approach or the Behavioural approach believes that public administration should be concerned with the study of human behaviour in organisation and operations of the various organisations. According to Simon decision making is the most important activity of administration. Human beings who work in an organization have aspirations and desires. Their behaviour is conditioned by their psychology, motives and social environment. The administrative science should study these 'facts' of behaviour without getting involved in the question of 'values'. This new approach is universalistic in character and its purpose is to build a system of interlocking generalizations about how human beings actually behave in these organisations.

4.4. What should be the knowledge base for public procurement study and what disciplines should inform the study of public procurement?

Public procurement is now claimed by many disciplines; each with its historical orientation of methodology at best. It has become a subject of inquiry in public administration, economics, medical sciences, engineering, project management,

finance, education, business administration, management, etc. The mathematization, for example, favoured by economists and psychologists will be different from an approach taken by anthropologists or sociologists and yet each of these becomes useful in our understanding of the social dimensions of public procurement operations. Research on public procurement has tended to be heavily influenced by the disciplinary backgrounds of writers. There remains an uneasy tension in finding appropriate theoretical frameworks for researching and studying public procurement.

Cresswell (2009) argued that within the social sciences (if we are to accept that public procurement belongs to this family), qualitative approaches will provide a means for exploring and understanding the meaning individuals or groups ascribe to a social or human problem. We cannot even describe social life precisely unless we first accurately grasp the concepts that people apply in their behaviour (Giddens, 1997).

Sementelli (2011) rightly observed that public procurement tends to rely heavily but not exclusively on the professions of law, economics and in some cases operations management particularly at the micro-level. A potential limitation of existing public procurement literature is its tendency to focus on traditional, private-sector procurement aspects as opposed to fully exploring the uniqueness of public procurement (Murray, 2008). Within public procurement research, political scientists may be interested in the political forces that come into play in the process of public procurement. They are concerned with who gets what, when and how and attempt to understand the process issues of government procurement policy-making as opposed to the output -- a contract. In public procurement, political scientists will be interested in the internal and external political forces that may influence a procurement decision to award a contract to a particular bidder. Politics here is used in the context that every decision is a political decision that involves the influence of power economic, political, administrative, and technical information.

Economists are generally concerned with production, consumption and distribution of wealth. They will be concerned with the costs and benefits of using a particular procurement method compared to other methods. Their concern will be on the costs and benefits of a particular procurement decision and their pre-occupation is not on the process, like the political scientists, but the outcome. They will be concerned as to who will eventually pay the "costs" resulting from a particular procurement decision. There are opportunities and costs which relate to particular procurement decisions and that will be the main pre-occupation of economists. Building mathematical models to predict the outcome of a particular procurement decision in terms of costs and benefits may equally be a major concern of economists.

Lawyers will be concerned with the laws, rules and procedures for public procurement. The legal frameworks which govern the practices of public procurement should occupy the legal professionals interested in public procurement research. They will be concerned with whether a procurement decision was arrived at following the principles and practices set by a country's procurement law and other related laws set by that government or any other body that has approved jurisdictional rights to do so. To the legal professionals, their pre-occupation is on how all procurement decisions should comply with the laws and possibly the legal implications of a procurement decision to the procuring entity and to government. Public administration experts will most probably be concerned with how a procurement decision will be used to promote efficiency and effectiveness in the running of government activities at whatever level. They need to be interested in the extent to which hitches in the

procurement processes impair a government's capacity to deliver timely and quality services to the public. On their part, sociologists need to concern themselves on the social forces that influence a procurement decision. Each discipline will therefore have its unique contribution in helping us understand matters of public procurement and those developing a public procurement body of knowledge should endeavour to face this reality.

4.5 What skills and competences do public procurement education programmes aim at addressing within the context of developing countries?

We administered a questionnaire to get responses on the stakeholders' views on what kind of procurement skills universities should be imparting in their graduates of procurement. The respondents came from a mix of different types of procurement professionals with 78% of them being male while 22% were females. The respondents had varying levels of procurement qualifications. Of these respondents, 56.7% were respondents that had attained bachelor's degrees, while the remaining had attained professional qualifications. The respondents also included 15.3% professionals working in the central government, 23.7% working in the local governments across the East African countries, 35.6% were working in parastatals while 25.4% were working in the private sector. Respondents were of varying age categories with 37.3% in the 20-30 age category, 54.2% were between 31-40 years of age while only 8.5% were above 40 years of age suggesting that procurement was still dominated by a relatively young group of professionals unlike other professions. It would also suggest that universities need to have curriculum designed for master's degrees to target those who were now becoming more senior in the profession. It was found through the analysis that 15.3% of the respondents had less than one year of experience, 64.4% were between 1 and 3 years while 20.3% had experience stretching over 4 years. On the specific skills which were needed in the job market and universities were supposed to impart to their students, different and interesting results emerged. In the next section, the findings that emerged are discussed.

Table 5: Skills needed by procurement professionals

Perceptions on the skills needed by procurement professionals	Disagree strongly	somehow disagree	Undecided	Agree somehow	Agree strongly
Procurement planning skills are critical for all professionals	1.7% (1)	-	-	6.8% (4)	91.5% (50)
I need skills in preparation of bidding documents	-	-	3.4% (2)	13.6% (8)	83.1% (49)
I need management skills in all procurement and disposal activities	-	1.7% (1)	5.1% (3)	16.9% (10)	76.3% (45)
I need skills in report writing to effectively manage my duties	-	6.8 % (4)	8.5% (5)	27.1% (16)	57.6% (34)
I need skills to enable me become a source of specific procurement expertise	3.4% (2)	5.1% (3)	10.2% (6)	13.6% (8)	67.8% (40)
I need skills to enable me proactively impact on our operations	-	3.4% (2)	5.1% (3)	30.5% (18)	61% (36)

I need skills in supply market analysis for effectiveness	-	3.4% (2)	10.2% (6)	42.4% (25)	44.1% (26)
I need to build a deep understanding of available procurement systems	-	1.7% (1)	10.2% (6)	23.7% (14)	64.4% (38)
I need to have a deep understanding of procurement laws	-	3.4% (2)	3.4% (2)	10.2% (6)	83.1% (49)
I need to effectively manage strategic relationships	1.7% (1)	1.7% (1)	8.5% (5)	39% (23)	49.2% (29)
I need to work more collaboratively with suppliers	3.4% (2)	3.4% (2)	5.1% (3)	35.6% (21)	52.5% (31)
I need analytical capabilities to help monitor compliance policies	-	5.1% (3)	11.9% (7)	27.1% (16)	55.9% (33)
I need to have analytical and problem solving skills	-	6.8% (4)	5.1% (3)	35.6% (21)	52.5% (31)

Responses showed that most of the respondents were in strong agreement that planning skills are critical for procurement professionals. Majority (83%) were of the view that they needed skills for preparation of bid documents. Understanding procurement laws was another area where respondents expressed strong views as a skill very essential in procurement management, with 83% of the respondents indicating strong agreement. Other skills received varying levels of agreement, with some respondents indicating strong agreement while others somehow agreed. These included management skills, report writing skills, skills in supply market analysis, skills in managing strategic relationships, among others.

Table 6: Perceptions on employers' needs when recruiting procurement professionals

Perceptions on employers' needs when recruiting procurement professionals	Disagree strongly	somehow disagree	Undecided	Agree somehow	Agree strongly
Recruiters need staff with interpersonal skills	-	1.7% (1)	10.2% (6)	35.6% (21)	52.5% (31)
Recruiters of procurement officers need people with self-motivation	3.4% (2)	6.8% (4)	8.5% (5)	30.5% (18)	50.8% (30)
Recruiters need procurement people with professional qualifications	5.1% (3)	1.7% (1)	8.5% (5)	23.7% (14)	61% (36)
There is increasing need for leadership skills among procurement personnel	1.7% (1)	-	13.6% (8)	32.2% (19)	52.5% (31)
Employers now need academic staff with academic	3.4% (2)	-	15.3% (9)	33.9% (20)	47.5% (28)

achievement					
Employers seek candidates who are strategic rather than tactical thinkers	-	6.8% (4)	27.1% (16)	30.5% (18)	35.6% (21)
Employers seek candidates who have supply chain management experience	1.7% (1)	11.9% (7)	11.9% (7)	44.1% (26)	30.5% (18)
Employers seek candidates with ability to develop supplier relationships	1.7% (1)	10.2% (6)	11.9% (7)	30.5% (18)	45.8% (27)
Employers seek candidates who possess negotiation skills	3.4% (2)	11.9% (7)	15.3% (9)	25.4% (15)	44.1% (26)
Recruiters expect candidates to have an understanding of the industry practices	3.4% (2)	6.8% (4)	20.3% (12)	33.9% (21)	35.6% (20)
Procurement professional must have ability to analyse second-tier suppliers	3.4% (2)	6.8% (4)	16.9% (10)	42.4% (25)	30.5% (18)
Procurement professionals must follow the flow of commodities globally	1.7% (1)	13.6% (8)	15.3% (9)	25.4% (15)	44.1% (26)
Procurement professionals must be able to use the internet	1.7% (1)	8.5% (5)	15.3% (9)	23.7% (14)	50.8% (30)

The team found out that interpersonal skills stood as the most popular aspects employers look out for when employing procurement professionals, with more than 85% of the respondents indicating agreement. Leadership skills and self-motivation came in closely, as other attributes employers seek out for when employing procurement staff. Further, the qualifications of the person to be recruited should show the person's ability to show professionalism. The views showed the training given to procurement students in the countries surveyed within East Africa, despite Procurement being a new field of training, had ably equipped the students with general knowledge about the profession, its requirements and the legal implications of failing to comply with the regulations that govern the professional practice.

Table 7: Abilities necessary for procurement professionals

Abilities for procurement professionals	Disagree strongly	somehow disagree	Undecided	Agree somehow	Agree strongly
Procurement professionals need understanding of the organisational business	-	-	13.6 % (8)	27.1 % (16)	59.3 % (35)
Procurement professionals should be able to make timely decisions	1.7% (1)	3.4 % (2)	6.8 % (4)	22% (13)	66.1 % (39)
Procurement professionals should have influencing skills		1.7 % (1)	10.2 % (6)	33.9 % (20)	54.2 % (32)
Procurement personnel need to have customer focus skills	1.7% (1)	3.4 % (2)	8.5 % (5)	37.3 % (22)	49.2 % (29)
Procurement professionals must effectively manage their time	1.7% (1)	5.1 % (3)	1.7 % (1)	30.5 % (18)	61% (36)
Procurement professionals must have time management skills	-	3.4 % (2)	11.9 % (7)	33.9 % (20)	50.8 % (30)
Procurement professionals should have an inquisitive mind in their work	-	3.4 % (2)	13.6 % (8)	25.4 % (15)	57.6 % (34)
Procurement professionals should be people oriented in their work	-	5.1 % (3)	11.9 % (7)	32.2 % (19)	50.8 % (30)
Procurement professionals should engage in effective verbal communication	5.1% (3)	6.8 % (4)	6.8 % (4)	42.4 % (25)	39% (23)
Procurement officials need to have an entrepreneurial spirit	1.7% (1)	11.9 % (7)	16.9 % (10)	32.2 % (19)	37.3 % (22)
Procurement officials need to devise novel ways of solving problems	8.5% (5)	3.4 % (2)	16.9 % (10)	32.2 % (19)	39% (23)
All procurement professionals should have information technology management skills	1.7% (1)	8.5 % (5)	13.6 % (8)	30.5 % (18)	45.8 % (27)
Teamwork is very critical for procurement efficiency	1.7% (1)	3.4 % (2)	10.2 % (6)	28.8 % (17)	55.9 % (33)
Continuous procurement development is critical for all professionals	1.7% (1)	1.7 % (1)	5.1 % (3)	16.9 % (10)	74.6 % (44)
Procurement professionals should abide by an ethical code of conduct	1.7% (1)	1.7 % (1)	6.8 % (4)	18.6 % (11)	71.2 % (42)
Professionals should have a total cycle cost approach thinking	-	-	5.1 % (3)	16.9 % (10)	78% (46)
The procurement professional must closely monitor all procurements	-	1.7 % (1)	5.1 % (3)	27.1 % (16)	66.1 % (39)

Having total cycle cost approach thinking and the ability to manage time well emerged as one which most respondents (95% and 91%) felt was very necessary for procurement professionals. These were followed by the need for continuous professional development (90%), the ability to make timely decisions (88% agreement), the need to understand organisational business, with 86% indicating agreement, abiding by the ethical code of conduct (89%), the ability to closely monitor all procurements (87%), among others.

4.6 Is public procurement education practitioner or academic oriented?

Public procurement ought to be divided into two parts, namely (1) the practice, and (2) the academic study. The world of practice and theory should not be too separate. The theoretical part should include the study of the fundamental characteristics of what constitutes public procurement within the context of the changing nature of government. It has to cover all activities which are involved in this function. The theory of public procurement must be concerned with the origin of the function within government. It must cover the theory of legislation for public procurement research and the role of various institutions and actors in that effort. Public procurement function and its relationship with other organisational functions must occupy the theorists. It must understand the theory of procurement in the East Africa. The applied part should embrace the study of the actual work of public procurement at all levels of government -- central, regional and district. The study of national and international problems in public procurement in a comparative way needs to be emphasized.

Gildenhuys (1997) further explained; and in accordance with our current debate, that academic financial education should be aimed at the acquisition of permanent knowledge: knowledge of the basic tenets and normative theories which would result in a more permanent expertise which would in turn ensure efficient and effective financial administration. Such education should be aimed at the development of the top echelons of the public sector that should do the thinking and not the routine functional work. Such people must be thoroughly educated in the philosophy and normative theories of public finance which will enable them to analyze and evaluate existing financial practices, procedures and policies, so that they can change and rectify shortcomings in order to ensure efficient and effective public administration. Public procurement management ought not to be taught from the technical aspects but from the philosophical foundations as well.

5.0 CONCLUSIONS AND IMPLICATIONS

The preliminary study has laid a foundation for future empirical research. It has highlighted the, procurement courses taught per university, approaches and methods, skills required and whether the teaching and the knowledge base. It was found out that the procurement courses are offered in many universities across East African in both public and private although named variously. Several approaches are used in teaching procurement across the four East African Countries of Uganda, Kenya, Tanzania and Rwanda. The most common approach was the lecture method due to the large classes especially at undergraduate level while at post graduate, case studies were emphasized. Teaching of Public procurement is indeed an emerging professional discipline in the four East African countries. The Institutions of higher learning still have a long way to go as far as imparting the professional skills are concerned. Such institutions must stick to the professional guidelines not only in the design of the curriculum but also in identifying the people with professional skills to equip others with the same skills. The old days when the notion was that everybody can handle procurement are gone. Moreover, the customers are also very

knowledgeable of what they want and this has to address the professional connotations and necessary intellectual menu. A self-assessment of Procurement programmes across all the four EA countries could be conducted under the auspices of the Inter-University Council for East Africa (IUCEA), German Academic Exchange Service (DAAD), German Rectors Conference (HRK) and the Dialogue on Innovative Higher Education Strategies (DIES) in conjunction with the East African Higher Education Regulatory Agencies. This assessment will help the universities improve on their respective curriculum, with inputs from key stakeholders through quality assurance.

6.0 LIMITATIONS AND FUTURE RESEARCH

The study was limited to the East African region. It covered universities that were teaching procurement. The content scope was restricted to the issues required in the study as outlined in each of the study questions. It is hoped that this research report will guide public policy makers in PPDA and Universities in the formulation and implementation of teaching approaches in the area of public procurement within the region. The study was a comparative analysis focusing on public procurement training in East Africa but could be replicated in other regions such as the Common Market for East and Southern Africa (COMESA) in an effort to standardise teaching approaches to enhance competitiveness. In view of the importance of this research, policy briefs for stakeholders in the various line ministries and departments should continuously be held as a measure of targeting high level policy makers who might not be able or available to attend workshops and seminars.

References

- Badenhorst-Weiss, J, Callender, G. & McGuire, J. (2010). "Building the Procurement Profession: A Comparative Review." *Journal of Contemporary Issues in Business and Government*, 16: 69-94.
- Bertucci, Guido (2007) "Strengthening Public Sector Capacity for Achieving Millennium Development Goals" in a Rosenbaum & J – M Kauza, Eds: Excellence and Leadership in the Public Sector: The Role of Education and Training New York United Nations Department of Economic and Social Affairs/ International Association of Schools and Institutes of Administration: pp. 1-8.
- Bruner, J. (1960/2006). *The process of education, Revised Edition*. Cambridge, MA: Harvard University Press.
- Callendar, G. & Mathews, D. (2000). "Government Purchasing: An Evolving Profession?" *Journal of Public Budgeting, Accounting & Financial Management*, 12(2): 272-290.
- Coe, C.K. (1989). *Public Financial Management*. Englewood Cliffs, NJ: Prentice-Hall.
- Cogburn, J.D. (2003). "Exploring Differences in the American States' Procurement Practices." *Journal of Public Procurement*, 3 (1): 3-28.
- Cohen, E., Brody, C., & Sapon-Shevin, M. (2004). *Teaching cooperative learning*. Albany, NY: State University of New York Press.
- Cresswell, J.W. (2009). *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (3rd ed.). Singapore: Sage Publications.
- Dewey, J. (1933). *How we think*. Boston: Houghton Mifflin Company.

- Gay, G. & Kirkland, K. (2003). Developing cultural critical consciousness and self-reflection in pre-service teacher education. *Theory into Practice*, 42(3), 181-187.
- Giddens, A. (1997). *Sociology* (3rded.). Cambridge, UK: Polity.
- Gildenhuys, J. S. H. (1997). *Public Financial Management*. Pretoria, South Africa: J.L. Van Schaik
- Gladden, E. N. (1972). *A History of Public Administration*. London, UK: Frank Cass.
- Holzer, M. & Zhang, M. (2002). "Introduction", *Chinese Public Administration Review*, 1 (1): 1-8.
- Jayapalan, N. (2000). *Public Administration*. New Delhi, India: Atlantic Publishers and Distributors.
- Johnson, D. & Johnson, R. (1998). *Learning together and alone*, 5th edition. Boston: Allyn & Bacon.
- Kuit, J., Reay, G., & Freeman, R. (2001). Experiences of reflective teaching. *Learning in High Education*, 2(2), 128-142.
- May, T. (2001). *Social Research: Issues, Methods and Process* (3rded.). New York: McGraw Hill.
- Martin, J. (2003). *The education of John Dewey*. New York: Columbia University Press.
- McCue, C.P., & Pitzer, J.T. (2000). "Centralized vs. Decentralized Purchasing: Current Trends in Governmental Procurement Practices." *Journal of Public Budgeting, Accounting, & Financial Management*, 12 (3):400-420.
- Postman, N. & Weingartner, C. (1969). *Teaching as a subversive activity*. New York: Delacorte Press.
- Prier, E., McCue, C., & Behara, R. (2010). "The value of certification in public procurement: the birth of a profession?" *Journal of Public Procurement*, 10 (4):512-40.
- Prince, M. (2004) "Does Active Learning Work? A Review of the Research," *Journal of Engineering Education*, 93:3, 223-231.
- Seifert, K. (1999). *Reflective thinking and professional development: A primer*. Boston: Houghton Mifflin Company.
- Slavin, R. (1994). *Cooperative learning: Theory, research, and practice*, 2nd edition. Boston: Allyn & Bacon.
- Sementelli, A. (2011). "Public Procurement: Political Spectacles and Ritual." In K. V. Thai (Ed.). *Towards New Horizons in Public Procurement* (pp. 42-59). Boca Raton, FL: PR-Academics Press.
- Smith, K., Sheppard, S., Johnson, D., & Johnson, R. (2005). Pedagogies of engagement: Classroom-based practices. *Journal of Engineering Education*, 94 (1), 87-103.
- Simcox, J.E. (2010). *Primitive Civilization or Outlines of the History of the Ownership in Archaic Communities*. Cambridge, UK: Cambridge University Press

- Sirkin, M.R. (2006). *Statistics for Social Sciences* (3rded.). New Delhi, India: Sage Publications.
- Snider, F.K. (2006). "Procurement Leadership: From Means to Ends." *Journal of Public Procurement*, 6 (3): 274-294.
- Thai, K. V. (Ed.). (2009). "International Public Procurement: Concepts and Practices." In K. V. Thai (Ed.), *International Handbook on Public Procurement*. (pp. 1-23). Boca Raton, FL: CRC Press.
- Thai, K.V., & Grimm, R. (2000). "Government Procurement: Past and Current Developments." *Journal of Public Budgeting, Accounting, & Financial Management*, 12 (2): 231-247.
- Wittig, W. A. (1998). "Building Value through Procurement: A Focus on Africa." Paper Presented to the 9th International Anti-Corruption Conference. [Online]. Available at www.legacy.transparency.org

SUSTAINABLE PROCUREMENT: STRONG ENOUGH AS A POLICY INSTRUMENT?

Abdullah KORKMAZ is a former Head of Department in Public Procurement Authority of Turkish Republic (PPA) and currently Legal Consultant in Ministry of Interior.

E-mail: akorkmaz68@hotmail.com

ABSTRACT

The goal of this paper is mainly scrutinized on the international and European Union regulations/implementations of sustainable procurement and using it as a policy option. Moreover, although Turkish Public Procurement Law does not contain detailed and comprehensive green and social provision in the current text, even so, we aim to give some information about Turkey case as an example country.

As might have been expected, public authorities are major consumers in all around the world. By using their purchasing power in a positive manner, they can make an important contribution to sustainable procurement. For many years, the single most important indicator in the practice of public purchasing was the economic factor. Environmental and social factors were seldom taken into account. However, the importance of non-economic factors in public procurement increased significantly with the development of the concept of sustainable development, understood as *'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs'*.

Internationally, public procurement, or in context of sustainability is officially regarded as an important, flexible, and powerful policy instrument. Sustainable policies are often described as “win-win” since they lead not only to environmental improvement but also to improved government efficiency. By integrating environmental and social considerations into procurement decisions, valuable contribution can be made to improve environmental and social outcomes. Integrating sustainable practices and principles into procurement is seen as integral in achieving value for money.

In markets with significant private demand, sustainable procurement appears to be most promising when it focuses on developing and commercialising innovative green products. But even so, pursuing environmental policies via the implementation of sustainable procurement is a complex task. Decisions about the implementation of sustainable procurement, as with any other policy tool, should be based on some serious analyses.

Keywords: Sustainable procurement, policy tool, Turkey

INTRODUCTION

Sustainable procurement (environmental, social and economic) is not a new development. Companies or contracting authorities realized long ago that efficiency in energy usage, waste generation and water consumption could lower costs. Governments increasingly include environmental and social criteria in their purchasing decisions in addition to economic one.

Several factors play important roles in this progress. First, is the general design and intent of sustainable procurement policies. Some policies seek to correct institutional deficiencies in government procurement practices that lead both to higher government purchasing costs and lower environmental quality. Sustainable policies that identify and correct such deficiencies are often described as “win-win” since they lead not only to environmental improvement but also to improved government efficiency. A second factor is the magnitude of government purchasing. Sustainable public procurement will be a more effective instrument of environmental policy, all else equal, when the government sector is a large, coordinated purchaser of relevant products. A third crucial factor is the private sector response to sustainable procurement. In principle, the private sector response may either reinforce or counteract the change in government purchasing.

Sustainability as a Public Procurement Policy Tool

Sustainable procurement should be considered an administrative policy tool. Administrative policy tools can be implemented by command and control approaches. For administrative policy tools to be cost-effective all actors

involved in the procurement process need to have full information on the marginal cost of reduction and the production technology of individual firms.

Development of concepts for many years, the single most important indicator in the practice of public purchasing was the economic factor. Environmental and social factors were seldom if ever taken into account. However, the importance of non-economic factors in public procurement increased significantly with the development of the concept of sustainable development, understood as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

The relevance and practical application of the environmental aspects of a public procurement can be demonstrated rather easily. Green requirements can be specified in the technical demands for the production technology and the selection of materials. The relevance and specification of social and ethical aspects of sustainable procurement is much more difficult to demonstrate as it is often difficult to demonstrate their effect on the characterisation of the final product. The potential of sustainable procurement as a policy instrument has been increasingly recognised, and over recent years there has been growing political commitment at national and international levels.

DEFINITIONS OF SUSTAINABLE, ENVIRONMENTAL AND SOCIAL PROCUREMENTS

Sustainable Procurement

There is no single definition of sustainable procurement -not least because sustainability is a contested concept but incorporate extrinsic cost considerations into decisions alongside the conventional procurement criteria of price and quality. Sustainable public procurement that contracting authorities take into account three pillars (economic, environmental and social) of sustainable development when procuring goods, services or works at all stages of the project. Sustainable procurement is a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society, environment and the economy. As a practical matter, sustainable procurement is the basis for continued efforts to add value to product and to improve social and environmental performance throughout the supply chain.

Environmental (Green) Procurement

Green Public Procurement (GPP) means that contracting authorities and entities take environmental issues into account when tendering for goods or services. Environmental concerns are the dominant macro -level justification for sustainable procurement; born out of the growing 21st century consensus that humanity is placing excessive demands on available resources through unsustainable but well- established consumption patterns. This is a sufficiently influential issue that environment-centric procurement is sometimes seen to stand alone from sustainable procurement.

Social Procurement

Social issues might broadly be defined as issues which impact on society or parts of society and cover a range of issues including equalities issues, training issues, minimum labour standards and the promotion of small and medium-sized enterprises (SMEs). The priority for all public procurement is to achieve the best "value for money". It means obtaining the best possible balance between price and quality in meeting the customer's requirements. It is important that, in seeking value for money, purchasers do not allow quality standards to fall below an acceptable level. Purchasers and contractors should not seek cost improvements by cutting corners on compliance with obligations to employees under employment, equal opportunities and health and safety legislation.

Benefits and Objectives of Sustainable Procurement

By integrating environmental and social considerations into procurement decisions, valuable contribution can be made to improve environmental and social outcomes. Integrating sustainable practices and principles into procurement is seen as integral in achieving value for money. By considering sustainability issues, along with other government priorities, other non-cost and cost factors on a whole-of-life basis, there is opportunity to achieve improved economic, social and environmental procurement outcomes.

Some specific benefits of sustainable procurement include:

- Reduced adverse environmental impacts arising from government procurement.
- More efficient use of public resources.
- Improved value for money in procurement decisions.
- Stimulus to local and global markets to innovate and produce more sustainable products and services.
- Provides government leadership to the community in demonstrating social and environmental responsibility.
- Reduces the potential negative publicity associated with the use of products, services and suppliers with poor environmental and social responsibility records.
- Improves working conditions for employees.

The Direct Effects of Sustainable Procurement

By influencing government purchasing decisions, sustainable public procurement initiatives directly affect both environmental quality and the economic performance of the government. Unfortunately, relatively little detailed information is available regarding either of these impacts. Sustainable procurement significantly changes the composition of government purchasing and whether it influences a substantial magnitude of purchasing. Policies must have significant impacts on both composition and magnitude to generate significant direct impacts. On the environmental side, another key driver is the extent to which policies address environmentally intensive sectors. All else equal, GPP will deliver greater environmental benefits if it is focused on sectors that raise the largest environmental concerns per unit of output. The most direct environmental benefit thus comes from focusing on environmental concerns that existing regulatory structures may have overlooked.

How Sustainable Procurement Interacts with Other Policy Instruments

This discussion has identified key distinctions between sustainable procurement and other environmental policy instruments. In practice, specific environmental problems may be addressed with multiple policy instruments. For that reason, it is important to consider how green public procurement may complement or conflict with other policy instruments. A natural starting point is the earlier observation that GPP may be particularly effective at encouraging innovation but, conversely, that it may be relatively weak at sparking subsequent commercialisation and diffusion. Under these conditions, it seems natural to view GPP as an instrument focused on eliciting the development of greener products and technologies, while other policy instruments (e.g. taxes, subsidies, and direct regulations) may be focused on the broader private market-place.

Comprehensive environmental policy development should emphasise the strengths of each instrument, while moderating their weaknesses. A related observation is that the limited scope of GPP may be an asset, rather than a limitation, in achieving certain policy goals. Specifically, the government can use its own purchasing as a testing ground for environmental policies and greener products. By undertaking such testing, the government may position itself to make more informed decisions about subsequent regulations affecting broader public and private markets. GPP can thus set a foundation for better design of traditional environmental regulations. Finally, it must be noted that GPP raises the potential for over-regulation in a world of pre-existing environmental regulations. Green procurement initiatives will generate greater social gains (and, likely, greater environmental gains) when they address environmental issues that have been poorly addressed by existing regulations.

Implementing Sustainable Procurement

When a procuring entity publishes a notice for tender it must state according to which principle bids are to be evaluated. Contract assignment according to the principle of economically most advantageous bid means that despite price, weight is also given to other criteria such as environmental criteria. The environmental criteria as well as the model by which such criteria will be evaluated against price need to be specified in the call for tender. The environmental criteria may be mandatory in the meaning that they have to be met by the bidding firm to be considered as a qualified bidder and have its bid considered. These criteria can be more or less stringent. However, environmental criteria may also be only recommending, which means that they do not have to be met. Again, criteria can be more or less stringent.

Furthermore, independently of whether they are mandatory or only recommending, weights can be given to environmental criteria relative to the price of the procured good or service. This gives the procuring entity an opportunity to design its implementation of sustainable procurement in several ways, deciding to what extent the environment important is compared to the product price. That is, the procuring entity can combine environmental criteria ranging from low to high level stringency with low to large weights given to the criteria. A typical example of low criteria stringency level would be eco-labelling of some sort. Holding other things constant, low environmental criteria stringency in combination with low weights given to these relative price, will create low incentives for firms to invest in more environmentally friendly technologies and as such have no or low expected effects on sustainability.

Alternative tools are market-based tools, such as taxes, subsidies, and tradable permits. Taxes and subsidies have impact on emissions levels indirectly via the price mechanism. Tradable permits works in terms of quantities just as the earlier described administrative policy tools. However, a market where permits may be traded at a certain price will be established and a relative price between a permit and marginal emission reduction will be established. This will create essentially the same economic incentive to adjust environmentally as in the case of tax. Market-based policy tools are automatically cost-efficient as all producers facing them adjusts until they meet the same marginal reduction cost, this in spite of the fact that no producer is another like.

Cost-efficiency: What Does it Mean in Context of Sustainable Procurement?

The fundamental point of departure for environmental policy should be that it shall contribute to allocate resources in such a way that welfare is maximized. Therefore, economically efficient environmental policy concerns two

conditions; firstly, given perfect information essentially about pollution quantities and their environmental damages, environmental objectives have to be set optimally. Formally this means that an optimal target is met when the utility of additional environmental control effort balances the cost of implementing this additional control effort. Secondly, the environmental objectives must be achieved at least cost, which implies that cost-efficient environmental control measures must be put into practice. If these two efficiency conditions are met, resources, including the environment, are allocated in a welfare maximizing way.

However, it is unrealistic to believe that agents deciding upon environmental standards have perfect information as assumed above, and therefore it is not reasonable to believe that they are able to price the environment correctly. Therefore, from a welfare point of view, it is nearly impossible to establish optimal environmental objectives. Instead desired environmental objectives are established, and the cost- efficiency condition should be the guiding rule in achieving these objectives.

When approaching sustainable procurement as an environmental policy tool it is important to reflect upon cost-efficiency and what it actually means. As a simple example, assume that an environmental problem originates from polluting firms that are different in terms of production technologies, and that the authorities is therefore about to decide upon a reduction target.

Furthermore, there is no environmental policy in use targeting the particular problem. In purpose of achieving the target the authority should implement a policy tool that accomplishes the reduction cost-efficiently. However, if the firms use different technologies they also differ in prerequisites of reducing their pollutions. This means that when the environmental objective is achieved cost-efficiently, i.e., when the marginal reduction cost for the firms are identical, they have reduced their pollutions differently in terms of quantities.

Using Public Procurement to Achieve Social Outcomes

During the 1990s, the development of 'green procurement' policies was nothing short of dramatic, at the national level, but more particularly at the European and international levels. Such initiatives were, however, more often than not, separated from efforts to integrate social policy goals into procurement. The development of 'green procurement' came to be seen as one part of a raft of initiatives to promote the general goal of sustainable development. Given that sustainable development has taken on an important social dimension, it is not surprising that there is now growing interest in the social aspects of procurement.

More recently, therefore, there has been growing debate about how aspects of social procurement can be combined with green procurement to produce 'sustainable procurement', thus addressing both social and environmental issues. The linkage of both social and environmental purchasing under the umbrella of 'sustainable procurement' appears to be generating a renewed interest in exploring the applicability of social linkages with procurement. There is, however, not much easily accessible information on the current extent of social procurement worldwide.

ACTION AT THE EUROPEAN LEVEL

The basic concept of sustainable procurement relies on having clear and ambitious environmental criteria for products and services. A number of national criteria and national approaches to sustainable procurement have been developed. However, as the use of sustainable procurement increases, the criteria used by Member States should be compatible to avoid a distortion of the single market and a reduction of EU-wide competition. Having a single set of criteria would considerably reduce the administrative burden for economic operators and for public administrations implementing GPP. Environmental criteria do exist at the European level – for e.g. under the EU Eco-label; the Energy Star Regulation; the Eco- design for energy-using products Directive.

Priority Sectors

The Commission has identified ten "priority" sectors for sustainable/green procurement. These have been selected on the basis of the importance of the relevant sector in terms of the scope for environmental improvement; public expenditure; potential impact on the supply side; example setting for private or corporate consumers; political sensitivity; existence of relevant and easy-to-use criteria; market availability and economic efficiency.

The priority sectors are:

1. Construction
2. Food and catering services
3. Transport and transport services
4. Energy (including electricity, heating and cooling coming from renewable energy sources)
5. Office machinery and computers
6. Clothing, uniforms and other textiles

7. Paper and printing services
8. Furniture
9. Cleaning products and services
10. Equipment used in the health sector

THE INTERNATIONAL EFFORTS

Today, the officially stated general purpose of public procurement is to serve the best interests of government by acquiring goods and services on the most advantageous terms, considering price and other factors deemed to be important to the purchasing agency. Public procurement law accordingly sets out a legal framework for this, and also gives potential purchasers assurances of transparency, due process and equal opportunities for bidding in a procurement process that is articulated in government regulation.

National and subnational priorities are very apparent in government procurement law and regulation. In the United States, for instance, such priority is given to purchases of goods and services from small business, from minority-owned business, and for “green” products. The “Buy America Act” also governs many kinds of procurement. In the European Union, concurrent directives requiring devolution and direction to purchase environmentally preferable products have encouraged “green” procurement on many sub-central levels. Importantly, international trade agreements will not pose serious barriers to green procurement.

Turkey Case

There is no direct green or social provision in the current Turkish Public Procurement Law. But, Turkey has a draft Public Procurement Law, which is fully align with the EU procurements rules. This draft law contains environmental and social considerations parallel to EU directives. Also, the government firmly believes that, green and social procurement is an urgent necessity for companies and contracting entites both. Pursuant to Turkish Public Procurement Law (Law No.4734), “In accordance with the related legislation, for the works requiring an Environmental Impact Assessment (EIA) Report, a positive EIA report must be obtained before the initiation of procurement proceedings. However, in works procurements to be made urgently due to natural disasters, EIA report shall not be required”.

For consulting services in technical, financial, legal or similar fields which are comprehensive and complex in nature and which require special expertise and experience, such as preparation of Environmental Impact Assessment Reports, plan, software developing, design, preparation of technical specifications or supervision can be procured from consultancy service providers. Also, it is possible to put some social and green provisions into the technical specifiaction, which are comply with EU legislation and Turkish domestic rules (e.g.pursuant to a Turkish law, 2% of all workers have to be disabled persons).

Unfortunately, it must be admitted that sustainability issue still is not a top item of Turkey’s public procurement policy agenda. But things are changing rapidly in Turkey like elsewhere. Turkey, as a candidate country to join European Union, has some obligations to regulate its legislation and implementation in line with EU and other international principles. In addition to that, Turkey is already working on a guideline for stakeholders.

CONCLUSION

In markets with significant private demand, sustainable procurement appears to be most promising when it focuses on developing and commercialising innovative green products for private demand. In other words, sustainable procurement will be most effective when it focuses on bringing forth new green products that the private sector has reason to adopt. Private sector adoption can, in principle, greatly amplify changes in government purchasing. This is crucial since individual governments typically make up only a small fraction of purchases in relevant markets.

One of the possible advantages of sustainable procurement is that economic tools are typically limited by national boundaries. Taxes, for example, are generally decided at the national level and only target firms located within the nation’s geographical boards. It is important to note that, the effect of sustainable procurement on the degree of competition is separate from the effect on price.

Implementing sustainable procurement could deter as well as stimulate entry. However, meeting the environmental criteria can demand investment costs and if so result in higher bids. As a consequence the outcome could be that bids are higher although more bids may be placed. Pursuing environmental policies via the implementation of sustainable procurement is a complex task.

Although sustainable procurement is politically appealing as a policy measure and has some advantages, it is likely to be more efficient to use economic tools, such as taxes, subsidies, fees or emission permits. Decisions about the implementation of sustainable procurement, as with any other policy tool, should be based on a welfare analysis, in which gains and losses are compared and only implemented when the net effect is beneficial.

On the other hand, the variety of social procurement initiatives raises several questions: First, there remain tantalising issues concerning how similar 'green' procurement is to social procurement, including the extent to which these two sets of initiatives complement or cut across each other. This will clearly affect the extent to which acceptance of international or regional standards in the area of social procurement will be possible in the context of sustainable procurement. Second, there are uncertainties about the extent to which social procurement raises different legal and policy issues regarding their compatibility with international and regional legal frameworks. To the extent that there are legal differences in the treatment of each, then discussions of sustainable procurement will be made more complex.

As the final word, it can be said that sustainable procurement is the way of the future. A range of resources and organizations exist to assist both the public and private sector in adopting green and social procurement practices. Those procurement practices often vary and depend on the service, product, resource, material, substance or commodity being purchased. Integrating environmental, health and safety aspects of products/services into the procurement process, alongside the traditional criteria of cost, quality, safety and technical performance continues to be the major challenge with both public and private sector organizations. While several challenges remain, they continue to be identified and addressed.

REFERENCES

- Arrowsmith, Sue, (2010), "The Law of Public and Utilities Procurement", Sweet & Maxwell, 1547 pp.
- Brammer, Steven and Helen Walker. (2007). Sustainable procurement practices in the public sector: An international comparative study. Working Paper Series 2007-16. University of Bath: School of Management.
- Brännlund, R. and T. Lundgren. (2009). Environmental Policy without costs? A Review of the Porter Hypothesis, Umeå Economic Studies, No 766, Umeå University.
- Burgi, M. (2007). Small and Medium-sized Enterprises and Procurement Law - European Legal Framework and German Experiences. Public Procurement Law Review 284.
- Commission of the European Communities, (2004): Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions. COM (2004) 327 final. Brussels,
- Council of the European Union, (2006). Review of the EU Sustainable Development strategy -Renewed Strategy.
- Cummings, G., R. E. Lloyd, Y. Qiao, and Thai, K. V. (2006). State and local procurement preferences: A survey. Herndon, VA: National Institute of Government Purchasing.
- D'Amato, A. (2006). Environmental Issues in Public Procurement: How Much Decentralization? *Revista di Politica Economica*, 96(1-2), 209-234.
- Erdmenger, C. (2003). *Buying into the Environment, experiences, opportunities and potential for Eco-procurement*. Greenleaf Publishing, 285 pages.
- EU Commission, (2003). Integrated Product Policy, Communication from the Commission to the Council and the European Parliament.
- European Union, (2004). *Buying Green! A Handbook on Environmental Public Procurement*. Available at: www.ucd.ie/procure/resources/buyinggreen.pdf.
- International Institute for Sustainable Development, (2007). Green Procurement. Available at www.bsdglobal.com/tools/bt_green_pro.asp.
- Lacroix, R., (2008). Energy and Eco-Development in France, (for NTUA), published on www.brainet.gr – January 2008 (54 pages).
- Marron, D. (2003) Greener Public Purchasing as an Environmental Policy Instrument, in *The Environmental Performance of Public Procurement: Issues of Policy Coherence*. OECD.
- McCrudden, C. (2004). Using public procurement to achieve social outcomes. *Natural Resources Forum*, 28(4), 257-267.
- OECD, (2013). *The Environmental Performance of Public Procurement: Issues of Policy Coherence*. Paris,
- Shezi, S. (1998). Public Procurement as an Instrument of Government Policy. Paper delivered to the 9th International Public Procurement Association Conference, Copenhagen, Denmark. June 1998.
- Thomson J. and T. Jackson. (2007). Sustainable Procurement in Practice: Lessons from Local Government, *Journal of Environmental Planning and Management* 50(3): 421 – 444.
- <http://ec.europa.eu/environment/gpp/> European Union Green Public Procurement
- http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf.

Examining the relationship between the barriers and current practices of sustainable procurement: a survey of UN organizations

Jacob Hasselbalch¹, Nives Costa² and Alexander Blecken³

UNOPS

Marmorvej 51

2100 Copenhagen, Denmark

¹E-mail: j.a.hasselbalch@warwick.ac.uk

²E-mail: NivesC@unops.org

³Email: AlexanderB@unops.org

1 Introduction

Commonly referred to as the ‘power of the purse,’ the pursuit of policy agendas through the purchasing function is nothing new in public procurement, with examples stretching back to the mid-19th century [1]. However, the focus on incorporating sustainability – understood in terms of the Triple Bottom Line of social, environmental and economic sustainability [2] – in public procurement is altogether more recent. While studies in the private sector started looking at environmental issues in supply chains as early as the 1990’s [3], it was not until 2006 that the United Kingdom, a forerunner in sustainable public procurement, issued the first national action plan for sustainable procurement facilitated by a multi-stakeholder Sustainable Procurement Task Force [4]. The following years saw a burgeoning of sustainable procurement national and international approaches, and a consequent upsurge in interest from academic researchers [5][6][7].

In the United Nations, the idea of using sustainable procurement (SP) to pursue sustainable development goals gained traction after the World Environment Day in June, 2007 where Secretary-General Ban-Ki Moon pledged “... to explore ways of making the United Nations more climate friendly and environmentally sustainable, and to develop a climate neutral approach to its premises and operations” [8] (p.15). The United Nations (UN) procured over 15 billion USD worth of goods in 2012, 60% of which originated in developing countries [9]. With its ambitious development goals in, inter alia, the areas of poverty reduction, environmental sustainability and the empowerment of women, it is natural for the UN to explore ways to leverage its procurement activities to further these goals and its environmental sustainability ambitions. The example of several sustainable procurement initiatives in public and private organisations worldwide is another motivator to consider the concept of sustainable procurement for implementation in UN operations.

A number of key developments and reports in the recent years have concurred to highlight the importance of implementing sustainable procurement in the UN’s operations [8], to deliver on the pledge of an improved, harmonised environmental sustainability performance in the whole UN system. A report from the Joint Inspection Unit specifically recommended the establishment of in-house sustainable procurement policies and guidelines to raise the environmental profile of the UN. Today, numerous training materials, guidelines and publications on the topic of SP are being made available to the UN organisations, many of which are collected on the UN’s sustainability communication platform called Greening the Blue (www.greeningtheblue.org).

In spite of all these recent efforts to harmonize and advance sustainable procurement in the United Nations, a number of issues are making the implementation problematic [10]. There are concerns that the process itself is more costly or time-consuming than traditional procurement processes. SP is also more complex, requiring procurement staff to take into account a wider range of different factors. This could require training efforts and updated procurement materials. Perhaps the strongest indication that SP is not as straightforward as the recent surge in interest seems to indicate is the fact that the General Assembly has yet to give its official endorsement of SP to the UN entities. This is a reflection of the unease that the concept awakens in especially the member states with developing economies, who fear that stricter environmental and social criteria in procurement will risk cutting their suppliers out of the UN marketplace. The Group of 77 (G77) and China presented these arguments in the Sixty Fourth General Assembly Meeting in 2009, and a decision was reached to postpone the decision on SP [11].

In this environment of increasing focus on the advancement and harmonization of SP in the UN, but also significant obstacles to its successful and widespread implementation, it thus makes sense to study the issue more closely in

order to provide actionable and relevant insights. Sustainable procurement in the UN especially represents a largely unexplored field, where findings can largely contribute to our understanding of policy directions in the public sector. As a case study, the UN represents a significant research subject in consideration of its procurement volume, the political and logistical complexity of its procurement operations, and most of all its visibility as an organisation mandated to lead policy development globally.

To gain an understanding of the current discrepancy between the political discourse and the application of sustainable procurement, we choose as field of research the perceptions that UN procurement practitioners have of sustainable procurement, and the interaction between this perception and other variables such as subjects' affiliation as practitioners or policymakers, or the level of existing SP activity in the respective organisations. A large sample of UN procurement practitioners is our main research subject; statistical sampling of a quantitative, cross-sectional survey is our method. As far as practical implications are concerned, we believe that researching this topic can bring a contribution to the understanding of the specific challenges faced by large complex international organisations like the United Nations when they start the process of implementing SP in their global operations. We believe our findings can be extended to the public sector large, and more broadly to organisations that are planning to expand their sustainable procurement practices into developing countries, an area of activity so far quite understudied.

1.1 Research questions

With the aim of providing an overview of sustainable procurement and the barriers to its implementation across the entire UN system, we put forward the following research questions:

RQ1. Which barriers to SP implementation are the most important ones to overcome?

RQ2. How do UN procurement policymakers and practitioners differ in their understanding of the current state of SP and the barriers?

RQ3. Is there a relationship between the barriers that staff report and the SP practices they are currently engaged in?

The paper is organized as follows: the first section discusses the theoretical and conceptual background of the paper. Secondly, the methodology is described; thirdly, the findings are presented and discussed; and finally a conclusion wraps up the paper.

2 Literature review and conceptual background

The study of sustainable procurement is closely linked to the field of sustainable supply chain management (SSCM) [12]. Seminal articles in the field of SSCM have recently been arguing that supply chain management needs to become sustainable supply chain management, both in theory and in practice [13][14][15], and giving examples of the benefits that accrue to organisations through SSCM [6], but also the difficulties that can arise [16]. The same observations hold true of the study of sustainable procurement, a field which is young but gaining much traction especially in the past few years [5]. Although the body of research is growing, significant gaps in the SP literature still exist especially in the areas of public sector, developing country research [5]. There is also a lack of conceptual clarity in the field as to the depth of analytic focus of the researches, and as to what dimension(s) of the Triple Bottom Line that are being addressed [17].

A number of recent papers are starting to explore the link between SP/SSCM and sustainable development [7][18][19][20]. Opportunities and challenges equally abound when extending sustainable supply chains into developing countries [21][22]. Although the conclusion is that there is a clear potential for SP to contribute to sustainable development goals, more research is needed in order to provide clearer guidance to organisations on how to avoid the pitfalls and maximize development gains. UN entities have the potential to be exemplar organisations in this regard, since they have the procurement expertise and presence in developing countries. However, very little academic research has been conducted on UN procurement specifically [23]. Previous research from Lund-Thomsen & Costa (2011) [10] may be the only academic treatment of SP in the UN available. The key findings of the study point to costs, but especially to lack of conceptual clarity and lack of empirical evidence on the actual as opposed to postulated benefits of SP in developing countries, as the main barriers to effective implementation in the UN.

2.1 Barriers to sustainable procurement

While UN-specific research on SP is sparse, there are a number of studies on the drivers and barriers to sustainable procurement in both the public and private sectors that can be of assistance. Giunipero, Hooker & Denslow (2012) [24] conducted a Delphi study of purchasing executives in the private sector to arrive at a categorization of high, medium and low drivers and barriers to sustainable procurement. They conclude that top management initiatives and compliance with regulation are the main drivers, while the main barriers are economic uncertainty and the initial investment that is required to do SP. In the public sector, Preuss & Walker (2011) [25] conduct an analysis of the psychological barriers to sustainable procurement. Inspired by works in organizational psychology, the authors aim to construct a conceptual framework of barriers that hamper progress in their sample of local government and health care authorities.

The strongest inspiration for the present study comes from Brammer and Walker's article on "Sustainable procurement in the public sector: an international comparative study" (2011) [26]. This paper provides a first-of-its-kind analysis of a survey of 280 public sector procurement bodies worldwide in order to gauge the differences in their approach to SP and the barriers and facilitators they report. They find that the nature and extent of SP practices vary across all regions and highlight the most important barriers and facilitators such as national policy environment and organisational contextual factors. We therefore endeavour to extend the findings of Brammer & Walker to a "complex confederal network of highly heterogeneous organizations" [23] (p. 832) such as UN. The attempt is to expand the findings of that research by focusing on a single organisation with multi-national characteristics, to determine the sector specific barriers proper of international public organisations. Responding to the research call of Brammer and Walker [26], we also provide a more current snapshot of the perceived status of SP in the UN compared to pioneering studies on the subject [10], that allows drawing conclusions of the evolution of this policy instrument in the UN system. Finally, we further develop this approach by introducing the variable of current level of implementation of SP practices. One of the main contributions of this paper is the analysis of how the current status of implementation of SP in the organisation influences the SP barriers reported by procurement practitioners.

2.2 Conceptual Background

The aim of the paper is to provide a sound insight of the most salient obstacles to the implementation of sustainable procurement in the UN as they emerge against the background of current SP practices. Pioneering research has been conducted on this topic [27] through semi-structured interviews with a sample of UN practitioners and policy makers from the largest procuring UN entities. The conclusion of that exploratory study was that especially the issues of policy, mandate, market barriers and procurement procedures constituted significant obstacles, while the highest level of disagreement between practitioners and policy makers was found in barriers related to resource needs and policy issues. The study seemed to indicate that the most significant barriers to tackle were those that existed in the higher strata of organizational hierarchies (policy and mandate issues), rather than the lower ones (operational issues). The study also pointed out at the limitations of deriving conclusions based on qualitative data from only twenty procurement experts employed in UN organisations, and at the need to confirm the findings through more statistically sound data.

To this end, we revisit the framework of barriers to SP used in Hasselbalch, Costa & Blecken (2013) [27], in order to provide some statistical rigor to the preliminary ranking by confirming our finding on a larger and more representative sample of procurement staff. We have chosen to continue working with the distinction between procurement practitioners and procurement policymakers, to test whether there are significant discrepancies in these two groups' understandings of SP barriers and focus areas. The assumption is that practitioners and policymakers may have different perceptions of the relative importance of various barriers and opportunities for SP, and that such dis-alignment may constitute a barrier in its own right. Finally, we are interested in exploring whether there is a relationship or connection between the SP practices that are currently implemented in various UN organisations and the barriers that procurement staff report. To this end, we conduct factor analysis and regression analysis to explore potential connections.

3 Methodology

Inspired by the innovative work of Brammer and Walker (2011) [26], the authors intend to carry out an international comparative study but within a more homogeneous sample of procurement practitioners from a single organisation, with the assumption that their conclusions can be more consistently extended to all large international organisations, public and private, that face similar structural and political constraints. As previous research on this subject was constructed on the basis of qualitative data from a limited number of procurement staff and experts employed in UN organisations, the logical next step was to test the theory and the findings of these exploratory studies by increasing the sample size and relying more on quantitative techniques.

3.1 Survey design

The choice of research tool fell on an online survey as the best technique [28] to reach the targeted population. The questionnaire was constructed using online survey software and distributed over email, on the assumption that regular access to email systems is an integral part of the work for all recipients of the survey, and that they are familiar with the online survey modality. During the survey design, due consideration was given to reasonably limit the time commitment required to filling the survey.

In scoping the survey, the authors acknowledged that the focus of the research was on the individual respondents' perceptions of sustainable procurement, and not on the official organisational discourse on the topic that tend to be politically charged. It was then decided to leave the option to respondents to remain anonymous. While this limits our statistical understanding of the sample, we believe the gains in terms of openness of the responses overcome this shortcoming. In lack of a unified database of all UN practitioners dealing with procurement, the survey was distributed through internal mail distributors in various UN agencies, plus various professional UN mailing lists and relevant working groups. It is estimated that these channels would reach an ample share of the UN procurement community. The barrier framework to be submitted to respondents was derived from Preuss & Walker (2011) [25] and from Hasselbalch, Costa & Blecken (2013) [27], with minor adjustments based on empirical testing carried out within the authors practitioners network, with the aim of increasing clarity of the questions while taking into consideration the cultural diversity of the surveyed subjects.

3.2 Data collection process

The survey consisted of two parts. The survey began with asking respondents to identify themselves as either a procurement policymaker (defined as someone who works with procurement at a policy level, i.e. setting priorities and developing guidance material) or a procurement practitioner (defined as someone who works with procurement on an operational level, i.e. carrying out actual transactions).

The first part of the survey then asked a number of questions on current SP practices at the respondents' organisations to gauge the current state of SP implementation, rated on a 5-point Likert scale [29]. These questions are primarily based on a review within the authors' internal practitioner network. We call these questions the 'Measures of SP implementation' (Table 1 below). On the basis of the outcome of previous research on sustainable procurement in the UN, the 'Measures of SP implementation' were conceived as background information that not all respondents would be necessarily aware of. It was hence decided to leave the option not to complete this section, and to maintain focus of the following part of the survey.

This was followed by the second and main part of the survey, which consisted of a matrix of questions, mainly derived from Preuss & Walker (2011) [25], tempered by the analysis from Hasselbalch, Costa & Blecken (2013) [27]. Each 'Barrier to SP' was presented organised by category, and respondents were asked to rate the importance of the barrier on a scale of 1 (unimportant) to 7 (very important) (Table 2 below). While it was not required to rate the 'Measures of SP implementation', it was mandatory to rate all barrier items to complete the survey. This decision was taken on the basis that our primary objective with the survey was to obtain more rigorous data on the barrier framework, specifically. With the large number of barrier items, it was also decided to use a scale of 1-7 rather than 1-5 to capture more detail.

Measures of SP implementation
My organization is currently doing SP
My organization should be doing more SP
My organization has a clear policy on SP
Our procurement manual contains a section on SP
Our solicitation documents include SP criteria
We use Life Cycle Costing (or Whole-Life Costing) in our evaluation
Sustainable procurement means more expensive procurement
My organization is willing to pay a higher price to do more SP
Doing sustainable procurement could hurt our relationship with suppliers
My organization takes steps to follow up and verify suppliers' reports on sustainability criteria

Table 1. Measures of SP implementation

Category	Barrier
Information	Lacking general information on SP (or lacking awareness) Difficulty in defining environmental criteria Difficulty in defining social criteria
Tools	Lack of tools and guidelines to support SP Procurement manual does not cover SP Difficulty in applying SP tools and techniques such as Life Cycle Costing
Performance measurement	Lack of monitoring/auditing of SP performance Lacking goals and targets for SP performance Lacking sustainability benchmarks
Policy/strategy	Lacking SP policy Procurement policies focused on cost-effectiveness only Need for more top management commitment Lack of inter-agency collaboration on procurement issues Staff resistance to organisational change
Mandate/politics	Lack of UN General Assembly endorsement of SP Lack of support/interest by Member States. SP does not support our efforts to meet our current mandate Risk of damaging relations with developing countries
Supply	Sustainable goods/services unavailable in local markets. Risk of limiting competition in our global supply base
Demand	Requisitioners do not demand SP Donors do not demand SP Beneficiaries do not demand SP
Resources	SP is too expensive in general Inability to justify higher upfront costs SP takes too much time Training needs Lacking funds in our budget to do SP Lacking staff to support/implement SP Lacking in-house technical expertise

Table 2. Barrier framework

3.3 Dissemination and response rate

The survey was created using online survey software and disseminated to the target population by email, being the entire UN procurement community. The UN procurement community we take to mean all UN staff that are employed in roles where they either carry out procurement transactions (practitioners) or have responsibility for setting procurement policy or strategic direction, or are otherwise engaged in designing training and guidance material (policymakers).

Several different channels were used to reach procurement communities across all UN entities. Procurement mailing lists exist in most UN organisations, and were used in concurrence with professional networks¹. The survey was distributed through those channel and maintained active for a total of six weeks, reaching a total response rate of 282. Data cleaning brought the number of responses down to 272, as we removed the rows of data where respondents had given all barrier items the same rating, on the assumption that they were clicking through the survey and not actually ranking barriers.

3.4 Measuring and analysing sustainable procurement in the UN

The first part of our analysis seeks to obtain statistical indicators that will assist us in answering our first research question and determine which barriers to SP are perceived as the most important to overcome. Comparing the variable means for the barrier items is one way to gauge the relative importance of the various measures and provide an overview of the data that is easy to comprehend.

¹ The High Level Committee on Management – Procurement Network, counting 37 member organisations; the Operations Management Teams in all UN programme countries; and the UN Development Group as access platform to Resident Coordinators.

When considering our second research question by comparing data from the policymaker group and practitioner group, we looked for significant differences in the means determined by the non-parametric Mann-Whitney *U* test, which has the advantage that the data need not be normally distributed [30].

Finally, in response to the third research question, we conducted an exploratory factor analysis on the 10 ‘Measure of SP implementation’ items and the 30 barrier items respectively in order to reduce the number of variables and look for joint variation in response to unobserved latent variables [31]. We propose a set of latent variables that explain the data and look for correlation between the SP implementation measures factors and barrier factors through regression analysis (cf. [26]).

4 Analysis of findings

Table 3 displays the means of the ‘Measure of SP implementation’ items. The purpose of these items was to get a sense of the current state of SP in the UN, in terms of practitioners views on what practices are currently being followed, which guidance material is available, and what is the perception on some of the different dimensions of SP. The majority of respondents agree that their organisations are currently doing SP, and there is a very strong consensus among all respondents that they should be doing more. Most also agree that their organisations have a SP policy and that the topic is also covered by their manuals. These observations indicate that the basic groundwork of the creation of the policy architecture around SP seems to be in place. On the questions of the usage of SP criteria in solicitation documents and Whole-Life Costing techniques, the majority of answers fell in the neutral bracket. When it comes to the statement that SP means more expensive procurement, most respondents disagree, which is an encouraging finding in itself for SP implementation. Another encouraging finding is the fact that the lowest ranked measure is the question of whether SP would cause problems with their organisations’ suppliers. Unsurprisingly, most respondents are unable to answer whether their organisations are willing to pay a premium to do more SP, as this decision does not typically lie in the domain of procurement staff. Finally, it does not seem that verification of suppliers’ sustainability commitments is carried out systematically in the UN. Overall, the measures of SP implementation provide a picture of SP in the UN as well under way, but with full implementation still lacking, and an appetite to do more. These results constitute relevant background information when proceeding to discuss our first research question: which barriers to SP implementation are the most important ones to overcome?

Item	Mean	Most cited response	Std. Dev.	Policymaker Mean	Practitioner Mean	Difference
My organization should be doing more SP	4.06	4	0.78	3.96	4.09	-0.13
My organization is currently doing SP	3.44	4	0.90	3.37	3.45	-0.09
Our procurement manual contains a section on SP	3.31	4	1.01	3.15	3.34	-0.20
My organization has a clear policy on SP	3.30	4	1.04	3.10	3.34	-0.24
Our solicitation documents include SP criteria	3.00	3	0.98	2.94	3.02	-0.08
My organization is willing to pay a higher price to do more SP	2.99	3	0.83	2.76	3.04	-0.28
We use Life Cycle Costing in our evaluation	2.92	3	0.98	2.90	2.93	-0.03
My organization takes steps to follow up and verify suppliers’ reports on sustainability criteria	2.82	3	0.94	2.61	2.86	-0.25
Sustainable procurement means more expensive procurement	2.79	2	1.03	2.63	2.83	-0.20
Doing sustainable procurement could hurt our relationship with suppliers	2.34	2	0.86	2.08	2.40	-0.31

Table 3. ‘Measures of SP implementation’. Scale of 1-5, where 5 equals ‘strongly agree,’ n = 272.

4.1 Main barriers to SP in the UN

The results on the barrier items are displayed in Table 4 below, with the ten highest ranked barriers emphasized in bold. The most important barriers come very clearly from two categories: performance measurement and resources. This contradicts the previous findings of of Hasselbalch, Costa & Blecken (2013) [27], which attributed very little importance to performance measurement and much more to higher-order items such as those having to do with

policy and mandate. When looking at the mean values by category, the mandate/politics category is significantly lower than all other categories by a very large margin.

Category	Barrier	Mean	Std. Dev.	Policymaker Mean	Practitioner Mean	Difference in means	Category Mean
Information	Lacking general information on SP (or lacking awareness)	4.39	1.78	4.20	4.43	-0.23	4.41
	Difficulty in defining environmental criteria	4.39	1.69	3.96	4.49	-0.53	
	Difficulty in defining social criteria	4.44	1.71	4.20	4.49	-0.29	
Tools	Lack of tools and guidelines to support SP	4.51	1.79	4.26	4.56	-0.30	4.36
	Procurement manual does not cover SP	3.99	1.87	4.30	3.92	0.38	
	Difficulty in applying SP tools and techniques such as Life Cycle Costing	4.58	1.69	4.44	4.61	-0.17	
Performance Measurement	Lack of monitoring/auditing of SP performance	4.78	1.75	4.80	4.77	0.03	4.81
	Lacking goals and targets for SP performance	4.80	1.73	4.84	4.79	0.05	
	Lacking sustainability benchmarks	4.86	1.70	4.84	4.86	-0.02	
Policy/Strategy	Lacking SP policy	4.14	1.80	4.12	4.15	-0.03	4.24
	Procurement policies focused on cost-effectiveness only	4.47	1.88	4.34	4.50	-0.16	
	Need for more top management commitment	4.42	1.84	4.58	4.38	0.20	
	Lack of inter-agency collaboration on procurement issues	4.52	1.89	4.16	4.60	-0.44	
	Staff resistance to organisational change	3.65	1.79	3.76	3.62	0.14	
Mandate/Politics	Lack of UN General Assembly endorsement of SP	3.58	1.77	3.50	3.60	-0.10	3.50
	Lack of support/interest by Member States	3.68	1.72	3.68	3.68	0.00	
	SP does not support our efforts to meet our current mandate	3.31	1.67	3.36	3.29	0.07	
	Risk of damaging relations with developing countries	3.42	1.69	3.28	3.45	-0.17	
Supply	Sustainable goods/services unavailable in local markets	4.72	1.80	4.78	4.71	0.07	4.61
	Risk of limiting competition in our global supply base	4.50	1.76	4.14	4.58	-0.44	
Demand	Requisitioners do not demand SP	4.64	1.86	4.74	4.61	0.13	4.47
	Donors do not demand SP	4.27	1.89	4.40	4.24	0.16	
	Risk of limiting competition in our global supply base	4.49	1.93	4.56	4.48	0.08	

Resources	SP is too expensive in general	4.23	1.54	4.06	4.27	-0.21	4.59
	Inability to justify higher upfront costs	4.40	1.62	4.06	4.48	-0.42	
	SP takes too much time	4.15	1.63	3.98	4.19	-0.21	
	Training needs	5.14	1.68	5.00	5.18	-0.18	
	Lacking funds in our budget to do SP	4.80	1.72	4.68	4.83	-0.15	
	Lacking staff to support/implement SP	4.56	1.77	4.50	4.57	-0.07	
	Lacking in-house technical expertise	4.88	1.74	4.80	4.90	-0.10	

Table 4. Barrier framework. Scale of 1-7, n = 272.

The performance measurement category items are all ranked very highly: “*Lack of monitoring/auditing of SP performance, mean=4.78*”, “*Lacking goals and targets for SP performance, mean=4.80*”, and “*Lacking sustainability benchmarks, mean=4.86*”. Combined with the lower ranking of the policy and manual barriers, this seems to be a strong indicator that the UN is at the stage where the background work for supporting SP has been completed, but the operationalization of SP into specific goals and targets that are measured against benchmarks has not. This insight also sits well with the emphasis on the need for training and for building expertise in the organisations that emerges from the Resources category, and supports the notion that the crucial next step is the operationalization of SP. In plain words, there are indications that there has been much talking about SP and very little doing. The fact that the barriers within the Information are ranked as medium instead of high barriers could be supporting this analysis.

The Resources category ranks high overall, but there are substantial differences between the different items within. The “*Training needs, mean=5.14*” barrier especially sticks out as the highest ranked item of all. There is a significant gap to the following barriers, even the second-highest ranked “*Lacking in-house technical expertise, mean=4.88*” barrier. What is noteworthy about both of them is that they measure the need for skill and expertise in SP. The “*Lacking staff to support/implement SP, mean=4.56*” barrier is substantially lower than both of these, and while it is still one of the high barriers, this seems to indicate that the problem cannot be solved by simply hiring more staff. The core problem is the need to upgrade the skills and expertise of existing staff, while making sure that new hires already have or will be given the required skills. Other Resource category items having to do with cost and time issues are lower than others within the category and are seemingly not as salient, except for “*Lacking funds in our budget to do SP, mean=4.80*”. This could be connected to the training and expertise issues, as building staff skills can be a costly affair, and procurement departments would have to allocate scarce funds towards these activities. In this context, it is interesting to note that the individual barrier dealing with the perception that “*SP is too expensive in general, mean=4.23*” does not figure as a particularly high barrier compared to the other items.

SP is a multifaceted issue, and the barriers to its implementation are unlikely to fall neatly into one category or be explained straightforwardly. The supply and demand barriers testify to this fact. Whereas the previous barriers mostly dealt with internal organisational issues, the Supply and Demand categories test external factors. “*Sustainable goods/services unavailable in local markets, mean=4.72*” (or programme area markets), is one of the higher barriers. This finding is aligned with the conclusions from Hasselbalch, Costa & Blecken (2013) [27]. The developing countries’ concern that stricter sustainability requirements could cut off their suppliers might be rightly placed. It is therefore of paramount importance that great care is taken in procurement operations to balance strict social or environmental criteria with the need to source from local markets and support capacity development for local suppliers. Since the operationalization stage of SP in the UN is still under way, there is still great scope to act on this concern.

The demand barriers show that compared to other stakeholders such as beneficiaries and donors, it is requisitioners (typically project managers) who have the lowest appetite for SP: “*Requisitioners do not demand SP, mean=4.64*”. Procurement is traditionally thought of as very process-oriented work. If procurers are not asked to score sustainability criteria, they are unlikely or even forbidden to do this of their own accord. This attitude may have to change if SP is to be implemented in the project management cycle, where a large share of procurement activities takes place. This finding concerning the demand barriers, supported by the indications coming from the supply barriers, tend to point out that in order to become successful, SP operationalization has to become a holistic affair, involving all stakeholders and especially project managers and local suppliers.

In the tools category, we see “*Lack of tools and guidelines to support SP, mean=4.51*” and “*Difficulty in applying SP tools and techniques such as Life Cycle Costing, mean=4.58*” as particularly high barriers, while “*Procurement manual does not cover SP, mean=3.99*” is lower than both of these. Staff are lacking SP-specific tools and

especially assistance in applying these, even though the procurement manual may already cover SP. This observation lends more support to the notion that operationalization of SP through training and performance measurement is the crucial next step.

Another interesting barrier to consider is “*Lack of inter-agency collaboration on procurement issues, mean=4.52*”. This barrier also considers a factor that is external to the procuring organisation, and supports the idea put forward in the previous paragraph, that SP operationalization has to be holistic in the sense of drawing in and involving external stakeholders. There is a significant opportunity for the UN to combine procurement harmonization and collaboration with more sustainability requirements. This will allow the various UN entities to not only realize economies of scale, but also leverage each other’s expertise and pool resources to address the increased complexity of SP.

This overview concludes the outline of current state of SP in the UN, as well as the analysis of the most significant barriers to its implementation. In the following section, we deal with our second research question: how do UN procurement policymakers and practitioners differ in their understanding of the current state of SP and the barriers?

4.2 Differences between procurement policymakers and practitioners

Of the 272 respondents, 50 identified themselves as procurement policymakers and 222 as procurement practitioners. Table 3 and Table 4 display the means of all variables for the policymaker and practitioner groups, respectively. The tables also present the calculated difference between the means. There is only one item showing a statistically significant difference ($p = 0.02$): it is the ‘Measure of SP implementation’ item stating that “Doing sustainable procurement could hurt our relationship with suppliers” in Table 3. Here we see that policymakers tend to more strongly disagree with the statement. This could reflect the fact that practitioners work more closely with suppliers in their daily work, thereby having a more realistic idea of how suppliers would respond to more sustainability requirements. However, it is equally likely that practitioners are overestimating how suppliers will respond. This finding hints to the need of further researching the relationship with suppliers to reveal what are the underlying factors that can explain why the two groups differ. However, it should be noted that both groups still tend to disagree on the whole with the statement, even if practitioners show more concern than policymakers.

It is also interesting to note that although we do not find statistically significant difference in the means of any other items at the 95% confidence level, a few additional items do fall within the 90% confidence interval (the ‘My organization is willing to pay a higher price to do more SP’ and ‘My organization takes steps to follow up and verify suppliers’ reports on sustainability criteria’ items; and the barrier ‘Difficulty in defining environmental criteria’), and in all cases they are rated higher by practitioners. It could be argued that the practitioner score is more realistic, simply due to the larger sample size. Further analysis could reveal whether policymakers are systematically underestimating some of the measures of SP implementation and barrier items. Our results imply that this might be the case, but we cannot make this conclusion with certainty at this stage. On the whole, however, there seems to be remarkable agreement between policymakers and practitioners on the relative importance of the barrier items. A larger sample size is unlikely to yield new insights in this regard.

4.3 The relationship between measures of SP implementation and barrier items

The final stage of the analysis concerns our third research question: is there a relationship between the barriers that staff report and the SP practices they are currently engaged in? As a first step, we conducted exploratory factor analysis (EFA) in the R software environment (we made use of the “fa” function in the “psych” package in R). The purpose of EFA is to make sense of large data sets by looking for latent (hidden and unmeasured) variables that can account for the variance in several of the measured variables simultaneously [31]. Thereby, the number of variables is reduced and the underlying structure of the data set can be deduced. The heuristic benefit of this exercise is that it allows us to look for correlation between multiple sets of variables simultaneously. Hence, we can discover whether and how the various SP measure items are correlated with the barrier items. We also considered confirmatory factor analysis or structural equation modelling, but opted for EFA because the state of research into SP in the UN is still in its infancy, and we have yet to identify strongly theorized causal relationships between our variables. Although EFA is generally conducted on continuous, normally distributed variables, it is not without precedent in the literature to apply the method for ordinal, Likert-type items such as survey data [32][26].

There are various strategies for determining the number of factors to extract [33]. The scree plot graphs the number of factors by each factor’s eigenvalue. A heuristic approach is to use the scree plot to determine graphically where the plot flattens out, signifying a drop in the marginal benefit of including further factors. Non-graphical solutions include the Kaiser-Guttman criterion, which states that all factors with eigenvalues above 1 should be included. Parallel analysis is another popular technique, whereby the eigenvalues of the data set are compared to those of a

random data set. All three of these techniques were carried out in R on both the SP measures and Barriers data sets. For the SP measure items, we decide to extract two factors as this is the solution given by both parallel analysis and the scree plot.² For the barrier items, parallel analysis and the scree plot suggest 3 factors, while 6 factors have eigenvalues above 1. Here we opt for 6 factors since a reduction from 30 variables to 3 factors risks oversimplifying the data or making it less interpretable. Since we assume that there will be correlation between the individual variables, we opt for an oblique rotation method rather than an orthogonal. Direct Oblimin is the default choice. We also apply the software's recommended factoring method of Ordinary Least Squares to find the minimum residual solution [34]. We dealt with the 12 cases of missing data in the SP measures items by using the method of single imputation to replace missing values with variable means [35]. There was no missing data on the barrier framework, since these questions required answers in the survey.

The results of the factor analyses are displayed in Tables 5 and 6 below. To ease the overview of the factor analysis we have deleted from the table all loadings below 0.30. This is also a cut-off level recommended in the literature, because a loading of 0.32 suggests an overlap of 10% or more in variance among the factors [36].

	MR1 (Enablers)	MR2 (Problems)	h2	u2
My organization is currently doing SP	0.68		0.46	0.54
My organization should be doing more SP			0.03	0.97
My organization has a clear policy on SP	0.82		0.67	0.33
Our procurement manual contains a section on SP	0.66		0.44	0.56
Our solicitation documents include SP criteria	0.76		0.59	0.41
We use Life Cycle Costing (or Whole-Life Costing) in our evaluation	0.55		0.31	0.69
Sustainable procurement means more expensive procurement		0.51	0.26	0.74
My organization is willing to pay a higher price to do more SP			0.06	0.94
Doing sustainable procurement could hurt our relationship with suppliers		0.70	0.49	0.51
My organization takes steps to follow up and verify suppliers' reports on sustainability criteria	0.65		0.43	0.57
<i>SS loadings</i>	2.96	0.77		
<i>Proportion Var</i>	0.30	0.08		
<i>Cumulative Var</i>	0.30	0.38		

Table 5. Factor analysis: Measures of SP implementation

Starting with the Measures of SP implementation (Table 5), the two factors suggested by the analysis distribute the variables neatly into two categories: a category describing good SP practices (MR1) and one describing problems and negative perceptions of SP (MR2). The MR1 factor can be interpreted as capturing the policies and practices that support sustainable procurement, such as the existence of SP policies and manuals and the use of sustainability criteria and whole-life costing. We therefore re-label this factor "Enablers" to illustrate the need for an enabling environment to support SP. MR2 captures two attitudes towards SP that describe some of the problems that are often associated with the concept, namely that it is more expensive and that it can strain relationships with suppliers. We therefore re-label the MR2 factor as "Problems."

	MR 6	MR 1	MR 2	MR 4	MR 3	MR 5	h2	u2

² The Kaiser-Guttman criterion suggests 3 factors for the SP measures items, but has a tendency to overestimate (Jackson, 1993).

	(Politics & Management)	(Performance measurement)	(Demand)	(Resources)	(Knowledge)	(Tools)		
Lacking general information on SP (or lacking awareness)					0.38	0.33	0.56	0.44
Difficulty in defining environmental criteria					0.99		0.94	0.06
Difficulty in defining social criteria					0.87		0.82	0.18
Lack of tools and guidelines to support SP						0.48	0.68	0.32
Procurement manual does not cover SP						0.64	0.66	0.34
Difficulty in applying SP tools and techniques such as Life Cycle Costing					0.43		0.58	0.42
Lack of monitoring/auditing of SP performance		0.85					0.83	0.17
Lacking goals and targets for SP performance		1.00					0.94	0.07
Lacking sustainability benchmarks		0.75					0.82	0.18
Lacking SP policy						0.54	0.65	0.35
Procurement policies focused on cost-effectiveness only						0.31	0.51	0.49
Need for more top management commitment							0.48	0.52
Lack of inter-agency collaboration on procurement issues	0.33						0.43	0.57
Staff resistance to organisational change	0.42						0.25	0.75
Lack of UN General Assembly endorsement of SP	0.63					0.32	0.66	0.34
Lack of support/interest by Member States.	0.75						0.67	0.33
SP does not support our efforts to meet our current mandate	0.69						0.54	0.46
Risk of damaging relations with developing countries	0.72						0.54	0.46
Sustainable goods/services unavailable in local markets.						-	0.33	0.67
Risk of limiting competition in our global supply base						0.35	0.41	0.59
Requisitioners do not demand SP			0.83				0.80	0.20
Donors do not demand SP			0.87				0.83	0.17
Beneficiaries do not demand SP			0.97				0.92	0.08
SP is too expensive in general	0.39						0.45	0.55
Inability to justify higher upfront costs	0.47						0.64	0.37
SP takes too much time	0.33						0.46	0.54
Training needs				0.32			0.40	0.60
Lacking funds in our budget to do SP				0.35			0.57	0.43
Lacking staff to support/implement SP				0.60			0.77	0.23
Lacking in-house technical expertise				0.93			0.75	0.25
				0.79				

Table 6. Factor analysis: Barrier framework

Moving on to the barrier solution, the analysis here produced six cross-category factors that represent six distinct dimensions of SP barriers that are intuitive even in the cases where they do not follow our theoretical categorization. The factors are presented in Table 6 in the order of the proportion of total variance that they respectively explain. “MR6=Politics & Management” captures mainly the category of mandate and politics barriers (which have the highest loadings on the factor), but includes also “*Lack of inter-agency collaboration on procurement issues*” and “*Staff resistance to organisational change*”, as well as the first three resource barriers

concerning expense and time constraints. Seen together, the variables seem to signify difficulties experienced mainly at the political, executive or managerial level. While there is an evident logic in the grouping of barriers related to political challenges, it is more interesting to note how time and cost barriers are hereby associated. It could be argued that organisations are reluctant to the choice of investing time and scarce resources in sustainable procurement, especially in terms of short term investments to reap future benefits, unless a clear political commitment is secured. Procurers who experiment higher political challenge tend therefore to see also cost and time investment as significant issues.

“MR1=Performance management” and “MR2=Demand” align perfectly with the existing categories of Performance measurements and Demand. “MR4=Resources” captures the resource barriers from “*SP takes too much time*” to “*Lacking in-house technical expertise*”, but loads very highly on “*Lacking staff to support/implement SP*” and “*Lacking in-house technical expertise*”. There is an indication here that the lack of investment in human resources for SP purposes takes the form of not only lack of technical expertise (a gap that can potentially be filled through training) but also of a scarcity of dedicated staff time. “MR3=Knowledge” has to do with information and knowledge issues and includes difficulties with applying SP techniques. The use of specific techniques such as whole-life costing seems to be more connected with general knowledge and awareness barriers.

Finally, one last cross-category factor is labelled “MR5=Tools”, and it loads the highest on the “*Lacking SP policy*” and “*Procurement manual does not cover SP*” barriers and seems to speak to the availability and applicability of different tools to support SP. “MR5=Tools” appears to be a composite factor, gathering a wide range of residual barriers that span over a range of SP barriers from macro to micro level: from lack of General Assembly endorsement down to lack of individual awareness of SP.

The factors in general fall into very comprehensible categories that seem to be measuring distinct underlying dimensions. The identification of the new factor categories has the purpose of expanding our understanding of linkages among barriers that may have not been fully appreciated at first sight, and may otherwise have diverted the focus of the analysis. The new factor categorisation that emerges here also provides us with a more accurate and evidence-based framework of analysis for some of the barriers that we have previously discussed. For example, it makes sense to consider SP policy together with the procurement manual and other guidance material as representing the practical tools available to procurement staff. In the same way, analysing together the political barrier and the perception of SP as a costly endeavour sheds light on the common foundation of these two barriers.

The next step in the analysis was to extract the factor scores for each respondent on the two measures of SP factors and the six barrier factors. The factor scores were estimated by the software’s recommended “ten Berge” method for oblique factor solutions [34]. Having extracted the scores, we used these as the basis for analysing the regression of the six barrier factors on each of the two SP measure factors. The results are displayed in Table 7.

	Enablers				Problems					
	Estimate	Std. Error	t value	Pr(> t)	Estimate	Std. Error	t value	Pr(> t)		
(Intercept)	0.000	0.047	0.000	1.000	0.000	0.045	0.000	1.000		
Politics	0.080	0.069	1.156	0.249	0.174	**	0.066	2.635	0.009	
Performance	-0.182	*	0.071	-2.545	0.011	-0.003	0.069	-0.043	0.966	
Demand	-0.183	**	0.066	-2.773	0.006	-0.084	0.064	-1.329	0.185	
Resources	-0.075	0.067	-1.113	0.267	0.025	0.065	0.386	0.700		
Information	0.028	0.064	0.438	0.661	0.039	0.062	0.638	0.524		
Tools	-0.381	***	0.057	-6.708	0.000	-0.092	.	0.055	-1.680	0.094
Residual Std. Error	0.776				0.746					
Multiple R ²	0.319				0.047					
Adjusted R ²	0.304				0.025					
F statistic	20.690				2.161					
P-value	0.000				0.047					

Table 7. Results of the regression analysis

On the Enablers factor, we find significant correlation with the Performance Measurement, Demand and Tools barrier factors. This implies that respondents that rate more highly each of the barriers associated with the Performance Measurement, Demand and Tools factors, are likely to deem their organizational environment as significantly less supportive or enabling of SP. This finding can be interpreted as suggesting a model enabling environment for sustainable procurement: few well defined higher level policy enablers (a mandate from the

General Assembly and SP policy support), paired with a clear demand for SP coming from both internal and external sources, and a general availability of tools and guidelines.

The Tools factor is the most significant correlation here. This is not surprising given that the issues of SP policy and manual figure on both factors. However, the Enablers factor also measures the degree to which respondents agree that they are doing SP and using sustainability criteria and techniques. The new Tools factor includes a range of instruments going from information and awareness, to policy and guidelines and even to General Assembly endorsement. This finding therefore shows the importance of having policy documents and guidance material in place at all levels of the chain of operations. The correlation with the Demand factor implies that working to boost the demand for SP from requisitioners, donors and beneficiaries may be a very effective way of advancing SP in the procuring organisations. Finally, the Performance Measurement factor likewise implies that putting into effect some concrete goals, targets and indicators of SP and measuring these against sustainability benchmarks should foster SP practices and leave practitioners feeling more enabled and supported in SP by their organisations. It is remarkable that some of the barriers scoring highest in the first phase of the analysis – namely the lack of training and of in-house technical expertise – are not figuring among the determining factors by the regression analysis. This outcome is only superficially contradictory, if we consider that technical capacity and its initiator (training) are usually not considered policy levers *per se*. While lack of technical expertise and training emerged as factual limitations, the regression analysis shows that it is impractical to boost expertise and training in a policy and guidance vacuum.

On the Problems factor, we see a significant relationship with the Politics factor. If respondents rate the Politics barriers more highly, they are likely to perceive SP as more expensive and straining relationships with suppliers. This suggests that much of the negative perception and attitude towards SP may stem from the unresolved political issues around the legitimacy of SP. Although the political barriers were rated the lowest in the first part of the analysis, the regression revealed a relationship between these barriers and the factor describing problems with SP, such as the perception that SP is more expensive and it strains relations with suppliers. A full UN-wide endorsement of SP given by the General Assembly could prove instrumental in dispelling and resolving these problems.

5 Conclusion

In this paper we reported the findings of a first-of-its-kind survey of sustainable procurement in the UN. Basing our approach on the study of Brammer and Walker (2011) [26], we have tried to address one of the research opportunities identified by the authors, namely that of carrying out an analysis of SP within an individual organisation, even an internally diversified one such as the UN. The purpose was to address three connected research questions: to gauge the perception of the most important barriers to overcome for implementing SP in the UN; to determine whether there were significant differences in this perceptions between policymakers and practitioners; and finally to explore the relationship between the perceived barriers and the SP practices that staff engage in. The research questions were addressed each in turn in the analysis of the survey data. We found that respondents deemed SP implementation to be under way in terms of the construction of the policy architecture to support SP, such as SP policies and manuals, but lacking in regards to the operationalization of SP into daily work flows through concrete and measurable performance targets and criteria. The most important barriers were identified to be pertaining to resources (especially training needs and lack of in-house expertise), performance measurement and supply and demand questions. We found very little significant difference in how policymakers and practitioners viewed SP issues, and there seems to be agreement especially in terms of the relative significance of the barriers. Finally, in order to explore the connection between the perceived levels of SP implementation and the reported barriers, we carried out an exploratory factor analysis of both data sets and used the factor scores for the generated constructs to do regression analysis. Thereby we discovered a significant negative correlation between the factor describing good SP practices with the demand, performance measurement and tools categories. In other words, respondents that do not feel they are applying SP good practices or do not feel supported by their organizational environment in doing so, will also tend to rate higher the barriers captured by the Demand, Performance Measurement and Tools factors.

If we combine the conclusions from the different parts of the analysis, some novel insights can be reached. While the lack of training and in-house expertise were rated as very high barriers, it is not immediately apparent whether the provision of more and better SP training or the development or hiring of in-house expertise in SP will lead to increased SP activity. Judging from the regression analysis, it seems that the levers of the demand, tools and performance measurement factors are the ones to pull to increase good SP practices. The respondents that reported lower barriers in these three cases would also tend to be in higher agreement with the assertion of following good SP practices. While the political barriers may seem insignificant at first glance, their connection to shaping or contributing towards negative perceptions on other aspects of SP is an important issue to consider. Dismantling the

political barriers may be the most effective way of addressing negative perceptions on SP, and they should therefore not be ignored.

We found substantial differences when comparing our results with those of precedent qualitative studies on SP in the UN. In previous studies [27], the picture of SP that emerged was one of a very politically tense environment that constrained the choices available to policymakers and even kept practitioners from pursuing aspects of SP. It seemed necessary to tackle higher-order barriers having to do with political, strategic and policy issues in order to progress. In the present study, however, these issues are downplayed significantly. Instead it is lower-order, practical issues such as performance measurement and capacity development that seem to be figuring highly. One possible explanation is that the rapid evolution of the political environment has brought about in a short timeframe wider acceptance for the concept of SP and that the significance of previously noteworthy barriers has been demoted. Another explanation of this is the composition of the sample. In comparison to previous studies that targeted a smaller group of respondents, selected on the basis of their familiarity with the SP concept, the present study examines responses from 50 policymakers and 222 practitioners from procurement communities at large. Practitioners are typically far removed from the strategic and political processes, which can explain why they rate these issues as less important. The sheer sample size of the present study suggests that the barriers identified here are significant for a large share of the UN procurement community.

The current state of SP as represented by the survey results seems overly positive. Most respondents agreed that they are currently doing SP and that it is covered by their policies and manuals. However, seeing as the authors are active in the procurement communities in the UN, we know that actual cases of sustainable procurement are far from the norm. There is probably an element of social desirability bias [37][38] making respondents report too positive values on the SP implementation items. It is also very likely that many respondents lacked information on whether their organizations use whole-life-costing or are verifying suppliers, and therefore answered the neutral option when the 'correct' answer would have been disagreement.

This research and analysis contributes to both the academic and the practitioners' field, inasmuch as it constitutes a first well-documented attempt to systematise the main constraints that international public organisations face in the actual implementation of SP principles. Considering the scarcity of previous enquires of perceived barriers to SP in the public sector - with the exception of Preuss & Walker (2011) [25] - it is hard to make comparisons. Nevertheless, we can attempt some generalisations: our findings are aligned with Brammer & Walker (2011) [26] in that the enabling policy environment mediated by contextual factors seems to be a key feature for public organisations successfully investing in SP. A specific contribution of our research is that it is paramount to recognise latent linkages among variables that are at the root of the investigated problems, or else the risk is to confuse some manifestations of the issue with the issue itself. From a managerial perspective, the conclusion to be inferred is that the most effective leverages for SP operationalization are stimulating internal and external demand, but also providing practitioners with the necessary tools - from the more practical to the higher policy level; setting targets and monitoring results.

The limitations of the current study especially lie in the fact that it is a survey of opinions on SP, and we are using opinions as proxies for making claims about the reality of SP in the UN. Further studies should attempt to reconcile how these perceptions about the state of SP implementation and the relative significance of the barriers correspond to real-world cases and examples of SP in the organizations. Secondly, this study focuses on the views of UN practitioners only. As some of our findings point out, SP implementation seems to be a collective affair. Other upstream and downstream members of the supply chain – donors, beneficiaries and suppliers to mention few - may have peculiar views and attitudes on what constitutes a barrier to SP. Future work that incorporates the views of these stakeholders will add considerably to our understanding of success and failure in the implementation of SP in large international organisations.

Acknowledgements

The authors wish to thank Helen Walker and Stephen Brammer for conceptual guidance and assistance especially with the exploratory factor analysis. We also extend our thanks to Manuel Blechschmidt, Johanna Hepp, and Lasse Folke Henriksen for their help with statistics and the R software environment. Thanks finally to Yu Huang for her useful and constructive comments on previous versions of the article.

6 References

- [1] C. McCrudden. (2004): Using public procurement to achieve social outcomes. *Natural Resources Forum*, Vol. 28, pp. 257-267.
- [2] J. Elkington. (1997): *Cannibals With Forks: The Triple Bottom Line of 21st-Century Business*. Oxford: Capstone.

- [3] R. Lamming & J. Hampson. (1996): The environment as a supply chain management issue. *British Journal of Management*, Vol. 7, pp. S45-S62.
- [4] DEFRA. (2006): *Procuring the Future: The Sustainable Procurement Task Force National Action Plan*. London: Department for Environment, Food and Rural Affairs, United Kingdom.
- [5] H. Walker, J. Miemczyk, T. Johnsen & R. Spencer. (2012): Sustainable procurement: past, present and future. *Journal of Purchasing and Supply Management*, Vol. 18, No. 4, pp. 201-206.
- [6] M. Pagell & Z. Wu. (2009): Building a more complete theory of sustainable supply chain management using case studies of 10 exemplars. *Journal of Supply Chain Management*, Vol. 45, No. 2, pp. 37-56.
- [7] L. Preuss. (2009): Addressing sustainable development through public procurement: the case of local government. *Supply Chain Management: An International Journal*, Vol. 14, No. 3, pp. 213-223.
- [8] UNEP. (2011): *Buying for a Better World: A Guide on Sustainable Procurement for the UN System*. Nairobi: United Nations Environment Programme (UNEP), United Nations Office for Project Services (UNOPS), International Labour Organisation (ILO), ILO's International Training Center (ITC ILO).
- [9] UNOPS. (2013): *2012 Annual Statistical Report on United Nations Procurement*. Copenhagen: United Nations Office for Project Services (UNOPS).
- [10] P. Lund-Thomsen & N. Costa. (2011): Sustainable Procurement in the United Nations. *The Journal of Corporate Citizenship*, Vol. 42, pp. 55-72.
- [11] UNGA. (2009, October 28): Budget committee takes up United Nations Procurement, with top official describing spike in volume during surge in peacekeeping. Retrieved August 6, 2013, from United Nations General Assembly: <http://www.un.org/News/Press/docs/2009/gaab3924.doc.htm>.
- [12] C.R. Carter & M.M. Jennings. (2002): Social responsibility and supply chain relationships. *Transportation Research Part E: Logistics and Transportation Review*, Vol. 38, No. 1, pp. 37-52.
- [13] M. Pagell, Z. Wu & M. E. Wasserman. (2010): Thinking differently about purchasing portfolios: an assessment of sustainable sourcing. *Journal of Supply Chain Management*, Vol. 46, No. 1, pp. 57-73.
- [14] C.R. Carter & D.S. Rogers. (2008): A framework of sustainable supply chain management: Moving toward new theory. *International Journal of Physical Distribution and Logistics Management*, Vol. 38, No. 5, pp. 360-387.
- [15] C.R. Carter & P.L. Easton. (2011): Sustainable supply chain management: Evolution and future directions. *International Journal of Physical Distribution and Logistics Management*, Vol. 41, No. 1, pp. 46-62.
- [16] M. Pagell & Z. Wu. (2011): Balancing priorities: Decision-making in sustainable supply chain management. *Journal of Operations Management*, Vol. 29, pp. 577-590.
- [17] S.U. Hoejmoose & A.J. Adrien-Kirby. (2012): Socially and environmentally responsible procurement: A literature review and future research agenda of a managerial issue in the 21st century. *Journal of Purchasing and Supply Management*, Vol. 18, No. 4, pp. 232-242.
- [18] F. Boons, H. Baumann & J. Hall. (2012): Conceptualizing sustainable development and global supply chains. *Ecological Economics*, Vol. 83, pp. 134-143.
- [19] H. Haake & S. Seuring. (2009): Sustainable procurement of minor items - exploring limits to sustainability. *Sustainable Development*, Vol. 17, pp. 284-294.
- [20] L.K. Nijaki & G. Worrel. (2012): Procurement for sustainable local economic development. *International Journal of Public Sector Management*, Vol. 25, No. 2, pp. 133-153.
- [21] J. Hall & S. Matos. (2010): Incorporating impoverished communities in sustainable supply chains. *International Journal of Physical Distribution and Logistics Management*, Vol. 40, No. 1, pp. 124-147.
- [22] C. Muller, W.J. Vermeulen & P. Glasbergen. (2012): Pushing or sharing as value-driven strategies for societal change in global supply chains: Two case studies in the British-South African fresh fruit supply chain. *Business Strategy and the Environment*, Vol. 21, pp. 127-140.
- [23] H. Walker & C. Harland. (2008): E-procurement in the United Nations. *International Journal of Operations and Production Management*, Vol. 28, No. 9, pp. 831-857.

- [24]L.C. Giunipero, R.E. Hooker & D. Denslow. (2012): Purchasing and supply management sustainability: Drivers and barriers. *Journal of Purchasing and Supply Management*, Vol. 18, No. 4, pp. 258-269.
- [25]L. Preuss & H. Walker. (2011): Psychological barriers in the road to sustainable development: Evidence from public sector procurement. *Public Administration*, Vol. 89, No. 2, pp. 493-521.
- [26]S. Brammer & H. Walker. (2011): Sustainable procurement in the public sector: an international comparative study. *International Journal of Operations & Production Management*, Vol. 31, No. 4, pp. 452-476.
- [27]J. Hasselbalch, N. Costa & A. Blecken. (2014): Investigating the barriers to sustainable procurement in the United Nations. *Springer Lecture Notes in Logistics (LNL) series*. Forthcoming.
- [28]P. Alreck & R. Settle. (1985): *Survey Research Handbook*. Homewood, IL: Irwin.
- [29]R. Likert. (1932): A technique for the measurement of attitudes. *Archives of Psychology*, Vol. 140, pp. 1-55.
- [30]H.B. Mann & D. R. Whitney. (1947): On a test of whether one or two random variables is stochastically larger than the other. *Annals of Mathematical Statistics*, Vol. 18, No. 1, pp. 50-60.
- [31]L.R. Fabrigar, D. T. Wegener, R. C. MacCallum & E. J. Strahan. (1999): Evaluating the use of exploratory factor analysis in psychological research. *Psychological Methods*, Vol. 4, No. 3, pp. 272-299.
- [32]B. Muthen & D. Kaplan. (1985): A comparison of some methodologies for the factor analysis of non-normal Likert variables. *British Journal of Mathematical and Statistical Psychology*, Vol. 38, No. 2, pp. 171-189.
- [33]D.A. Jackson. (1993): Stopping rules in principal components analysis: a comparison of heuristical and statistical approaches. *Ecology*, Vol. 74, No. 8, pp. 2204-2214.
- [34]W. Revelle. (2013): An overview of the psych package. Retrieved August 15, 2013, from The Comprehensive R Archive Network: <http://cran.r-project.org/web/packages/psych/vignettes/overview.pdf>.
- [35]T.E. Raghunathan. (2004): What do we do with missing data? Some options for analysis of incomplete data. *Annual Review of Public Health*, Vol. 25, pp. 99-117.
- [36]B.G. Tabachnick & L.S. Fidell. (2007): *Using Multivariate Statistics*. Boston, MA: Pearson Education Limited.
- [37]S.J. Levy. (1981): Interpreting consumer mythology: A structural approach to consumer behaviour. *Journal of Marketing*, Vol. 45, No. 3, pp. 49-61.
- [38]W.J. Zerbe & D. L. Palhaus. (1987): Socially desirable responding in organizational behavior: A reconception. *Academy of Management Review*, Vol. 12, No. 2, pp. 250-264.

SUSTAINABLE PUBLIC PROCUREMENT IN BRAZIL: RESULTS, CHALLENGES AND PERSPECTIVES

Daniel Pezzutti Ribeiro Teixeira

Ph.D in International Law by the University of Sao Paulo/Brazil

Attorney in Brazil and Portugal

Rua Indiana 310 1st. floor

Sao Paulo, SP, Brazil

E-mail: daniel.teixeira@adv.oabsp.org.br

1. - INTRODUCTION.

With the most important nations uniting in order to implement policies in favor of sustainability, the role of the Public Authorities begins to embrace this new dimension – whether by intervention or by direct action: as well as being a normative and regulating agent of the economic order, the State is also a consumer of goods, services and works. While assuming parameters of sustainability as a criterion for its procurements, the State not only redefines standards of consumption, but also directly impacts the reorganization of the market, as it forms or enhances a market niche, influencing public opinion and business decisions, in order to reflect on the general demand standards.

Thus, public procurement may work as an important and efficient tool to promote sustainable development in the public sphere, with direct repercussion on private enterprise.

Sustainable public procurement is fundamented on sustainable consumption, which consists of the use of goods and services that attend basic needs, introducing improved quality of life, and concomitantly minimizing the use of natural resources and toxic materials (as well as waste and polluting emissions during their life cycle) so as not to put at risk the needs of future generations. Thus, sustainable consumption is directed at the aspect of demand, seeking ways to offer the goods and services necessary to satisfy basic needs, to improve life quality and to reduce the pressure on the earth's supply.

Besides the environmental perspective, it is important to note that the concept of sustainability is applied to consumption in all its dimensions, including social and economic. Thus, sustainable consumption does not mean only consuming less, but, also, consuming differently, more efficiently, oriented towards improved quality of life. Beyond this, it also means a more equal division of resources and benefits.

A sustainable tender is an instrument to integrate environmental and social considerations to the phases of the procurement process and for contracting public agents, with the objective of reducing impacts to human health, environment and human rights. In practical terms, it involves applying criteria from the concept of sustainability to the bidding process. Thus, it should consider not only traditional economic parameters (price, terms and quality), but, also, base its decisions on criteria such as assessment of product life cycles, associated risks, measures of success and implications for the environment and society. It may also include aspects such as the use of water and energy, residue generation and greenhouse gas emmissions, ethnic and gender diversity, safety at work and in the transport of materials, human rights, local procurement and small companies. In summary, the description of the sustainability concept, recognized in this article, is based on three pillars – environmental, social and economic – and should be expanded into socially inclusive, environmentally sustainable and economically sustainable over time.

The present article is the summary of a report, entitled “Sustainable Public Procurement”, obtained from extensive research developed by the Center for Applied Legal Research of the Law School of São Paulo of the

Getúlio Vargas Foundation with the objective of analyzing the current stage of the policies of use of the State's procurement power to promote sustainability in Brazil [1].

There have been several initiatives by the Public Authorities to elaborate sustainable public procurement policies. When these experiences are analyzed concretely, the complexity that involves sustainable public procurement can be seen: issuance of laws and rulings shocks with administrative management, involvement of significant institutional players and impact analysis of the policy, among other aspects. One of the central goals of the research carried out in this article was to map the dynamics of sustainable public procurement by studying emblematic cases, analyzing the participants, studying the legislation and its practice, as can be seen in the following chapters. Another goal of this research was to assess legal solutions for the ongoing debate regarding how to make sustainable public procurement more effective, which will be shown at the end of this work.

2.- RECENT LEGISLATIVE ALTERATIONS THAT OFFER THE POSSIBILITY OF USING SUSTAINABILITY CRITERIA IN PUBLIC TENDERS IN BRAZIL

In Brazil, the Federal Constitution of 1988 includes, among the principles that rule economic activity, the pursuit of the defense of the environment and free-competition (article 170). Furthermore, article 225, clause IV, of the Federal Constitution itself reflects the notion of sustainability when it requires prior environmental impact studies for the installation of works or the development of activities that may have a potential environmental impact.

The analysis of recently published regulations demonstrates the use of the state's procurement power to satisfy related public objectives, generally linked to the implementation of wider public policies that transcend the search for the most advantageous proposal. Traditionally, the normative precepts regarding public tenders in Brazil have been established upon the ruling of the most advantageous proposal, so that requirements, procedures and judgment criteria are articulated to make it feasible for the Public Administration to contract in a manner that is considered most efficient.

In the environment of Public Law Practice, the movement to expand the conditions for exemption from the Procurement Law (Law 8.666/1993), in order to foster certain activities or institutions has not received systematic criticism nor more forceful resistance. The opposite has occurred, however, with the controversial Complementary Law 123/2006, which instituted the National Statute for Micro and Small-sized Companies.

As a government line of action, state procurement power would be considered a relevant instrument to foster determined categories that are considered worthy of public policies. Thus, the tender would become an important mechanism to stimulate manufactured products and national services, conceived as "sustainable national development" by Law 12.349/2010 that altered Law 8.666/1993, to include a code of conduct and to benefit the preference margin for these products.

Besides the alteration in the substance of Law 8.666/1993, to benefit national manufactured products and services, the legislator altered article 3 of this Law, to insert, together with the rules of proposal selection for the most advantageous to the administration, "the promotion of sustainable national development".

In this way, the legislator intended not only to legitimize the instrument of preference margin – and nothing better than the use of a code of conduct for this end –, but, especially, to modify the belief that then conducted the practice of tenders in Brazil: to seek the proposal that is most advantageous for the Public Authorities. Thereafter, the administrator would not only consider the proposal that was most advantageous to the Public Authorities, attending the principles of isonomy, but would also have to consider sustainable national development. This important modification in the code of conduct in a tender – which could even be considered emblematic – determines that, in the end, the Administration should guide its public contracts by the most advantageous proposal and, equally, seek to promote sustainable national development. This, perhaps, is an attempt to bestow on the principle of isonomy a less formal and substantive vision.

The fact is that with this innovative legislation, the Procurement Law began to use of the preference margin instrument, corresponding to up to 25% on the price of foreign manufactured products and services. However, in the case of national manufactured products and services, resulting from technological innovation and development achieved in the Country, the Public Authorities have the possibility of establishing an additional preference margin.

3.- REGULATIONS REGARDING SUSTAINABLE PUBLIC PROCUREMENT IN BRAZIL

Considering some normative precedents which took into account public procurement sustainability directed at certain items of consumption or even for specific organs or administrative areas, the Secretariat of Logistics and Information Technology (SLTI), a part of the Planning, Budget and Administration Ministry, assumed the responsibility of imposing order on government procurements and signed the Regulatory Instruction (IN) 01, in 2010, with the ultimate end of creating awareness in federal public areas and organs regarding the idea of sustainability in public tenders.

More than a legal matter, the purpose of the IN-SLTI 01/2010 was to send a sign to the Federal Public Administration regarding how public procurement would be handled thereafter, while the regulating Decree was still in discussion. The IN-SLTI 01/2010 would be, therefore, a preview of Decree 7.746/2012, which would only be issued in 2012.

Only from the issuance of IN-SLTI 01/2010, can it be affirmed that a sustainable public procurement policy was construed in the Brazilian federal sphere. Although not an isolated initiative, the IN-SLTI 01/2010 disciplines the insertion of sustainable criteria in the practices of tenders by federal Administration organs.

IN-SLTI 01/2010 discourses on the criteria of environmental sustainability in federal sustainable public procurement as well as sustainable tenders for goods and services. This is a regulatory act linked to the Federal Administration. But, as it is a discretionary command, in other words, non-mandatory, the federal policy is the result of the logic of incentives: the adoption of sustainable criteria in tenders would be stimulated, especially through environmental and social awareness, but sanctions would not be in place for the simple fact of the public administrator opting for a non-sustainable tender.

The big contribution resulting from Decree 7.746/2012 would be institutionalizing the policy of the use of the state's procurement power to satisfy sustainable ends, relying, for this, on a specialized government branch – the Interministerial Commission for Sustainability in Public Administration (CISAP). Furthermore, legal disciplining, through a Decree, aimed at extending the policy to all the federal administration, since until then it was restricted to just a few branches that adhered to the IN-SLTI 01/2010. Another factor of the issuing of Decree 7.746/2012 is related to the pursuit of the desired legal certainty to stimulate the adoption of sustainable criteria by the Federal administration in its public contracting processes. It was necessary that the government give a clear sign regarding the insertion of sustainability criteria in its tenders, notably in public procurement processes, so that the policy could be developed.

The suggestion that sustainable public procurement is a discretionary option can be seen in the normative text of Decree 7.746/2012: article 2 indicates that the Federal Administration “can”, not “must”, acquire goods and contract services and works considering sustainable criteria and practices. Following this line, the government branches subject to the Decree can require, in the notice, that the products bid be made of recycled, non-toxic or biodegradable material, as well as obeying other sustainability parameters. Furthermore, the Decree establishes the possibility of foreseeing, in the instrument that calls for the bid to contract services, the adoption of sustainability practices in the execution of the contracted services as well as in sustainable public procurement, of sustainable criteria for the supply of goods.

However, one of the main innovations brought about by Decree 7.756/2012 was the creation of the CISAP, which is characterized as an interministerial organ of consultative nature and permanent existence, linked to the SLTI. However, the greatest transforming potential of the CISAP is effectively the promotion of the sustainability culture in the Federal Administration. CISAP's proposal is to prepare the administrator to deal with sustainability, including with regards to the instrumentation for sustainable public procurement, whether through publicising good sustainability practices or through actions to stimulate awareness and qualification of civil servants. Thus the CISAP will have an active role, together with the government branches subject to Decree 7.746/2012, in the elaboration of sustainable logistic administration plans and monitoring the achievement of targets.

4.- STUDIES OF TENDER NOTICES FOR SUSTAINABLE PUBLIC PROCUREMENT

The study which this article refers to was developed from a list supplied by the federal government of 20,846 occurrences that refer to sustainable tenders carried out in 2012. From this data, a sample analysis was developed in order to describe the sustainable public procurement process during the period of one year (from January 1st. to December 31st. 2012).

In the first part of this chapter, the aspects of the qualitative analysis of sustainable public procurement will be seen. While in the second part, the results of the quantitative analysis that these notices produced in the practice of sustainable public procurement will be shown.

4.a.- Qualitative analysis of the notices for sustainable public procurement.

The experience of the federal government with sustainable public procurement can be analyzed from different analytical perspectives. Among these, the most appropriate for this study was believed to be the analysis of the sustainable clauses that characterize a tender as a sustainable public procurement. This is fundamentally due to the assumptions that the outlines of sustainable public procurement are conducted by the administrator that defines the parameters of the sustainable tenders in the elaboration of notices, case by case ("Procurement drafting").

Without presenting an exhaustive research of the sustainable tender notices, examples were found of sustainable clauses in federal sustainable public procurements. These examples were systematized according to the type of sustainability clause found in the tender, which allowed not only a better understanding of the dynamics of sustainable public procurement in the federal sphere, but also of the assessment of the advancement of the practice.

4.a.1.- Contracted object

In a sustainable public procurement notice, the sustainability clause is found in the contracted object. In other words, the tender can be classified as being sustainable if the specification of the object is directed at sustainability, indicating that the Public Authorities will buy sustainable products.

This is the most representative means of insertion of sustainable criteria in federal tenders. In fact, most of the sustainable public procurement notices are so considered since they direct the use of the state's procurement power for the acquisition of sustainable goods.

The most recurrent is the use of the rules established by the Brazilian Association of Technical Rules (ABNT) to classify a product as sustainable or of low environmental impact, as assessed by a technical institution and usually measured by the National Institute of Metrology, Quality and Technology (INMETRO). Few examples of the use of private certification, as seen in the "Forestry Stewardship Council" (FSC), were found. It is interesting to note that the controllers' understanding of sustainable public procurement objects was considered in the draft of the clauses of tender notices, demonstrating that the controllers exert a role in the sustainable public procurement policy that exceeds traditional control mechanisms.

4.a.2.- Bidder certification

The Brazilian tender legislation requires that the bidder present several documents to prove that it is fully qualified to honor the commitment that will be assumed when the administrative contract is celebrated. The Procurement Law (Law 8.666/1993) requires the presence of documents that prove the bidder's legal certification (legal classification) and technical competence regarding the object bid (technical qualification), certification from the Internal Revenue and regarding labor obligations (tax and labor regularity) and a certificate confirming that it does not employ workers under 18 years old to work at night or to perform work that is dangerous or unhealthy, as well as prohibiting workers under 16 years old from any type of work, except apprenticeships (article 27).

In the competitive processes, the bidder must be certified in order to have the proposal evaluated. In practical terms, this means that the first envelopes to be opened will be the ones regarding certification, and this documentation will be analyzed individually. Once the certification requirements are satisfied, the bidder will be considered certified and the proposal envelope will be opened. If not, it will be considered uncertified and the corresponding envelope will be returned still sealed. To make this process more agile – and it can be extremely slow depending on the amount of documents to be analyzed and the appreciation of eventual appeals –, the Auction Law (Law 10.520/2002) foresees the inverted order of the phases: first the proposals are judged, and then the certification documentation is examined. Besides the celerity of this procedural process, the dispute of offers between all the parties interested in the tender, and not only those that are certified, enhances competitiveness and, therefore, the possibility of the Public Authorities obtaining economically more efficient (cheaper) proposals.

The sustainable clauses of the bidder's certification, in Brazil, are the result of the Law. The people who must be registered in the Federal Technical Register of Potentially Polluting Activities Or Users of Environmental Resources are foreseen in article 2 of the Normative Instruction 31/2013 of the Brazilian Institute of the Environment and of Renewable Natural Resources (IBAMA), as seen: individuals or legal entities that practice potentially polluting activities and/or the extraction, production, transport, commercialization of products that are potentially harmful to the environment, as well as products and subproducts of fauna and flora, and other activities controlled by IBAMA and state and municipal environmental agencies.

Sustainability is, therefore, defined by the legislator himself, making the administrator responsible for attending the legal obligations and requiring the presentation of the documents specified for the tender. If the administrator inserts some sustainable criteria in the tender notice for bidder certification in the tender, when there is no corresponding legal obligation, this will be defined as "undue restriction". The Article 37, clause XXI, of the Federal Constitution establishes that only technical and economic requirements indispensable to guarantee the fulfillment of obligations under the terms of the Law can be admitted.

In fact, the Regulation of Sustainable Public Procurement (Decree 7.746/2012) is categorical when it affirms that sustainable practices and criteria in tenders are limited to "technical specifications of the object or as an obligation of the contracted party" (article 3).

4.a.3.- Judgment of the proposals

Taking into consideration the predominance of the "auction" mode in sustainable public procurement, the "lowest price" type is the judgment criteria seen in almost all the analyzed notices. In practical terms, in the "lowest price" tender, the most advantageous proposal corresponds to the one that determines the lowest public expense ("the cheapest" proposal).

In the case of sustainable public procurement, however, the proposal judgment phase is powered by the preference margin. In practically all the notices analyzed, clauses that favored micro and small companies, under the terms of Complementary Law 123/2006, were found. However, other preference margins were foreseen in the notices, such as margins for recycling cooperative associations.

It is important to report that the preference margin can only be foreseen through regulations issued under the terms of the law's generic permission: exceeding the sphere of the public administrator's competencies to foresee differentiated judgment criteria, even when sustainable, if they do not find legal backing.

The judgment clauses of sustainable public procurement proposals strictly comply with legal and regimental regulations regarding tenders (fundamentally, the Procurement Law and the Auction Law) and tender benefits, notably the Micro and Small Companies Law.

4.a.4. Duties of the contracted party

In sustainable procurements which have as their object the contracting of services, contractual obligations are at times established and the contracted party must fulfill these during the execution of the contract.

The requirement for sustainability as the most recurrent obligation in the notices that were analyzed, corresponds to conditioning the use of sustainable natural goods to render the services being bid.

4.b.- Quantitative analysis of sustainable public procurement notices.

4.b.1. Predominance of the "auction" mode in sustainable public procurement

Tenders for sustainable goods have always followed the procedures of the "auction" mode. It was seen that approximately 3% of the cases were exempt from tenders, in other words, there was direct contracting. Of this percentage, all the contracts (100%) were celebrated with micro or small companies. This result suggests a relationship between the dynamics of this kind of contract and the cases of tender exemption (listed in article 24 of Law 8.666/1993).

4.b.2- Dispersion of the values of sustainable public procurement

Sustainable public procurement has not followed standard values; much to the contrary, the values practiced in sustainable tenders differ markedly. The variety of objects bid is so great that, automatically, values oscillate significantly, to the order of 995%, according to statistical studies.

In other words, it was found that, among the objects established in the sustainable category, there is a significant difference in value (variation coefficient of 671%), as well as a manifest disparity between the total amounts of sustainable public procurements (variation coefficient of 995%).

Sustainable items in tenders range from low to high value goods, from the purchase of envelopes, where unit value is R\$0,10 (US\$0.04) to a minivan type transport vehicle with a unit value of R\$65.170,00 (US\$27,154.00). In the same way, a purchase totaling R\$2,05 (US\$0.85) [referring to 1 stamp pad], as well as a purchase totaling R\$8.339.580,00 (US\$3.4 million) [referring to 2,598 computer units].

4.b.3. The relation between increases in values incurred with sustainable public procurement by the Federal Public Administration and growth in quantity of sustainable procurements

As per the document issued by the federal government “Managerial Information of Sustainable Public Contracts” [2], in 2012, 1,952 sustainable tenders were held, which correspond to a total of approximately R\$39,5 million (US\$16.5 million). The amount incurred with sustainable tenders was approximately R\$12 million (US\$5 million) in 2010; while in 2011, it was around R\$14 million (US\$5.8 million). In other words, analyzing this evolution over the years, it is possible to see that growth, although modest, has occurred in the amounts spent in sustainable public procurements. Despite the higher values practiced in sustainable public procurements as a direct result of the increase in the quantity of sustainable tenders to the order of approximately 20%, in comparison to the previous year, this is still a little expressive universe when compared to the government’s absolute numbers: R\$72,6 billion (US\$30.25 billion) spent on the 231,800 public contracts preceded by tenders. In other words, sustainable public procurement still represents a very small portion of the tender practice in the federal government, approximately 0.1% of the total amount incurred and 0.6% of the total number of tenders.

4.b.4. The practice of sustainable tenders is concentrated on a small number of goods

From the analysis obtained regarding the objects found in sustainable tenders, conducted in 2012, it is possible to see that the 763 items listed in the Materials Catalogue System (CATMAT) [3] are represented. The goods are inserted on CATMAT as sustainable, through the sustainability criteria classification, by technicians during the process of cataloguing new items added from 2012, in other words, items inserted on the CATMAT in years prior to this, still do not have the classification “yes” or “no” for sustainability, due to the high number of items included (around 200,000) in the catalogue that does not allow a retroactive analysis. This technical classification, in terms of sustainability, takes into consideration the more objective aspects contained in the regulations, such as: objects that contain recycled materials, biodegradable objects, and non-toxic materials.

However, although the objects that were bid in 2012 represent the universe of goods on the CATMAT, a few items are predominant in the practice of sustainable tenders. In other words, the practice of sustainable tenders is concentrated on a small number of goods. This means that the sustainable public procurement scenario is not made up of multiple objects, but of recurrent goods found in the notices, notably detergent, recycled paper, soaps, cartridges for printers and air conditioning units.

4.b.5. The State’s procurement power is directed at few markets

From the value allocated towards sustainable public procurements, 81% was directed at the computer, paper and air conditioning markets. There is an almost direct relationship between the highest quantity of goods bid and their respective categories. Detergent, for example, is found most often bid, being included in 20.34% of the tenders, and, in the same way, the cleaning materials category – to which detergent belongs – is also the champion among the categories most bid, object of 46% of the tenders.

Data suggests, therefore, that the allocation of state public procurement power in Brazil is concentrated in only a few markets. Considering the relationship between values and objects bids, it can be seen that the policy of sustainable public procurement is directed to attend certain markets whose goods are the object of sustainable public procurement, as is the case of the paper and PC markets.

It is important to read this information with care. Firstly, it is important to emphasize that the values involved in sustainable public procurement are insignificant when compared to the total public procurement power

of the state, and, for this reason, a tender with only one item of a higher value, such as, for example, automobiles, can distort the results of the analysis. Secondly, the fact that a portion of the state's public procurement is directed at certain markets is not necessarily a positive or negative factor. It is simply an explanation of a real factor, of which the implementer of public policy should be aware of, regarding the policy's final destiny so that they can check the success of this policy.

4.b.6. The higher presence of determined goods – or markets – in sustainable tenders does not mean to say that these also represent the highest percentage in value

When the values included for each market against the frequency with which this market appears in the dynamics of sustainable tenders is reviewed, it is possible to verify that there is no relationship between these. This is because the markets that appear with the lowest percentage in number of tenders are able to obtain a large part of the value directed towards sustainable public procurements.

Thus, for example, the computer market appears in eighth place in number of tenders (only 0.3%), is second place among the markets that receive most income in terms of value, with 25.85% of the total amount involved. An example that depicts the opposite of this relationship is the case of the cleaning materials market which, despite figuring as the largest market in percentage of tenders, obtains only 8.9% of the value spent in sustainable public procurements.

Thus, we conclude that markets that include specific goods such as “paper”, “computers” and “air conditioning equipment” correspond to a large portion of the state's procurement power, approximately 73% of the entire market; evidence that the policy is concentrated only in some sectors of the economy. The big categories (warehouse, cleaning material and equipment in general) when added to the amounts attributed to them, correspond to almost half the value directed to the paper market.

4.b.7. Branches of the Federal Public Administration that most spend their budget on sustainable goods procurement

According to the “Managerial Information of Sustainable Public Contracts Report”, of 2012, there are some federal administration branches that, in terms of values, most use sustainable public procurement: the Ministry of Justice is in first place with 12.2%, and the Ministry of Education, in second place, with 11.4%.

It can be seen that there is a great concentration of values in these two branches, since the sum of the values spent with sustainable public procurement by the Ministry of Justice and the Ministry of Education totals R\$23,6 million (US\$9.8 million), an amount that surpasses considerably the amounts spent by all the other branches together. However, these results may not suggest exactly how much the sustainable public procurement policy is developed within each branch. A possible theory for this reality is that, for example, the Ministry of Education spends a lot – when compared to other organs – on sustainable public procurement because there is a higher demand for paper to apply tests for middle school students throughout the national territory and when it carries out the procurement for the supply of this necessity, it does so within the mold of a sustainable public procurement. The same kind of reasoning may serve to justify the elevated spending in the Ministry of Justice, in other words, the high demand for paper, and also the purchase of cars classified as sustainable, such as those that use “flex” fuel and so on.

4.b.8. Concentration of spending on sustainable public procurement in determined Brazilian geographic regions

The study has shown that there is a greater concentration of amounts spent by the Federal Public Administration in the Northeastern, Southeastern and especially Southern regions of Brazil, which are the three most economically developed regions. In terms of percentage, these three regions include 80% of the value spent on sustainable tenders, while the Northern and Midwestern regions correspond to only 20%.

This data suggests that there may be a trend, in the Federal Public Administration environment, indicating that the more developed the sustainable public procurement policy is in a determined region or State, the higher the probability that the federal branches physically found in this area of the federation will apply the policy.

4.b.9. The benefit of a solution favorable to micro and small companies was found in the practice of sustainable tenders

The Procurement Law (Law 8.666/1993), in its article 3, paragraph 2, foresees as a selection criterion between proposals, in cases where there are equal conditions, the preference for goods and services that are successively “II – produced in the country, III – produced or rendered by Brazilian companies; IV – produced or rendered by companies that invest in technological research and development in the Country”. And if these criteria are not sufficient to reach a decision between the proposals, the same law foresees, in its article 45, paragraph 2, that the classification be mandatorily and exclusively made by a public draw.

However, with the advent of Complementary Law 123/2006, the tie settling criteria present in Law 8.666/1993 are no longer the only ones to be applied in tenders. Complementary Law 123/2006, in its article 44, establishes that, for settling ties in tenders, preference will be given to contracts with micro and small sized companies. And a tie will be considered between proposals, not when there is an actual numeric equality between them, but when there is an illusionary equality, created by the legislator, in other words that the micro and small sized companiew proposals are considered tied when values that are equal or superior to up to 10% of the one best classified.

Thus, considering this criterion for settlement that favors micro and small sized companies as something that is inserted in the public support policy for these companies, it was worth checking how this policy relates to the sustainable public procurement policy. Thus, the use of this criterion was the variable analyzed in the database and it was seen that in 5% of the sustainable tenders the decision criterion that benefited the micro and small sized companies was used.

4.b.10. Micro and small companies receive a significant portion of the resources destined towards sustainable public procurements, but the limited liability companies that are not classified as micro or small companies are most often winners in sustainable tenders

From the data analyzed in this research, it was possible to see that there exists a high presence of micro and small companies, both, as far as participation in the quality of proponents in sustainable tenders – since of the 20,845 sustainable public procurement proposals, 19,262 were held by micro or small companies –, and as winners, since from the 1,952 procurements carried out, in 1,793 of the cases a micro or small company won the tender. In other words, 92.50% of the sustainable tenders had the participation of micro or small companies, while 91.80% of the sustainable public procurement notices published had one of these companies as its winner.

In reality, the results points to the fact that the companies that most gain with sustainable public procurement, and for this reason possess high presence in the allocation of public procurement power, are of the limited liability type, not classified as micro or small companies. This discovery originated from the fact that out of the 1,952 sustainable tenders held, only 144 were winners (7.4%), but the values of these tenders correspond to 42% of the total amount spent on sustainable public procurements.

Thus, when this information is analyzed jointly, the conclusion reached is that micro and small sized companies participate actively in Federal sustainable public procurements, but don't win in terms of value, in other words, fostering micro and small sized companies in the environment of sustainable public procurement can be misrepresented.

Therefore, these figures suggest possible problems with this public policy that invite deeper reflection regarding the initiative of promoting public policy in tenders. In this line, two fronts are open for analysis and reflection: (i) the feasibility of promoting public policy outside the tender, so that companies can be more capacitated to dispute more sophisticated objects or values and (ii) the combination of strategies for implementing public policy in and out of tenders.

5.- SOME PROPOSALS FOR THE REGULATIONS OF SUSTAINABLE PUBLIC PROCUREMENT IN BRAZIL

In our opinion, the ideal logic to determine the content of regulations that aim at the implementation of the sustainable public procurement policy in the governmental environment is the incentives' logic, which works as a kind of stimulus for public administrators themselves. For this implementation, it is advisable to use “soft law”. These incentives could appear in different ways, but always viewing recognition and valuing those administrators who take some initiative to promote sustainability, especially when related to public procurement.

For the hypothesis of notorious benefits to sustainability, there should be an impeditive command. The case of prohibiting products that destroy the ozone layer (in the terms of Decree 2.783/1998) or the requirement of the "PROCEL SEAL"¹ (energy saving seal) for products that use electric energy should be noted. The PROCEL SEAL is a product developed and conceded by the National Program for Conservation of Electric Energy (PROCEL), coordinated by the Ministry of Mines and Energy, with its Executive Secretariat maintained by Eletrobras. The PROCEL SEAL aims at orienting the consumer during purchasing, indicating the products that present the best levels of energetic efficiency in each category, in this way, offering savings on the electric energy bill. It also stimulates the manufacture and commercialization of more efficient products, contributing towards the technological development and environmental preservation.

These matters have already been consolidated and their effects recognized in and out of the federal government. For these types of cases, we suggest the adoption of rules that forbid or impose the acquisition of goods according to the features defined by law or undergoing regulation.

It is known, based on published scientific studies, that some products – especially chemicals – can harm both the environment and people's health. This harm can result both from the products themselves and from use at certain levels. Considering this, the regulations which rule the topic of sustainable tenders – such as the IN-SLTI 01/2010 – suggest the need for non-toxic products, specifications of dangerous substances concentration and recommended levels, and, when existing, observance of technical rules of institutions such as the National Agency of Sanitary Vigilance (ANVISA), the National Council of the Environment (CONAMA) and the ABNT.

Furthermore, it would be important to create standard notices for different product categories, especially for those that are most often bid. In these notices, all technical criteria and other fundaments needed for the base of the procurement of a determined sustainable product would already be systematized. Only when there is greater doubts regarding the certainty and legality of the tender would the administrator be obliged to exercise argumentative efforts and technical justifications, including in the notice, in a specific and measurable way, the social, environmental and/or economic gains.

6.- CONCLUSION

The concept of sustainability is systematic and relates to the continuity of economic, social, cultural and environmental aspects of human society, and may be reached by means of detailed planning and actions that are able to achieve and maintain these same ideals long term. Besides this aspect, which has been handed down through several generations, the concept of sustainability also includes, as one of its ideals, the reduction of poverty and of inequalities, since it proposes to answer human needs and to promote improved quality of life.

Despite the Brazilian regulations having assumed the objective of promoting "sustainable national development", which indicates that sustainability unites social and environmental aspects, as stated in the legislation, a great part of the notices that currently allow public procurement are restricted to demanding some environmental criteria, and, even so, with certain superficiality and limited coverage, such as minor consideration for the productive chain. Therefore, applying the policy of sustainable public procurement is at an incipient stage and will tend to become more robust after the publication of Decree 7.746/2012.

Besides the environmental issue, another requirement that is increasingly found in tender notices is compliance with Complementary Law 123/2006 and Decree 6.204/2007 which gives exclusivity or preference to micro and small sized companies. However, this criterion has not necessarily been able to integrally fulfill the principle of sustainability which guarantees diversity of producers and forms of production. This is because it still cannot be said that inclusion of small producers or family producers, who often have no access to the government's tender notices, occurs.

Regarding the legal discipline of sustainable public procurement, the ideal regulatory picture seems to be composed of minimalistic laws and rules that advance content. In other words, a Law that only outlines what is necessary to carry out the sustainable public procurement policy, giving the act more generic content that can be specified and deepened by another regulation. This, indeed, with a content that would concentrate more on specific points of the matter, advancing the theme and supplying a greater degree of compatibility of the rules with (future) needs during elaboration and implementation of the sustainable public procurement policy.

¹.

However, this type of delegation of the Law to regulation should not endanger legal certainty – both of the administrators, or other policy players –, for this, greater thought should be conferred to the formation process of these regulations. For this, it is mandatory that the regulations be preceded by an administrative process that contemplates an ample debate involving the topic, through audiences with administrative participation as well as technical instruction.

The topic of sustainable public procurement has different stages of development in the Brazilian federation, encountering States of the Federation with a high degree of policy development and others that have not advanced at all regarding the issue. It is also known that the Federal Government has a great interest in the topic and that, besides its interest in the development and diffusion of this policy, it has greatly invested in the improvement of this practice, creating specific areas to obtain sustainable public procurement. Therefore, it is evident that this agenda has resulted in an advance in the specialization of federal administrators, creating a kind of expertise, as opposed to what is occurring in some areas of the federation, that may not know how to deal with the topic for implementation, or even for some who know nothing about it.

In the year of 2012, sustainable public procurement in Brazil corresponded to only 0.1% of the amount spent by the Federal Public Authorities with the acquisition of goods, services contracts and public works, and totaled only 0.6% of the tenders. This experience in Brazil is still incipient, but this does not make it insignificant. On the contrary, from the analysis of sustainable tender notices for goods, published by organs and institutions of the Public Law Practice of the Federal Administration, an enriching experience has been seen in the employment of sustainable criteria for tenders. It is essential to understand this experience, to increment the debate regarding sustainable public procurement, that is: to highlight good practices so that they may serve as a model for public administrators; identifying the difficulties to address efficient solutions; and achieving the empiric registration of the movement of political consolidation of sustainable public procurement, which is observed more on an operational plane than on a normative plane.

REFERENCES

[1] J. B. de Palma and N. N. Pedroso Junior (2013): “Sustainable Public Procurement”, Pp 173-242. In Mecanismos jurídicos para a modernização e transparência da gestão pública. Ministério da Justiça, Secretaria de Assuntos Legislativos – v. 2. (Série Pensando o Direito, 49). Brasília, DF, Brazil. (Available only in Portuguese): <http://participacao.mj.gov.br/pensandoodireito/wp-content/uploads/2013/11/Volume-49-II-FGV-Compras-P%C3%BAblicas-Sustent%C3%A1veis.pdf>

[2] “Managerial Information of Sustainable Public Contracts Report” (Available only in Portuguese): http://www.comprasnet.gov.br/ajuda/Manuais/0301_A_12_INFORMATIVO%20COMPRASNET_ComprasSustentaveis.pdf

[3] “Materials Catalogue System” (Available only in Portuguese): <http://www.comprasnet.gov.br/Livre/Catmat/conitemmat2.asp?nomeitem=&chkSustentavel=S&indItemSustentavel=S&msg=>

Sustainable Public Procurement in the Netherlands; a cross case comparison of change agents in procurement projects

Jolien Grandia¹

¹Erasmus University of Rotterdam
Faculty of Social Sciences,
Department of Public Administration,
Burgemeester Oudlaan 50,
Rotterdam, the Netherlands,
E-mail: Grandia@fsw.eur.nl

Abstract

Political pressure can stimulate organisations' engagement in sustainable public procurement; however, it is inside the organisation that changes have to be made and barriers removed to make it successful. Procurement is a process where the decisions of the project teams determine whether the full potential of sustainable procurement is used. To optimize this project teams should be encouraged to enact new behaviour. This role is awarded to the change agent in organisational change literature. In this article we make a cross case comparison of the role of change agents in seven public procurement projects in two Dutch national government organisations. We conclude that by advising and removing barriers change agents play an important role in sustainable procurement projects and help use its full potential.

Keywords: sustainable procurement, public procurement, change agent, organisational change, national government.

1. Introduction

Governments around the world are trying to reduce the negative environmental impact of production and consumption by leveraging their influence as major procurers of goods and services (1,2). Sustainable procurement is "the acquisition of goods and services in a way that ensures that there is the least impact on society and the environment throughout the full life cycle of the product"¹ (3). It is a policy tool that helps achieve desired outcomes in society and drive forward the sustainability agenda (2,4-6). Although political pressure can stimulate organisations' engagement in sustainable procurement, changes have to be made and barriers removed inside organisations to make it successful (7).

The procurement process is considered a special decision-making process in which the decisions of project teams determine whether the full potential of sustainable procurement is used (8). Attitudinal barriers to sustainable procurement exist among some actors in procurement projects (9,10). Sustainable procurement is not a constant in an organisation but rather varies across projects (3,11). Although people might verbally endorse certain policies, this does not necessarily lead to a change in their behaviour (3). To optimise the implementation of sustainable procurement in procurement projects, project teams must be encouraged to enact new behaviour (12). Organisational change literature awards this role of encouraging new behaviour to change agents, who are considered to be able to increase employees' readiness for change by influencing their beliefs, attitudes, intentions and, ultimately, their behaviour (13). A number of recent general sustainability studies also highlight the importance of change agents as potential catalysts of sustainability initiatives (14,15). Moreover, a recent study by Grandia, Groeneveld, Kuipers and Steijn (11) indicates that actors in sustainable procurement projects

¹ Green public procurement, environmentally responsible public procurement, green purchasing and eco-procurement are other terms that are used to describe the same phenomenon or policy. In this research, the term 'sustainable procurement' is used because it is the closest match to the Dutch name of the policy, '*Duurzaam Inkopen*'.

might also act as change agents. However, in sustainable procurement literature, the role of change agents has not been researched thoroughly.

With this research, we close this gap in the literature and show that change agents are present in procurement projects and that their actions influence the degree of sustainable procurement in procurement projects. We do so by examining *what role change agents play in sustainable procurement projects in the Dutch national government*. To answer this question, an extensive comparative case study was carried out in which seven procurement projects in two organisations within the Dutch national government were compared based on interviews with 35 key persons.

The theoretical framework is discussed in the next section; in section 3, the research design and methods are discussed; in section 4, the results of the case studies are presented; section 5 concludes.

2. Change Agents in Sustainable Procurement

Based on earlier empirical data and progressive insight, two degrees of sustainable procurement are developed: A) compulsory sustainable procurement and B) non-compulsory sustainable procurement. With regard to compulsory sustainable procurement, a project can have A1) no application, A2) partial application, or A3) full application of ecological criteria. If a project has non-compulsory sustainable procurement, it can have B1) non-compulsory ecological criteria (e.g., ecological award criteria) and/or B2) a design that adds value to its surroundings (e.g. generating electricity). These degrees of sustainable procurement will be used to categorise the implementation of sustainable procurement in procurement projects in this research.

Sustainability concepts are difficult to translate into practice and provide a new reality that makes it difficult for people to rely on existing routines (16), complicating the process towards sustainable procurement (3). Change agents can reduce this by translating general concepts into a language that fits the organisation (14).

But what is a change agent? A change agent “is an internal or external individual or team responsible for initiating, sponsoring, directing, managing or implementing a specific change initiative, project or complete change programme” (17). In the literature, change agents were originally considered to be top or senior managers, but in principle, any actor, at any level of the organisation, can become a change agent (18,19).

Change agents operate in an organisational change process, which typically consists of several phases that take considerable time to unfold (12). Although the introduction of sustainable procurement is considered to be an organisational change, it is inside the procurement projects (and thus at the project level) that the decisions of project teams determine whether the full potential of sustainable procurement is used (8). In this research, we therefore study the role and actions of change agents at the level of the procurement project.

Organisational change literature mentions several actions that change agents can carry out. For example, Caldwell (17) notes that change agents can envision, initiate, sponsor, adapt or carry forward change; build support; and provide advice, expertise or process skills. Further, Kendra and Taplin (20) mention interviewing, directing, managing, speaking/presenting, listening and reflecting, writing, cooperating, refining and giving feedback, leading and training/educating as actions of change agents and being sensitive to organisational surroundings and being tactful. The mentioned actions and competencies remain rather vague, as there is no universal change agent model that shows what kind of actions are required in which situations and under which circumstances, nor is there a fixed set of competencies that a change agent should possess (17). However, having such one-dimensional models may be undesirable, as they do no justice to the “empirical complexity of change agent roles within organisations and finding new ways of managing change processes in an integrated and coherent manner to affect lasting change” (17).

Nevertheless, the actions mentioned in the literature do provide us with an instrument to identify the actions undertaken by key actors in procurement projects and identify whether they act as change agent and if so in which stage of the procurement project’s process.

For this purpose, we use a framework developed by Armenakis and Bedeian (12) (see figure 1) that includes three phases (unfreezing/readiness, moving/adoption and freezing/institutionalisation) of organisational change and three stages through which change targets progress (denial/resistance, exploration/culmination and commitment/aftermath) as a response to actions to implement the organisational change (12).

Although this model is developed for change at the organisational level, it can also be used as a framework to study change at the project level. It allows us to position the activities of a change agent during a procurement project within the different phases of organisational change and relate them to the stages through which the project team members progress. For example, a change agent could encounter resistance and decide to organise a workshop about sustainable procurement during the unfreezing/readiness phase.

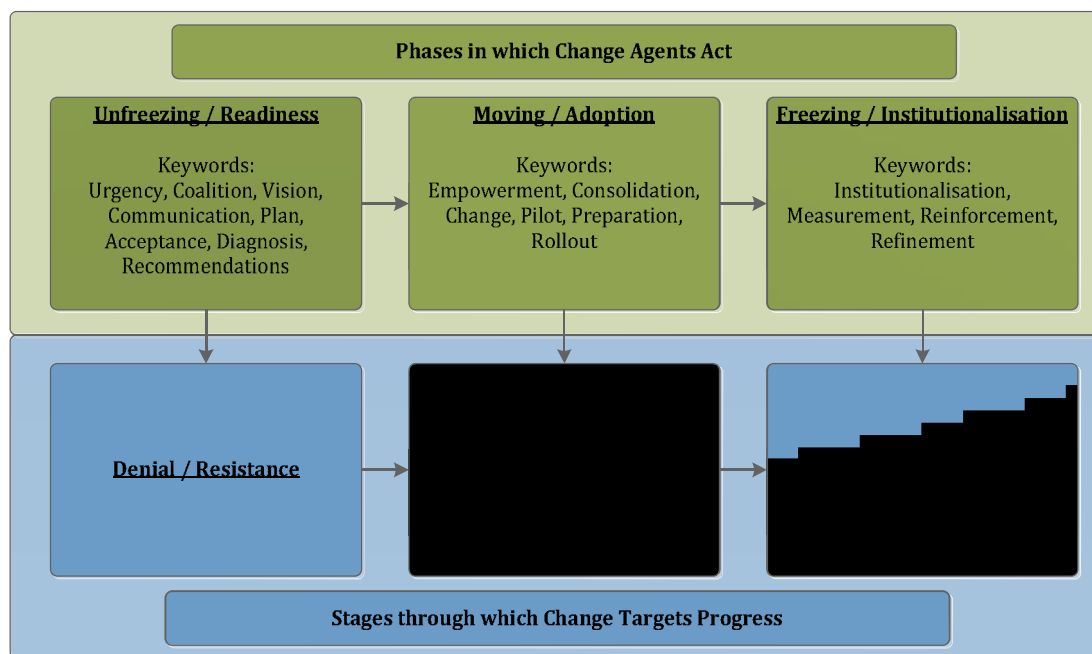


Figure 1. Framework. Source: Armenakis & Bedeian (12)

3. Methods and Case Selection

We examined the role of change agents in seven sustainable procurement projects in two Dutch national government organisations. Because we wanted to know both whether and how change agents are involved in sustainable procurement projects, a case study was deemed the best design. An expert survey was used to identify two organisations expected to vary regarding the degree of sustainable procurement: the Ministry of Defence and the Department of Waterways and Public Works (RWS).

In both organisations, policy advisors were contacted, and a snowball procedure was used to identify seven relevant procurement projects. We defined a case as: a procurement project procured in 2012-2013 and carried out by a dedicated project team working in a procurement department of a ministry or agency. A case was deemed relevant if it fell under one (or more) of the 52 product categories of the Dutch sustainable public procurement policy and if the degree of sustainable procurement could be determined. In principle, we selected cases with variation in the degree of sustainable procurement; however, during interviews, it often became apparent that a project had a higher degree of sustainable procurement than initially stated. Organisational and project characteristics, such as the type and size of the organisation and procurement department, as well as the size (> 1 million Euros) and duration (> one year) of the procurement project, were controlled for².

Interviews were the main source of data; however, internal documents and publicly accessible information about the procurement projects were also studied. Interviews were held with key persons. An actor was defined as a key actor if he or she had a leading role in a project (e.g., project leader or procurer) and was able to influence whether the full potential of sustainable procurement is used within the project or if he or she was identified by other key actors as a key actor. To identify key actors, a snowball procedure was used. Interviews were carried out until no additional key actors were suggested. In all cases, the project leader, procurer and sustainable procurement policy advisors were considered key actors and were subsequently interviewed (with the exception of 1 procurer who refused to cooperate). In total, 35 interviews were held (usually 5 per case). The interviews lasted, on average, between 1 and 1.5 hours and were recorded and transcribed verbatim. To facilitate the analysis and allow for a more systematic comparison of variables in and across the cases, all the interview transcripts were systematically and manually analysed on a case-by-case basis. A log containing the origins of all the quotes was kept.

² At the time of writing, some projects are on-going, and therefore, not all details regarding the projects, e.g., exact amount of money and products involved, names of the projects or specific details of the sustainability criteria, can be publicised, as publication of these details could hinder the procurement process.

In order to be able to identify change agents in the procurement projects, the theoretical definition of Armenakis and Bedeian (12) was operationalised. In this research, an actor is considered to be a change agent if he or she performed *observable actions* to initiate, sponsor, direct, manage or implement sustainable procurement during a procurement project and if these actions are *recognised* by key actors within the project.

4. Findings

In the following paragraphs, we provide a short description of what is procured in each case and then an in-depth case comparison of the role of the change agents in the cases.

4.1. Cases of Sustainable Procurement

The *first* case involves the reconstruction of 23 kilometres of highway. Replacing intersections with roundabouts and constructing central reservations, bike paths, flyovers and a bike tunnel should improve the safety of this dangerous road (29 fatal and over 200 serious accidents in the last 10 years). The *second* case involves replacing a sluice in the Juliana canal. It is a special project because it is the first Design, Build, Finance and Maintain³ contract for a wet works project. The *third* case also involves the renovation of a sluice but also involves the construction of a second lock chamber and widening of the canals to increase its capacity and diminish the wait to enter the Twente canal. The *fourth* case involves the combined procurement of cleaning, catering and security services for all the RWS locations. Integrating these three services into one contract allows RWS to outsource the management of these services. The *fifth* case involves the procurement of a quay for a marine harbour in the Netherlands by the Defence Real Estate Department. The *sixth* case involves the procurement of vehicles and ten years of maintenance by the Defence Materiel Organisation. The vehicles will be used in heavy terrain, but not in dangerous situations, and are bought 'off the shelf.' The *seventh* case is a combined procurement by the Ministry of Defence and FMH⁴ for more than 2,000 warm beverage machines (WBM). WBM fall under category management and are therefore procured by the Ministry of Economic Affairs⁵.

4.2. Case Comparison

To facilitate the case comparison, more comprehensive information about the presence, position and activities of the change agent as well as the different phases and stages of the change process and the degree of sustainable procurement are presented in table 1. When we compare the seven cases and whether and how a change agent played a role in the cases, a number of interesting patterns become visible.

³ In a Design, Build, Finance and Maintain contract, all four aspects of construction are integrated into one contract for which the supplier is responsible.

⁴ FMH is a public organisation that provides facility services (including procurement) for the following ministries: Social Affairs and Employment, Foreign Affairs, Infrastructure and the Environment, Education, Culture and Science and the Ministry of Health, Welfare and Sport.

⁵ Category management means that most facility goods are grouped into categories (e.g., office supplies, energy, catering) and are appointed to one specific ministry that is responsible for developing a government-wide procurement strategy and that often carries out the procurements. Warm beverage machines are part of the catering category, which is assigned to the Ministry of Economic Affairs.

Table 1.

Nr.	Org.	Case	Change Agent?	Who	Activities	Phase	Stage	Degree of Sustainable Procurement
1	RWS	Highway	Yes	Sustainability Advisor	- Advising - Educating - Problem solving & Adapting - Providing Expertise	2: Moving / Adoption 3: Freezing/ Institutionalisation	2: Exploration 3: Commitment	A3: Full Application B1: Sustainable Award Criteria
2	RWS	Sluice 1	Yes	Sustainability Advisor (2x)	- Advising - Coordinating - Problem solving - Providing Expertise	2: Moving / Adoption 3: Freezing / Institutionalisation	2: Exploration 1: Resistance 3: Commitment	A3: Full Application B1: Sustainable Award Criteria
3	RWS	Sluice 2	Yes	Technical Manager	- Being assertive - Building support - Carrying forward Change - Envisioning - Initiating - Problem solving & Adapting	1: Unfreezing/ Readiness 2: Moving / Adoption	1: Resistance 2: Exploration	A3: Full Application ⁶ B1: Sustainable Award Criteria B2: Adding Value
4	RWS	Cleaning, Catering & Security	Yes	Sustainability Advisor	- Advising - Monitoring - Providing Expertise	1: Unfreezing /Readiness: 2: Moving/ Adoption	1: Resistance/ Denial 2: Exploration	A3: Full Application B1: Additional Ecological Criteria
5	Defence	Real Estate	Yes	Sustainability Advisor	- Advising; - Being Assertive - Facilitating; - Initiating - Organising - Providing Expertise - Speaking / Presenting - Writing	2: Moving/ Adoption 3: Freezing / Institutionalisation	2: Exploration 3: Commitment	A3: Full Application B1: Sustainable Award Criteria B2: Adding Value
6	Defence	Vehicles	Yes	Sustainability advisor	- Advising - Writing	3: Freezing / Institutionalisation	3: Commitment	A2: Partial Application B1: Sustainable Award Criteria
7	Defence	Warm Beverage Machines	No	N/A	N/A	3: Institutionalisation	3: Commitment / Aftermath	A3: Full Application B1: Additional Ecological Criteria

4.2.1. Comparing the Presence of Change Agents

When we view the table and compare the cases, it becomes apparent that in six of the seven cases, a change agent can be identified. Only in the Warm Beverage Machine case can no change agent be identified. This is also the only case in which the project team reached the final stage and phase of the change process: institutionalisation and aftermath. Sustainable procurement was considered business as usual. It appears as though—at that time—sustainable procurement had been implemented to the greatest extent possible. One of the respondents explained, “*The machine is just a machine, at a certain point you are developed out.*” In the future, innovations may arise, and the category manager was continuously communicating with suppliers about possible innovations in, for example, ingredients, but until an innovation occurs, sustainable procurement cannot be implemented further. This finding suggests that when sustainable procurement has been implemented to the greatest extent possible, a change agent is no longer needed.

4.2.2. Comparing the Phases and Stages of Change

When we take a further look at the phases and stages of the change process, we see that in two cases, the change agents needed to “unfreeze” the situation and create willingness to change. However, the team members’ reactions and change agents’ subsequent actions to the resistance differed between the two cases. In the Sluice 2 case, the change agent chose to put all his energy and effort into building support for the change throughout the

⁶ This project is in the planning phase; therefore, the contract has not been drawn up. The reported degree of sustainable procurement reflects what the project team has prepared and researched and thus plans to include in the contract.

duration of the project. He focused heavily on initiating change and motivating key actors to implement sustainable procurement to the greatest extent possible. The change agent explained: *“When I first mentioned sustainability in the project, it was considered an odd word. Then, you start to explain what it involves; try to get people enthusiastic about it—at least aware of the different sides to the potential design.”* He also explained that the initial project team was in favour of developing the most sustainable sluice but that he had to keep the idea ‘warm’ during the project; otherwise, it would have degenerated, especially when, due to illnesses and a death, almost all key actors were replaced and new actors had to be brought ‘on board’.

In the Cleaning, Catering and Security case, the change agent felt that there was very little to gain (there was too much resistance, including at the management level). He thus chose to just advise the actors in the project, appreciate the sustainable procurement practices that were implemented in the project, and spend his time and energy on other projects in which he could have a greater impact. One of the project members stated: *“We sat with him and said, ‘Gee, I’m afraid we will have to stay at the lowest threshold, difficult as it might be. But we will make sure we grow each year’. And that was a positive point for him. Well, ok, then we are at least doing that.”* This case shows that change agents, who also operate at the organisational level, make conscious choices regarding the specific projects in which to invest their time and energy in order to optimise the implementation of sustainable procurement at a higher (i.e., the organisational) level. In all the other cases, the project teams were already aware of the need to implement sustainable procurement and were willing to explore sustainable procurement practices in their project. The change agents in these projects focused on assisting the project teams in exploring sustainable procurement practices and focused on removing barriers to sustainable procurement implementation, such as a lack of knowledge or tools.

4.2.3. Comparing the Roles of Change Agents

When we look at the roles of the change agents in the different projects, it becomes apparent that all change agents had an advisory role. In some cases, the change agent initiated this role, while in other cases, the project teams requested help. One of the respondents in the highway case explained why they requested help: *“I said, ‘I need a good advisor, somebody who really has a lot of knowledge about it, because I am not going to experiment. It is too important for that.’”* As result, his director arranged time for an advisor who had helped them in the past to assist the project team. The advisory role of the change agents makes perfect sense if we reflect on the stages and phases. All the cases reached the second—and often also the third stage—of the change process. The project teams are convinced of the need to implement sustainable procurement but require help in exploring options for sustainable procurement practices, advice on how to implement such practices or solutions to problems that arise during this process.

By informing them of the potential for sustainable, the change agents helped the project teams explore the possibilities for sustainable procurement in their specific project. There was no general way in which the change agents advised project teams. For example, the change agent in the Quay case regularly organised workshops on sustainable procurement, while the change agent in the Sluice 1 project published information about it on the intranet. The change agents also assisted the project teams in removing other knowledge barriers to the exploration and implementation of sustainable procurement—for example, by answering specific questions, providing them with updates on relevant market developments or assisting them in calculating the environmental effects of their procurement projects. One of the respondents in the Sluice 1 project explained: *“Whenever I run into something and wonder how I am going to deal with it, I plan a meeting with [the change agent], and he explains it to me.”* The change agents do not implement sustainable procurement themselves but help the project teams implement sustainable procurement in their projects by removing knowledge barriers. Or, as one of the respondents, stated: *“They say, ‘I’ll help you get on your way and show you how you could handle it, but you’ll have to do it yourself.’”*

Although all the change agents had an advisory role, in two cases (Sluice 2 and the Quay), the change agents also played another role, focusing specifically on initiating change and motivating the project team to implement sustainable procurement to the greatest extent possible. In the Sluice 2 project, this role makes perfect sense, as the key actors were in the first stage of the change process (resistance) and the change agents had to diminish this resistance to be able to move forward. One of the team members stated: *“I did notice that it is very difficult, even within such a team. He might also say that. He often felt like he was the only one who wanted it. [...] There certainly was a lack of enthusiasm. Opposition, he might have seen it that way. It was more that people reasoned, ‘We are busy enough; let us focus on what we really have to do. And then if we have time and money left for sustainability, we can do that too.’”*

The change agent undertook several actions to increase the project team’s enthusiasm and motivation and diminish their resistance and lack of awareness regarding the potential for sustainable procurement in their project. He, for example, regularly sent them examples of comparable projects in which non-compulsory sustainable procurement practices were successfully implemented. He explained: *“In Zealand, they created an*

entire sluice with dimmable LED lights, making it dark at night rather than completely lit. I send that into the organisation to show them good examples of what can be achieved. [...] I just try it again every time. Once a month, I send something and say: 'This has been achieved; we could use that in our sluice.' I try to keep the idea warm, to keep it in their minds. We do have to build that second lock chamber! I hope that they will eventually pick it up."

In the Quay project, the project team was already convinced of the need for more sustainable procurement and had reached the second phase, which may suggest that the need for a change agent to initiate and motivate would have been diminished. However, the change agent continued to motivate the actors involved in the project. This could be because of the hesitant attitude towards more sustainable procurement at the organisational level. One of the key actors explained: *"I get the idea that it is not hugely expressed as a priority. My colleague [the change agent] is more or less the only advisor dealing with it. It really is his, how do call it, mission. And it apparently is really difficult to get the rest of the organisation engaged. You are truly relying on project leaders and project teams that are willing to apply it"*. The change agent needed a positive and successful example of non-compulsory sustainable procurement to convince the rest of the organisation of the necessity of implementing it. His actions in this project are part of a larger change process. One of the project team members explained: *"We were merely toying. He wants to launch it on a larger scale. For now, it is a project in which we applied several facets, or will apply I should say, because we have not put out the tender yet. But, he of course wants to get much more support for it."* The change agent in the Sluice 2 project solely focused on reaching a sustainability goal in this specific project. Looking at their job titles, this makes sense: the change agent in the Sluice 2 project was a member of the project team and thus was mainly operating at the project level, whereas the change agent in the Quay case was an advisor at the organisational level and had a sustainable procurement goal at the organisational level. This case also shows that change agents may make conscious decisions about projects to which they dedicate their time and energy in light of their sustainable procurement goal at the organisational level.

4.2.4. Change Agents and the Degree of Sustainable Procurement

When we look at the degrees of sustainable procurement of the cases, we notice that all projects have non-compulsory sustainable procurement. Regarding the degrees of sustainable procurement identified above, there are two projects with B2 (adding value) and five projects with B1 (adding non-compulsory criteria). One of the respondents explained: *"It actually became something we find normal, that you have to include. It might seem like the attention is gone, but it is actually just embedded in the organisation. It is standard; you automatically include it."* That all projects do more than they are required to do is an indication that emergent sustainable procurement initiatives are relatively common.

The respondents indicated that the change agents played an important role in their projects with regard to sustainable procurement. However, determining the extent to which the presence and actions of the change agents directly influenced the degree of sustainable procurement is difficult because, in most cases, the change agent was so embedded in the project team that, in hindsight, unravelling who was responsible for initiating certain decisions or making certain suggestions that increased the degree of sustainable procurement is difficult. However, in the vehicle case, it is possible to directly attribute the increase in the degree of sustainable procurement to the intervention of the change agent because the contact was highly formalised. The project team sought advice from a health and safety advisor, who forwarded the formal specification to his colleague, a sustainability advisor. The sustainability advisor noticed the low degree of sustainable procurement and wrote a memo with a number of suggestions to improve the sustainability of the vehicles. The project team was not required to adopt these suggestions but chose to do so and turned them into award criteria for the tender (B1). The project team and change agent did not speak directly (only documents were exchanged) or know each other's names, and the change agent did not even know whether his suggestions were adopted. Although the project team had not thought of these suggestions themselves (and were thus not using the full potential of sustainable procurement), after receiving the memo, they adopted the suggestions. Thus, without the memo from the change agent, the project would not have had non-compulsory sustainable procurement.

It is striking to see that the cases in which the change agent was the most embedded and proactive in the projects (Quay and Sluice 2) are also the only cases that add value to their surroundings (B2) and that the case in which the change agent was passive and the least embedded in the project (vehicles) had the lowest/most mixed degree of sustainable procurement. The change agent in the latter case explained that he normally only provided advice if he was contacted by a project team: *"It is the intention that we do all projects. But it depends a little bit on whether a project leader asks for advice and guidance."* This is a vastly different approach from that of the change agent in the Quay case, who contacted people himself: *"We just want to do it! I could write it all down, but you also need projects. So we looked for projects. I also asked around in our regional offices: 'What do you think are good projects?'"* Thus, if change agents want to achieve better results and increase the degree of

sustainable procurement in procurement projects, they should ensure that they are proactive and embedded in the projects.

Finally, when we compare the cases, we also see that sustainable procurement is not an end state but a process. Although most project teams considered applying the compulsory ecological criteria to be business as usual, this did not mean that project teams are equally committed to further sustainable procurement. Thus, if the national government wants project teams to implement more sustainable procurement practices, they need change agents that are continuously able to initiate, sponsor, direct, manage or implement sustainable procurement initiatives.

5. Conclusion and Discussion

In the literature, sustainable procurement is considered to be a special decision-making process in which the decisions of key actors determine whether the full potential of sustainable procurement is used (8). Change agents can reduce the complexity of sustainable procurement by translating general concepts in a language that fits the organisation (14). In this paper, we therefore examined the presence and role of change agents in seven sustainable procurement projects in the Netherlands. Based on our empirical results, we can draw three conclusions.

First, in all but one case, a change agent was identified by the key actors. According to these key actors, the change agents played an important role in the exploration and implementation of sustainable procurement initiatives in their projects. By advising the project teams, the change agents were able to remove knowledge barriers to the exploration and implementation process as well as reduce the project teams' resistance to implementing sustainable procurement practices and lack of awareness regarding the potential for sustainable procurement in their projects. In two cases, the change agents also had an initiating and motivating role, increasing the willingness of project teams to include more sustainable procurement practices in their projects.

Second, most of the change agents were operating at both the project and the organisational level. They appeared to make conscious decisions regarding which projects to participate in and how much time and energy to invest in 'being a change agent' in the projects in light of their overall goal of increasing the degree of sustainable procurement at the organisational level.

Third, the respondents indicated that the presence and actions of the change agents influenced the implementation of sustainable procurement in their projects. We find an interesting pattern regarding the role of change agents and the degree of sustainable procurement at the project level. In the cases in which the change agents were the most proactive and embedded, we also find the highest degree of sustainable procurement. By contrast, in the case with the least embedded change agent, we also find the lowest degree of sustainable procurement. These findings suggest that a change agent who is more proactive and, perhaps, more embedded in a project has more possibilities to influence the behaviour of the project team, thereby increasing the degree of sustainable procurement in the project. This finding is interesting because the literature often emphasises the importance of external change agents (as they are less affected by implicit and explicit organisational rewards and punishments) (20); however, our research suggests external change agents may be less effective than internal change agents, as external change agents are further removed from projects.

Acknowledgements

The author would like to thank the Dutch Ministry of Interior Affairs and Kingdom Relations for financially supporting the research and the practitioners who contributed to this study.

References

- [1] L.W.P. Ho, N.M. Dickinson, G.Y.S. Chan. Green procurement in the Asian public sector and the Hong Kong private sector. *Natural Resources Forum* 2010 FEB;34(1):24-38.
- [2] S. Brammer, H. Walker. Sustainable procurement in the public sector: an international comparative study. *International Journal of Operations & Production Management* 2011;31(4):452-476.
- [3] J. Meehan, D. Bryde. Sustainable Procurement Practice. *Business Strategy and the Environment* 2011 FEB;20(2):94-106.
- [4] K. Green, B. Morton, S. New. Green purchasing and supply policies: do they improve companies' environmental performance? *Supply Chain Management: An International Journal* 1998;3(2):89-95.

- [5] L. Preuss. Addressing sustainable development through public procurement: the case of local government. *Supply Chain Management-an International Journal* 2009;14(3):213-223.
- [6] J.G. Murray. Effects of a green purchasing strategy: the case of Belfast City Council. *Supply Chain Management: An International Journal* 2000;5(1):37-44.
- [7] S.U. Hoejmoose, A.J. Adrien-Kirby. Socially and environmentally responsible procurement: A literature review and future research agenda of a managerial issue in the 21st century. *Journal of Purchasing and Supply Management* 2012 12;18(4):232-242.
- [8] E. Günther, L. Scheibe. The hurdle analysis. A self-evaluation tool for municipalities to identify, analyse and overcome hurdles to green procurement. *Corporate Social Responsibility and Environmental Management* 2006;13(2):61-77.
- [9] A. Erridge, S. Hennigan. Sustainable procurement in health and social care in Northern Ireland. *Public Money & Management* 2012 09/01; 2013/10;32(5):363-370.
- [10] H. Walker, S. Brammer. Sustainable procurement in the United Kingdom public sector. *Supply Chain Management-an International Journal* 2009;14(2):128-137.
- [11] J. Grandia, S.M. Groeneveld, B.S. Kuipers, A.J. Steijn. Sustainable Procurement in Practice: Explaining the Degree of Sustainable Procurement from an Organisational Perspective. *Rivista di Politica Economica* 2013(April/June):41-66.
- [12] A.A. Armenakis, A.G. Bedeian. Organizational change: A review of theory and research in the 1990s. *Journal of Management* 1999;25(3):293.
- [13] A.A. Armenakis, S.G. Harris, K.W. Mossholder. Creating Readiness for Organizational-Change. *Human Relations* 1993 JUN;46(6):681-703.
- [14] A. Van der Heijden, J.M. Cramer, P.J. Driessen. Change agent sensemaking for sustainability in a multinational subsidiary. *Journal of Organizational Change Management* 2012;25(4):535-559.
- [15] D. Dunphy, S. Benn, A. Griffiths. *Organizational Change for Corporate Sustainability: A Guide for Leaders and Change Agents of the Future*. London, U.K. ; New York, U.S.A.: Routledge Taylor; 2007.
- [16] A. Van der Heijden, P.P. Driessen, J.M. Cramer. Making sense of Corporate Social Responsibility: Exploring organizational processes and strategies. *Journal of Cleaner Production* 2010;18(18):1787-1796.
- [17] R. Caldwell. Models of change agency: a fourfold classification. *British Journal of Management* 2003;14(2):131-142.
- [18] L. Crawford, A.H. Nahmias. Competencies for managing change. *International Journal of Project Management* 2010;28(4):405-412.
- [19] L. De Caluwe, H. Vermaak. *Learning to change: A guide for organization change agents*. Thousand Oaks, CA: Sage; 2003.
- [20] K.A. Kendra, L.J. Taplin. Change Agent Competencies for Information Technology Project Managers. *Consulting Psychology Journal: Practice and Research* 2004;56(1):20.

PROMOTING CLEANTECH IN PUBLIC PROCUREMENT AND INVESTMENTS IN FINLAND

Katriina Alhola¹, Ari Nissinen² and Jyri Seppälä³

Finnish Environment Institute
P.O.Box 140
FIN-00251 Helsinki
Finland

¹Katriina Alhola, D.Sc.(Tech.) is a senior researcher in the Finnish Environment Institute (Centre for Sustainable Consumption and Production). Her area of interest is in sustainable production and consumption, especially in cleantech and green public procurement (GPP) and innovations. ²Ari Nissinen, Ph.D., is a senior researcher working at the Finnish Environment Institute's Centre for Sustainable Consumption and Production. His teaching and research interests are in green public procurement, eco-design, environmental impacts of products and services, sustainable consumption, and life-cycle assessment. ³Jyri Seppälä, Prof., is a director in the Centre for Sustainable Consumption and Production in Finnish Environment Institute. His expertise is in life cycle assessment, risk analysis and environmental impact assessment.

ABSTRACT. The Finnish government has set an objective of 350 million Euros, or 1 % of the total value of Finland's public procurement, to be directed to cleantech solutions, i.e. products, services and processes that cause less harmful effects to environment than their alternatives, and also add economic value. Buildings, energy production, traffic solutions and waste services have been named as potential sectors for cleantech but yet there are no explicit criteria, content, implementation process or follow-up system for public cleantech procurement and investments.

This paper aims at illustrating how the innovative public cleantech procurement could be examined and promoted. The focus is on several realized cleantech solutions in Finland and on the cleantech potential of future investments of so called "carbon neutral municipalities", but also state framework contracts are studied. This paper describes a methodology on how cleantech investments could be assessed and promoted, and suggests for a web based decision support system that could be used by the contracting authorities in order to implement innovative cleantech procurement. It could also be used by bidders in order to strengthen the market and demand for cleantech solutions in Finland and more generally.

Keywords: Public procurement, investments, cleantech, green public procurement, decision support system

INTRODUCTION

Cleantech refers to industries, technologies and solutions that reduce the harmful environmental effects of production and consumption more than their alternatives while competing favorably on price. More precisely, to be considered 'cleantech', products and services must optimize the use of natural resources offering a cleaner alternative to traditional products and services, being an innovative or novel technology or application and add economic value (Stack et al., 2007).

Growth in cleantech sector has increased during the past ten years and it is now an established investment category in public markets. Altogether 18 categories are recognized under the cleantech sector including categories related to energy solutions, transportation, water and wastewater, air and environment, materials, manufacturing agriculture, recycling and waste (Cleantech Group, 2014). On these markets, the growth has been significant during the past years both internationally and nationally. In 2012 there were 15 % growth in the cleantech business sector in Finland, and it was expected to rise up to 29 % in 2013 (EK, 2013). Globally innovative cleantech industry could be worth many trillion euros by 2015 (CMS, 2009). Thus cleantech is seen as one of the most important sectors accelerating innovations and success of local companies, and public procurement can be seen as one of the important means to boost this market growth.

Cleantech investments is a key component also in the European political agenda aiming at more innovative and sustainable future according to the EU's ambitious objectives of increasing the use of renewable energy and resource efficiency. In the Europe 2020 strategy public procurement is seen as one of the market-based instruments that could fulfill the objectives of supporting the shift towards a resource efficient and low-carbon economy and improving the framework conditions for business to innovate (European Commission, 2010a, see also: European Commission, 2011; European Commission, 2010b; European Commission, 2010c). Thus, public procurement rules should insist on efficiency conditions to increase energy savings and spread innovative solutions, notably in buildings and transport (European Commission, 2010c) which are recognized as important cleantech sectors. Also the revision of public procurement directives, announced 15th January 2014, allows the public purchasers for taking environmental aspects better into account in different phases of the purchasing process and promotes the selection of cleantech solutions in the procurement process. For example, a new form of competitive procedure, introduced as 'innovation partnership' will allow for a public purchaser to open a competitive procedure to find a supplier to new innovative product or service, giving opportunity to the tenderer to come up with an innovative solution together with the purchaser. Thus, when it comes to the delivery stage, the procuring authority will not need to go through a second competitive procedure to find the supplier of the solution (Proposal for a Directive of the European Parliament and of the Council on public procurement, 2011/0438 (17a)). In addition, the renewal of public procurement directives encourages public authorities to use the life cycle costing (LCC) method in order to better point out also the monetary benefits of innovative cleantech solutions during the life cycle (Proposal for a Directive of the European Parliament and of the Council on public procurement, 2011/0438 (38)).

The Finnish Government has set similar aims for cleantech, and has announced the Government Decision-in-principle on the promotion of sustainable environmental and energy solutions (cleantech solutions) in public procurement, accepted on 13th June, 2013 (Finnish Government, 2013). More precise objective has been set that 350 million Euros, or 1 % of the total value of Finland's public procurement should be directed to cleantech solutions. The governmental paper states that the public sector shall promote cleantech criteria and solutions in all its procurement but the key industries are construction, energy sector, transport and waste management. The governmental decision has binding force in respect to state procurement units but is a recommendation for other procurement entities. With this paper, the government also seeks for benchmarks for business that could be increasingly adopted as cleantech solutions both the Finnish and EU markets. At the moment, energy efficiency is the most important cleantech sector in Finland and around 60 % of cleantech companies have expertise on energy efficiency solutions, including the production, transfer and delivery of renewable energy, and also waste management and development of waste utilization solutions provide important market opportunities for Finnish cleantech sector (Korpiniemi, 2013).

Despite the importance of cleantech in several national and international policies, the implementation of cleantech procurement, the more precise definition, content, procurement criteria and processes and follow-up system for public cleantech procurement and investments is lacking in practice. In this paper, we suggest a method on how innovative cleantech procurement could be analysed and developed to better reach the ambitious objectives set in the national and EU level.

MATERIAL AND METHODS

In order to plan the methodology and framework for analysing cleantech and its further potential in public investments, we did a preliminary screening of 1) existing cleantech cases, 2) potential future cleantech public investments and 3) the challenges and expectations of procuring authorities towards innovative cleantech procurement and research. We asked the Finnish 'carbon neutral municipalities' and several larger cities about their interests to join the larger cleantech procurement project "Processes and Decision Support system for Innovative Public Cleantech Procurement", where this methodology to assess the cleantech procurement and processes would be developed. Altogether 14 so called 'carbon neutral municipalities' and five larger cities expressed their interest to join as well as the state procurement unit and several actors that actively promote cleantech, including ministries. In the end of the year 2013, the funding application of the research project was approved by TEKES (Finnish Funding Agency for Technology and Innovation) which is the most important publicly funded expert organisation for financing research, development and innovation in Finland (<http://www.tekes.fi/en/tekes/>). The development of the method and its expected outcome, the decision support system –database, started in the beginning of 2014.

The material in the method for studying cleantech procurement include:

1. The innovative cleantech investments and procurement cases that have already been realized in Finland (and internationally)

2. The ongoing and potential innovative cleantech investments of Finnish carbon neutral municipalities
3. Expectations and interest of procuring municipalities towards developing innovative cleantech procurement through research

Firstly, we collected cases of innovative cleantech investments that have been financed by institutions promoting innovations. Many of the cases have been funded by TEKES Innovative public procurement financing instrument. Other examples and pilots can be found for example among investments of the public hospital districts and EAKR-funded cases in which the cleantech component has been one of the determining aspects. Examples of selected cases are shown in Table 1.

Table 1. Examples of Finnish cleantech investment cases.

Case	Procurer / Financing instrument or organization	Innovative cleantech component	Reference
Design competition and solutions for sustainability of office and laboratory building “Synergy Building”	Finnish Environment Institute and Senate Properties / TEKES	Energy-efficient and ecologically sustainable building forming an excellent working environment as well as cost-effective construction.	Nissinen et al., 2010; Rintala & Nissinen, 2011
Energy production plant, planning and procurement; implementation of a small CHP power plant based on ORC technology	Energy company (owned by a Toholampi municipality) / TEKES	Use of wood-based pellets instead of fossil fuels.	http://www.tekes.fi/en/tekes/results-and-impact/cases1/2013/toholampi-min-energia-new-power-plant-type-arrives-in-finland/
New energy-efficient day care centres as life cycle implementation	City of Porvoo / TEKES	Established as life cycle project. Energy efficiency was in a significant role throughout the whole life cycle project. The total level of annual energy consumption was set in the call for bids. The choice of heating systems was left up to the bidder, with one exception: direct electric heating was not permissible.	http://www.tekes.fi/en/tekes/results-and-impact/cases1/2013/city-of-porvoo-porvoos-new-energy-efficient-day-care-centres-as-life-cycle-implementation/
Energy efficient and needs oriented supported housing	Siiliinjärvi municipality / TEKES	To improve efficiency while combining social and energy efficiency of buildings and housing. Co-operation of the public, private and third sector was essential.	http://www.tekes.fi/tekes/tulokset-ja-vaikutukset/caset/2013/siiliinjärvelle-ensimmäinen-passiivitasoinen-palvelutalo/
Design competition for a program to reduce homelessness	Cities of Espoo, Helsinki and Tampere / TEKES	The features of the service guided the design of each building. Focus was also on energy efficiency of buildings and in housing.	http://www.tekes.fi/tekes/tulokset-ja-vaikutukset/caset/2013/tampereen-kaupunki-tampereelle-uudenlainen-tukiasumisyksikko-suunnittelukilpailulla1/
Solar energy in Östersundom	Östersundom area in Helsinki region / IJI-	Residential area in Östersundom planned as using solar energy.	http://www.iji-hanke.fi/caset/lahden-seudun-kehitys-ladec-oy/

	program (EAKR)		
Zero energy children's day care	City of Lahti / IJI-program (EAKR)	Environmentally efficient building, new financing options for energy efficiency and possibilities for renewable and local energy.	http://www.iji-hanke.fi/caset/green-net-finland-ry/
Energy efficient (major) renovation, updating a large hospital complex built in 1965 to respond today's high functional requirements	HUS - The Hospital District of Helsinki and Uusimaa / TEKES	Major reduction of energy consumption. Information modelling is used during the project in order to fit the large amount of technical systems in energy efficient way.	http://www.skolry.fi/husn-meilahden-tornisairaala-pilottina-energiatehokkaassa-peruskorjaamisessa
New Childrens' Hospital in Helsinki	Public and private funding	The aim is to build the world's best pediatric hospital that offers first-rate care, comfort, safety, versatility and energy efficiency.	http://www.granlund.fi/en/news/granlund-involved-in-the-new-children-s-hospital-team/#main

Secondly, we asked for potential cleantech procurement and investments in the Finnish 'carbon neutral municipalities' (http://www.hinku-foorumi.fi/en_GB/). The potential is pre-examined through screening the investment lists of the municipalities, mainly allocated for the year 2014. Altogether 12 (of 14) municipalities delivered their investment lists (Table 2).

Table 2. Summary of the potential cleantech investments of the carbon neutral municipalities (based on their investment lists for the year 2014).

Cleantech sector	Potential cleantech component	Types of investments	Number of cases	Cost €
Building and construction: maintenance and repair, new buildings	Heat production, new solutions, e.g. ESCO type solutions, technical solutions for less water, heat and electricity use, energy efficient lift, more efficient planning and use of space, energy efficient lightning, resource efficient material use	Renovation or installation of ventilation	2	2 190 000
		Improving thermal insulation	1	150 000
		Switching heat system (in rental houses)	1	1 000 000
		Planning and constructing new buildings (sport arenas)	8	8 000 000
		Extension of school building	1	620 000
		Renovation of school buildings	5	8 700 000
		Constructing day care building	4	9 550 000
		Renovation of day care building	1	1 600 000
		Building a hospital / health care center	2	3 450 000
		Renovation of hospital / health care center	2	1 200 000

		Renovation of municipal hall	1	1 400 000
		Other Energy efficiency investments	1	200 000
		Space solutions in buildings	1	100 000
		Other renovation, e.g., lifts	2	930 000
		Lightning of rooms	1	20 000
Outdoor lightning	LED lightning	Street lights	9	4 740 000
Energy and heat production		Electricity grids	1	6 290 000
		District heating, building or extension	3	2 260 000
		Wood chips heat production	1	300 000
		Actions to fulfill the energy efficiency requirements	1	1 800 000
Vehicle	Vehicle classes, euro norms, hybrids, eco-driving, car sharing	Procurement of vehicles and equipment	2	450 000
Infra (traffic)		Junctions, highways, roads, bridges, etc.; building and renovation	11	73 100 000
Infra (water sector)		Sewage and water pipes, renovation and building	6	6 200 000
Other procurement of goods and services		Food service	1	160 000
		Equipment	7	1 570 000
		Furniture	2	86 000
		Parks, swimming facilities	5	490 000
		Other services	1	90 000
Total amount €				136 646 000

Thirdly, the procuring authorities of the municipalities and larger cities as well as Hansel Ltd that makes the state framework contracts, and other actors in the field of cleantech procurement were asked about their views about promoting the cleantech procurement through research at the same time when their preliminary willingness to participate the larger research project was requested (in August, 2013). Altogether, 22 actors and procuring authorities answered the question. The respondents' expectations and views for research needs included:

- Common operational model for public purchasers that would lead to more efficient tender competition
- Need to make the monetary benefits of cleantech investments visible
- Finding new technical cleantech solutions
- New innovative financing options for cleantech investments

- Developing a tool for follow-up (ambitious cleantech targets)
- Support for planning and implementing cleantech investments
- Possibilities for joint procurement
- Measuring the environmental impacts of realised cases and comparing them to the pre-set targets
- Tools for decision making
- New ideas and tools for innovative procurement and sharing of experiences

We used this material as basis for planning the methodology on how to analyse and promote public cleantech procurement and to provide the web based tool, i.e. decision support system for procurers and bidders to better respond the challenges arisen in the field of cleantech procurement.

RESULTS

Based on the pre-screening the realized, ongoing and coming investments of the municipalities as well as the responses from the procuring authorities about their interests and challenges in the field of cleantech, there is a call for larger research and synthesis about the success factors, measurements, tools, new innovative modes and options for implementing cleantech. It is also obvious that there are many actors and interest groups as well as information providers that could share their expertise on cleantech procurement. Thus, we create a method or research framework where this network of actors could better share the experiences and views about cleantech procurement and implement cleantech to their future investments, which would also strengthen the market and demand for cleantech solutions in Finland.

The focus is on examining the processes e.g., preparation of procurement, exchange of knowledge and financing arrangements, that could advance more environmentally friendly investments. A decision support system, also called as “cleantech procurement folder” is being built to develop these processes that aim at innovative and low carbon procurement solutions. This will provide purchasers with the possibility for joint procurement, exchange of knowledge and sharing experiences, and allow bidders to get information about future cleantech demand and public procurement criteria. This decision support system will also bring up and make the environmental and financial benefits of cleantech investments more visible. The functionality and applicability of this support system is developed further by experiences gained from testing it to real-life procurement cases in Finnish municipalities.

In the course of the project, action research approach is used, meaning that we take an active role in structuring and implementing innovative cleantech investments in co-operation with municipalities. We go through the ongoing and planned investments of participating municipalities and search for product, service and investment groups that have the potential for cleantech. Based on this we aim at finding those product groups where the innovative approach could be best applied, searching for procurement criteria and definitions of the subject matter of the contract that would support the creation of innovative cleantech investment. In addition, we apply new processes (e.g. new financing solutions) in the implementation of cleantech procurement. These could lead to more innovative procurement solutions and create new business opportunities for Finnish companies. We also look for international examples of innovative public procurement and its impact on business performance as well as communicate the results of this study and good examples of Finnish clean tech procurement internationally.

The method will consist of two phases and eight work packages (WPs). In the first phase (WP1 – WP4), the data, i.e. the content and pilot cases are selected for the decision support system (Fig. 1).

WP1 starts with gathering the data about realized cleantech investment cases that have been funded by innovation financing instruments (e.g. TEKES) and/or are otherwise known as pilots in the cleantech area. Examples can be gathered by asking participating cities and municipalities, other procuring units, governmental procuring unit and other actors in this field about their innovative cleantech investments. Then a more detailed analysis of these cases are made in workshop in which the purchasers, tenderers and other experts participate. This analysis focuses on how the purchasers and bidders consider the success factors of the investment from the innovative and environmental point of view and what are the most important components of the procurement process. In this analysis, also the impacts of the recently published revision of EU public procurement law and its preparation to the national legislation are taken into the consideration and vice versa.

The information that has been received in the WP1 and in the WP2, i.e. a more careful analysis of selected cases, will be used to formulate criteria and assessment tools for cleantech procurement, according to which public procurement can be considered as cleantech procurement or investment (WP3). Preliminary results by the research group will be discussed in a workshop in which several experts will be invited. The specific criteria will be

analysed in terms of what cleantech means in different product and service categories, and what kind of procurement criteria and requirements would support the creation of innovative solutions in different product groups and to which categories the cleantech thinking is most suitable. In addition, the criteria will focus on the procurement processes that would promote innovative cleantech investments. Also the suitability of different tools and methods that exist in measuring the environmental performance of procurement are assessed, for example life cycle costing (LCC).

The data gathered in WP2 and WP3 will be applied in the WP4 where the coming investments of the participating municipalities, cities and other organisations will be examined. The potential ongoing and future cleantech investments are analysed together with the procuring authorities in each unit, e.g., in cities or municipalities, and the possibilities to include the cleantech component are considered. We also look for potential investment cases where new innovative approaches, e.g. joint procurement or new ESCO-type financing tools could be applied. In this work package, also the cases that could be used as pilots in the ‘cleantech procurement folder’ are pre-selected.

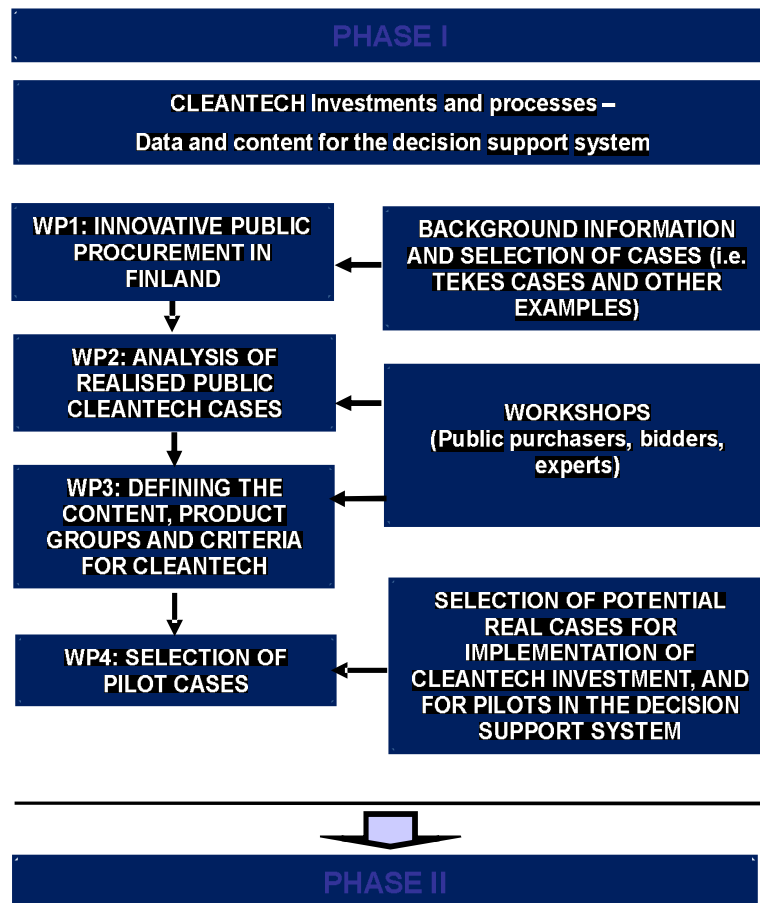
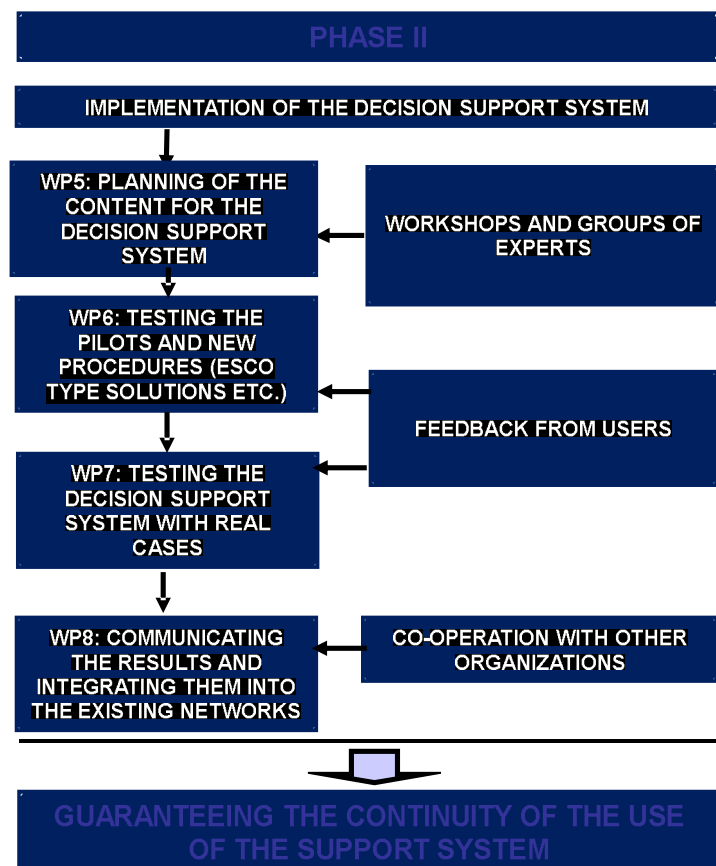


Figure 1: First phase, data gathering and analysis of cleantech procurement and its potential.

In the second phase (WP5 – WP8), the web based decision support system is planned and implemented (Fig. 2). In WP5, the content of this ‘cleantech procurement folder’ will be planned so that the objectives and results of the analysis in the first phase can be organised and communicated to users and stakeholders in a functional way. One of the most important requirements for the web interface and database is its easiness to use. In the introduction page the users could easily find links to the planned, ongoing and already realized procurement cases according to the product group and also in time order. Also international examples will be presented. An obvious task is to bring up the results from the analyses and workshops done in the first phase of the method. This database is aimed at being interactive so that the users can share their experiences and comments and create new contacts. It will be open for all users, so also companies may utilize the information on future investments on municipalities and be better prepared to respond the coming procurement requirements.

In work packages 6 and 7, the procurement cases to be included in the decision support system will be tested, i.e. how this framework would support the implementation of cleantech procurement in these cases and how it should be developed. Activating various important actors that could promote the cleantech case is an important feature of the web interface and related action. At first we test the already realized cases (analysed in WP2) and finally the ongoing or future cases will be added and tested. This will be done in the workshops of experts.

Finally, in the WP8, the decision support system will be made known in national level. In this, the interaction with other stakeholders and organizations related to public procurement and cleantech is important. The purpose is to integrate the decision support system as part of the existing networks and structures such as the Forum for carbon neutral municipalities (http://www.hinku-foorumi.fi/en_GB/).



1

Figure 2: Second phase, implementation of the decision support system.

CONCLUSIONS

Based on the pre-screening of the realized, ongoing and coming investments of the Finnish municipalities, it seems that there exist great potential for cleantech investments in public procurement. Altogether the investments that could be targeted to cleantech sector of these relatively small municipalities in Finland are over 136 million euros during the year 2014. It will be interesting to see whether cleantech procurement can be realized in state framework contracts, especially as the organization has a lot of experience of various procurement methods important in the seeking of innovations. In many municipalities, however, the preparation of large investments such as construction of buildings and infra are separated from the ‘procurement office’ for goods and services. Although in monetary terms the large investments represent the major part of the total investments of the municipalities, the volume of smaller and medium sized procurement such as goods and services is high and thus will also be focused in this analysis.

So far cleantech investments are mainly done separately in different municipalities and joint procurement is not a common procedure. In addition, the experiences of cleantech investments and the process leading to a successful procurement are quite rarely shared. However, the experience sharing organized by TEKES (Finnish Funding Agency for Technology and Innovation) has evidently promoted consciousness of the benefits and potentials as well as sharing good actions models and experiences. And good examples of joint procurement exist also from the private sector, such as the procurement of solar panels by households in small Finnish towns, Lappeenranta and Mynämäki, and this approach has raised interest also among public purchasers in several municipalities (<http://www.mynamaki.fi/uploads/Asuminen/Aurinkosahko2.pdf>). Methodology illustrated in this paper, and especially the outcome, the ‘cleantech procurement folder’ aim at finding the opportunities for joint purchase and connecting the procurement authorities and encouraging them to co-operate. One important aspect in co-operation is the possibility to share risk through new innovative financing options and partners.

In the course of the project, action research approach is used, meaning that we take an active role in structuring and implementing innovative cleantech investments in co-operation with municipalities. In addition, the interaction with purchasers, bidders, experts and other actors in the field of cleantech is seen important in both carrying out the analysis and communicating the results. The outcome of the method, the web based decision support system, aims especially at creating and strengthening the co-operation of public and private sector in creation of new innovative solutions and smart procurement and investment decisions.

The results of this project will also serve the Finnish companies so that they would be better prepared to the demand for cleantech solutions and coming investments in advance, which could have a positive impact on their competitiveness nationally and internationally and create new business opportunities. Also pilots in this study may serve as references for cleantech companies. New innovative means could also create innovative solutions for example in the fields of traffic and renewable energy. The web interface and database can also be utilized in education and other research purposes.

ACKNOWLEDGEMENTS

We acknowledge TEKES - the Finnish Funding Agency for Technology and Innovation, Ministry of Employment and Economy, Ministry of Environment, Hansel Ltd, the Association of Finnish Local and Regional Authorities, cities of Jyväskylä, Turku, Oulu, Tampere and Lahti, and the forum of 14 carbon neutral municipalities as well as Finnish Environment Institute for funding this project.

REFERENCES

Cleantech Group (2014). What is cleantech? <http://www.cleantech.com/about-cleantech-group/what-is-cleantech/> [www, visited 14.1.2014].

CMS (2013). CMS Lawyers for Business. The Impact on Key Sectors in Europe. Oxford Analytica. Report, June, 2009.

EK (2013). Cleantech Finland. http://www.ek.fi/ek/fi/ajankohtaista/uutiset/suomen_cleantechliiketoiminta_kasvoi_15_vuonna_2012-10855 [www, 10.1.2014].

European Commission (2011). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A resource-efficient Europe – Flagship initiative under the Europe 2020 strategy. Brussels, 26.1.2011 COM(2011) 21.

European Commission (2010a). Communication from the Commission – Europe 2020. A strategy for smart, sustainable and inclusive growth. Brussels 3.3.2010 COM(2010) 2020 final.

European Commission (2010b). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative Innovation Union, SEC(2010) 1161. Brussels, 6.10.2010 COM(2010) 546 final.

European Commission (2010c). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy 2020 A strategy for competitive, sustainable and secure energy, SEC(2010) 1346. Brussels, 10.11.2010 COM(2010) 639 final.

Finnish Government (2013). Government decision-in-principle on the promotion of sustainable environmental and energy solutions (cleantech solutions) in public procurement, 13.6.2013. Available at: http://www.tem.fi/en/current_issues/pending_projects/strategic_programmes_and_flagship_projects/strategic_programme_for_the_cleantech_business [www, visited 10.1.2014].

Korpiniemi, S. (2013). The Effect of Government Defined Cleantech Policy on the Infrastructure Sector SME Entrepreneur Activities after 2015. Public procurement. Thesis, Vaasa University of Applied Sciences. (*In Finnish, abstract in English*)

Nissinen, A., Juvonen, H., Kämäri, J., Linjama, J., Niemelä, J., Muttilainen, J., Rintala, T., Etelämäki, P. (2010). Identifying and assessing the critical aspects of eco-efficiency for a new Finnish office and laboratory building. SB10 Finland, Sustainable Community – buildingSMARTTM, 22-24 September in Espoo, Finland, Conference proceedings electronic version p. 768-773. ISBN 978-951-758-506-4.

Proposal for a Directive of the European Parliament and of the Council on public procurement 2011/0438 (COD)

Rintala, T. & Nissinen, A. (2011). Design competition for a near zero energy building – implementation, results and lessons to learn. Proceedings of the Sustainable Building 2011 Conference.

Stack, J., Balbach, J., Epstein, B. and Hanggi, T. (2007). Cleantech venture capital: How public policy has stimulated private investment. Environmental Entrepreneurs, Report May 15, 2007.

Sustainability and Public Procurement: Lessons learned in the University of Edinburgh

Karen Bowman¹ MA(Hons) FCIPS SRN

¹ The University of Edinburgh,
Procurement Office,
Charles Stewart House,
9-16 Chambers Street,
Edinburgh EH1 1HT
United Kingdom
E-mail: Karen.Bowman@ed.ac.uk

The University of Edinburgh has been ‘**influencing the world since 1583**’, as one of the world’s top universities, is now ranked 17th in the Top Universities QS World Rankings [1] but is also covered by public procurement law [2]. Our Vision is to recruit and develop the world’s most promising students and most outstanding staff and be a truly global university benefiting society as a whole. This is described in University of Edinburgh Strategic Plan 2012-2016 see Fig. 1: The University of Edinburgh strategic plan structure diagram [3], in current progress report in the Annual Review 2013-14, the Principal & Vice-Chancellor Professor Sir Timothy O’Shea noted “the magnificent achievement of our colleague, Professor Peter Higgs ..awarded a Nobel Prize in Physics, recognising his outstanding contribution to the theoretical work that led to the prediction of the Higgs boson particle. Professor Higgs had to wait almost 50 years before his visionary theory could be proved. [4].

The mission of our University is the creation, dissemination and curation of knowledge. As a world-leading centre of academic excellence we measure our performance against the highest international standards; produce graduates fully equipped to achieve the highest personal and professional standards and to make a significant, sustainable and socially responsible contribution to Scotland, the UK and the world, promoting health, economic growth and cultural wellbeing.



Figure 1: The University of Edinburgh strategic plan structure diagram

In common with the other ‘ancient’ Scottish Universities, the University of Edinburgh is legally constituted by the Universities (Scotland) Acts but our graduates, academic staff and members of the University Court, ensure that our wider community have a continuing voice in the well-being or prosperity of the University. The University Court of the University of Edinburgh (The Court) is the governing body and legal persona of the University; and all the property belonging to the University is vested in the Court (chaired by an elected Rector). The University is a charitable body, registered in Scotland (SC005336), and a “Recognised Body” granted degree awarding powers.

We are also a large commercial business with a financial turnover in 2012-13 of about £0.74bn p.a. generating an operating surplus on target at 5%, according to our Annual Review [4] and Financial Statements for 2012-13[5] with buildings, land and estate valued at £1.4bn. We now have 12,722 members of staff and host on campus 32,868 students and are growing rapidly. We created 171 spin-outs or start-up companies in five years and gross value add from research amounted to £201.6 million GVA and almost 3,600 jobs, assessed in 2011[6]. Our procurement of goods, services and works is around £197m p.a. All acquisition of goods, services and capital works whether on contract or not, are in effect carried out in the name of The Court of the University of Edinburgh, but most of the day to day decision making and delegated authority for procurement lies with three Academic Colleges and three Support Groups, headed by Vice-Principals. Colleges are further divided into 22 Academic Schools, who host Research Principal Investigators, shared Scottish research pools, and some highly technical National UK research infrastructure facilities as well as responsible for teaching the undergraduate, post-graduate and research students and offering open learning (2013, we were the first UK university to offer MOOCs – Massive Open Online Courses and now 47,000 people have done at least one Edinburgh MOOC course - from locations online all over the world).

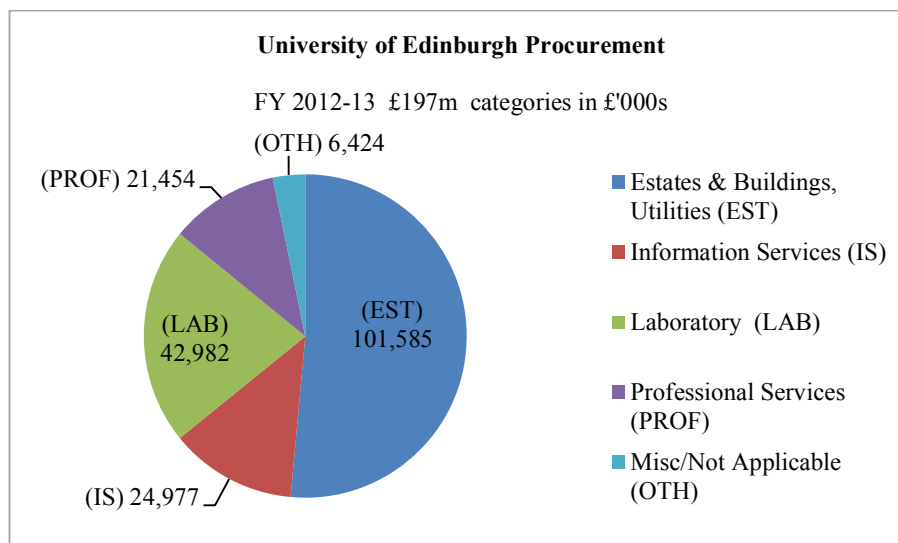


Figure 2: The University of Edinburgh procurement categories

We have a Social Responsibility and Sustainability (SRS) (formerly Environmental) Strategy 2010-2020 [7] which highlights the Global Challenges, as described by Professor Sir John Beddington, Edinburgh alumnus and Chief Scientific Adviser to the UK Government, in 2009 that, “*due to the social, environmental and economic disruption we face today, a “business as usual” approach will lead to a “perfect storm” of food, water and energy shortages by 2030*” [8]. Fig. 2: The global challenges. Our SRS strategy is monitored by a Senior Vice Principal-led Sustainability and Environmental Advisory Group (SEAG) with key participants from all Colleges and Support Groups and specialists in sustainability, estates, procurement, finance.

Global challenges	
• Urbanisation • Energy demand • Food demand • Population • Climate change • Biodiversity • Alleviating poverty • Water demand • Infectious diseases	
<i>Global Challenges (Beddington 2009)</i>	

Figure 3: The global challenges

Despite its ancient history, charitable status, business operations and enshrined ordinances of academic freedom, the University of Edinburgh is considered as a ‘public contracting authority’ under the Public Contracts (Scotland) Regulations 2012 [2]. The funding from the Scottish public purse is only 27% and for competitively won research activities from ‘public’ sources across the UK (eg Research Councils) and European Union however we cannot

evade this by the 'Cambridge' test [9] i.e. to be designated as 'non-public' despite recent self-fundraising from philanthropic donations of £350m, as public funding is majority of income, even with £ms in student tuition fees .

As in most UK public procurement contracting authorities, procurement expenditure is segmented into categories and we set priorities for improving the '*where we are now*' to '*where we would like to be*'. Looking back at our history, the University has sustained itself and looked to continuously improve and modernise; we will look at Chemistry and English, long standing disciplines, procuring very different materials, and at modern SRS ambitions.

Chemistry research and teaching could have considerable environmental issues, waste concerns and inefficient buying attitudes. Our School celebrated in 2013, its tercentenary and has improved its purchasing efficiency and effectiveness and reduced environmental impacts over time. The teaching of Chemistry at Edinburgh began in 1713. The Edinburgh Chair has been held by some famous people e.g. Joseph Black (Professor of Chemistry, 1766–1799 discovered carbon dioxide gas and latent heat). The student Chemical Society at Edinburgh University is the world's oldest chemical society (1785). Major contributions from our School include Benjamin Rush, the first Professor of Chemistry, Pennsylvania College now University (1768), signatory to the US Declaration of Independence; Benjamin Silliman, first Professor of Chemistry at Yale University (1802), demonstrated fractional distillation of petroleum; John Macadam, first lecturer in Chemistry at University of Melbourne (1862) named in Macadamia nut; Acharya Prafulla Chandra Ray: known as the Father of Indian Chemistry, founded Bengal Chemicals & Pharmaceuticals in 1893. <http://www.chem.ed.ac.uk/tercentenary/>

Although the University has, in 2013, been recognised for its commitment to equality, with policies and practices that strive to eliminate gender bias in the workplace, 300 years ago, it was inconceivable, in any university, that women could be allowed to obtain degrees, let alone follow successful academic careers. But the Edinburgh seven, led by Sophia Jex-Blake, were the first group of female medical undergraduates, even starting a riot in 1870, to obtain a UK medical degree. Even Rosalind Franklin, (after whom an award is named by the Royal Society for Chemistry), is widely regarded as not receiving sufficient recognition for her experimental work on the structure of DNA. In our Chemistry School, we have an unusually high number of female faculty [10], and won in 2011 an Athena SWAN Gold award [11]. Our Vice Principal & Head of College of Science and Engineering, Professor Lesley Yellowlees, former Head of the School is the first woman to be elected as the President of The Royal Society of Chemistry [12], and is to be made CBE (Commander of the Most Excellent Order of the British Empire) by Her Majesty the Queen. [13] Our chemists challenge 'norms' in society and in their laboratories.

The School of Chemistry has also had a female Procurement Officer, leading one of the most modern purchasing, stores and materials management services in higher education. As part of the sustainable procurement team it built up a strong reputation not only for excellent equipping and contracts management, but for efficient and effective stock-handling to bench-top reducing health and safety risks, costs to researchers and lessening consumption and chemical waste, taking a more 'green' approach to managing and tracking chemical stocks. In 2013 Chemistry won a prestigious S-LAB Award in the Laboratory Environmental Improvement category from the UK Environmental Association of Universities and Colleges [EAUC] which aims to create better linkages between, and highlight best practice among, key players involved in laboratory design, operation and management, across higher education, public sector and commercial laboratories around the world. The School of Chemistry began new chemical management in 2008 as part of our Sustainable Procurement strategy. Its innovative 'cradle to grave' system of management is the first of its kind in the world to be implemented by an academic institution. The programme tracks the procurement, storage, use and disposal of chemicals through an online database. It has been rolled out to every active laboratory in the School. In the University Staff news in August 2013 [14], Tim Calder, School of Chemistry Waste Management Officer was quoted as saying '*Chemicals are a valuable resource and as scientists it's our prerogative to make chemical purchasing, usage and disposal as sustainable and environmentally friendly as possible.*'

The use of Chemical Manager within the Enterprise Reagent Manager (ERM SciQuest) tool provides a sustainable management system for chemicals for purchase avoidance, tracking of scheduled chemicals and severe poisons, reducing disposal risks and costs and avoids potentially hazardous chemical stockpiling. The School views the correct use of Chemical Manager as obligatory for all research groups which it extends to post-doc students, undergoing supervised research or training. Even in 2005, an Internal Audit of 'Ordering and receipt of goods and services' said (edited) [15]: '*The School uses SciQuest to place orders with suppliers, bringing the triple benefit of 1) placing orders with a favoured supplier, 2) placing orders only from authorized personnel, and 3) charging purchases to the appropriate cost centre or research grant. We observed that Stores operates a well-managed system. ...Large volume, low-risk items are held in Stores as 'consignment' stock, owned by the supplier until removed from the shelf by a user, and also act as a distribution centre to other laboratories.. Further, ability to measure supplier performance has highlighted occasional failures to meet service level agreement, and substantial*

cash compensation for the University.” Note that these consignments are tracked by contracted suppliers and mean the slow-moving items go back for re-use for other clients, not just sent to waste from our School.

This School’s commitment is clear [16] on its website, “As part of the University of Edinburgh’s Social Responsibility and Sustainability Strategy, the School of Chemistry is committed to the S-LABS model promoted by the higher education environmental performance improvement (HEEPI) programme, S-LABS = a SAFE, SUCCESSFUL, and SUSTAINABLE workplace making your aspirations achievable in a manner fit for the challenges of the 21st Century. Sustainable development is an important aspect.. increasingly reflected in scientific and technical research. It is also espoused by most lab operators. However, there is often a disconnect between these aspirations and activities and day to day laboratory life. Higher education laboratories are also important places for influencing the attitudes and behaviour of the staff and students who work and study in them. Their future careers will provide many opportunities to contribute to both the research and innovation which is needed to create sustainable lifestyles and technologies, and to broader public and policy debates.”

In a less obvious in our sustainable procurement story, the University’s English Literature department –also believed to be the oldest in the world – celebrated 250th anniversary in 2012, of the first Regius Professor of ‘Rhetoric and Belles-Lettres’ (1762). An inspiration to literary greats such as Sir Walter Scott, Robert Louis Stevenson, Sir Arthur Conan Doyle and JK Rowling, Edinburgh became the world’s first UNESCO City of Literature in 2004. An exhibition at the University’s Main Library, ‘City of Words: Writers, Readers and Critics in Edinburgh, 1762–2012’, included a quote in old Scots to make sure we ‘always had enough books’ from an era where these were rare commodities. Our English department encourages students in research with societal gains e.g. an accessible text describing Ben Jonson’s walk to Scotland in 1618, a ‘Literary High Street’ downloadable app, sharing the city’s literary history. The University now spends £5.7m p.a. on books or journals/ebooks, procured collaboratively, accessible globally and, yes, real books are still re-used again and again by students. <http://www.ed.ac.uk/news/events/english>

Procurement, if defined as it is in the Scottish Procurement Policy Handbook [17], as **‘the acquisition, whether under formal contract or otherwise, of goods, services and works from third parties’** must be, by simple conjecture, just as old as the University itself. In the earliest days of academic endeavour the wealthy and educated gentry would observe and investigate phenomena, debate matters of state, politics, ethics, or carry out experiments, supported by their servant-class laboratory technicians, or scribes/secretaries and buyers! The most infamous procurements for the University of Edinburgh were the acquisition of bodies for Anatomy Lectures (which as public events, were arguably early community outreach and knowledge exchange) originally these were secretly disinterred from the local graveyards or later by even more nefarious means (as in the legendary 19th century children’s rhyme *‘Up the close and down the stair, In the house with Burke and Hare. Burke’s the butcher, Hare’s the thief, Knox, the boy who buys the beef’*) as their method was eventually to entice friendless people into their house in the West Port district in the Old Town, stupefy them with drinks and thereafter suffocate them and sell bodies to the porters at Dr Knox’s anatomy rooms at the University. At least 16 people were thus done to death before Burke and Hare were apprehended and tried in December 1828 [18]. This acquisition process was not socially responsible, nor environmentally sustainable nor economically viable! But it did inspire literary works.

But it was only in the 1980s, that Edinburgh became the very first university in the UK to appoint a Director of Procurement and [just the second in 400 years] the current incumbent is female. If our sustainable procurement strategy aims to help deliver the University’s Strategic Plan [19], we must be learning constantly about the risk matrix of social, environmental and economic factors and the opportunities to mitigate negative impacts, including supporting local small business; we use ~1000 SMEs of which about 30% are in Edinburgh and Lothians area [20]. Buying activities are still devolved to the academic management and the right to academic freedom enshrined in legal ordinances, but The Court does require expenditure to follow a Delegated Authorisation Schedule [21]. The guiding principles for acquisition from third parties [19] reflect the University’s Vision [3] (see Fig. 4).

Our function is recognised for a strategic role in Universities UK (Principal and Vice Chancellor’s) efficiency exchange [22] and 2013 Times Higher Education Leadership & Management Award: Outstanding Procurement Team [23].

"The University of Edinburgh's procurement of goods, services or works, will

- be transparent and create the most economically advantageous balance of quality and cost;
 - be driven by desired results to meet the University Strategic Plan goals, enablers and themes;
 - reduce the burden on administrative and monitoring resources;
 - lead to simplified or routine transactions using eProcurement tools;
 - be based upon open and fair competition;
 - follow all appropriate regulations and legislation including, but not limited to,
 - the Public Contracts (Scotland) Regulations 2012 as amended. [1]
 - We are a public contracting authority adhering to Scottish Public Procurement Policy Handbook [17].
 - Procurement professionals are used for approving all planned expenditure or complex acquisitions [21]."
-

Figure 4: Our procurement guiding principles

The University's SRS Strategy 2010-2020 chimes with UK Government sustainable development strategy of 2005, 'Securing the Future' [24] (StF) which neatly says *"Sustainable consumption and production requires us to achieve more with less."* *"to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations."* The 'Securing the Future' (StF) report was influential in a pan-government awareness of public procurement to "raise the game in using policy tools like public procurement specifications, minimum standards and publicly available information about the environmental performance of different products". StF recognised that *"Improving the professionalism of purchasing activity across the public sector and the more widespread use of whole-life costing will go some way to achieving this. But we also need to examine ways to stimulate and enable whole-life accounting – where expenditure looks to achieve the best outcome for the public overall, irrespective of when or where costs and benefits fall"*. The UK Government committed to work with professional and academic institutions, including the Chartered Institute of Purchasing and Supply. Now there are professional guides for CIPS Members in public and private sector and questions included in CIPS exams <http://www.cips.org/en-GB/Knowledge/Ethical-and-Sustainable-Procurement/>.

The UK asked Sir Neville Simms to quickly lead an industry and public sector Sustainable Procurement Task Force whose report "Procuring the Future Sustainable Procurement National Action Plan: Recommendations from the Sustainable Procurement Task Force" [25] (Simms Report) which confirmed that *"Procurers occupy an important position in many organisations – including those in the public sector – in that they need to liaise effectively with both internal customers and the supply chain. From this position they can influence the articulation of need by working with specifiers and users. They can – and increasingly do – work solely with the market in signalling future requirements and so stimulating product development and innovation. In order to deliver sustainable procurement, procurers – both specialists and non-specialists – have the chance to challenge the need to purchase at all."* Many public bodies embraced the practical Flexible Framework self-assessment tool to monitor and improve "People, Policy, Process, Suppliers, Results". In international collaboration to influence changes in the global economy, Simms was endorsed by the UN Marrakech Task Force on Sustainable Public Procurement, led by Switzerland, and the UK was given the leadership of the International Taskforce on Sustainable Products.

Understanding and using the role of procurement teams for efficiency and sustainability was taken further, in the same year (2006), when Scottish Ministers published John McLelland, CBE's influential Review of Public Procurement in Scotland [26] which says *"The procurement function and its organisation should be regarded as one of the most important in the undertaking and its status should rank with that of other professional functions such as finance."* McLelland's '**critical success factors**' for the estimated £8bn p.a. of Scottish public purse included corporate and social responsibility in Recommendation 9.9.1 "While the achievement of Best Value remains the primary goal, each organisation's adopted corporate and social responsibilities should be translated into guidelines and a specific practices document". In Scotland too, Ministerial response was rapid, asking McLelland to chair the Scottish pan-public Procurement Reform Board, initially. Scotland has sustained procurement leadership, now with the Depute First Minister of Scotland, Nicola Sturgeon, MSP. The Scottish Model of Procurement [27] says 'embedding sustainability in all we do'. And a 'procurement reform' bill is making its way through Scottish Parliament [28]. The University Director of Procurement was invited to comment by Parliamentary Committees and by senior civil service. The draft Bill adds to Scots law on transparency (EU Directives), procurement equalities duties, bribery act, and other probity policies, as well as environmental law, e.g. on Climate Change [29]

Scottish Procurement



Figure 5: Scottish Model of Procurement

Our Principal&Vice-Chancellor signed up to the Universities & Colleges Climate Commitment for Scotland (UCCCCfS) in 2010 and we have now created (2013) a Social Responsibility and Sustainability Directorate, headed up by Dave Gorman, a former senior member of the Scottish Environmental Protection Agency. UCCCCfS was supported by the Environmental Association of Universities and Colleges (EAUC) who published each institution's Climate Change Action Plans 2010 [30] <http://www.eauc.org.uk/ucccfs/ccaps> to demonstrate publicly the top-level commitment to greenhouse gas reduction and mitigation and UCCCCfS aim to *"Allocate time and resources to implementing measures to reduce our overall carbon footprint and engage in the community planning process to deliver low-carbon solutions ('mitigation') ... including: energy consumption and source, waste reduction, recycling and responsible disposal, sustainable estate development, sustainable travel planning, and responsible procurement of goods and services."* Our outcomes are reported publicly by our SRS Highlights [31] such as energy efficiency improvements since signing up on top of £12million invested in Combined Heat and Power (CHP) energy centres over 2002-05, which had successfully cut carbon emissions by 8,500 tonnes CO₂e/year, and generated annual savings of £1.5m i.e. similar centres are being built or in plans; the 3% annual target for waste reduction was achieved with 67 percent recycling rate in 2010/11, and a small emissions reduction. Recognising that suppliers are key to CO₂e emissions, our procurement team initiated discussions with an academic group and a software solution provider on carbon intensity from supply chain, as detailed in DECC GHG protocol, estimated this at 78,000 tCO₂e, major construction projects creating 26%. Supply chain carbon intensity was 0.569 tCO₂e / £1,000. Although the supplier survey proved too burdensome for SMEs, the Director of Procurement then co-convoked with EAUC and procurement shared service (APUC Ltd) a Sustainable Procurement Topic Support Network which agreed to adopt the HEFCE standard approach for the baseline year (2012-13) for higher education statistics [32] to allow comparisons and collaborations. APUC provides the Scottish universities the analysis, saving around £200k on process and shared CO₂e categorized data is available to the Procurement Strategy Group of directors/ heads of procurement for review. The data should be available by conference date.

On behalf of the Vice Principals, the Director of Procurement volunteered to lead on other SRS themes e.g. to help the University of Edinburgh become Scotland's first Fairtrade University, following a students' vote in 2004 [33] and to be among Scottish public bodies who signed up to a Suppliers' Charter in 2009 [34] . During 2012, investigated and followed up students' suggestion that Edinburgh should again be first in Scotland, (and an early adopter in the UK higher education sector), to join USA and international universities, as an affiliate to the garment Workers' Rights Consortium [35]. And most recently procurement people, with students and environmental specialists, lead on steering APUC's development of a sustainable supply chain policy and code of conduct. [36] with a searchable supplier sustainability accreditation database under development for Scottish universities and colleges. And we work with Scottish Government on best practices, prioritization methods (updating Marrakech).

As our procurement teams go about organising for OJEU [2] tenders, collaborative or local contracts or direct awards (if justified legally) to deliver targets to meet customer demands, we are growing professional impact on the total influenceable spend of the University, on behalf of the legal persona, The Court. As there is no formal mandate and we are in an international community used to academic freedom, we have to use a variety of ways to influence and gain a stronger ethos for whole life costs, and wider social responsibility and sustainability issues, to help our colleagues to choose criteria reflecting the strategies e.g. in evaluation models, supplier pre-qualification

questions, technical specifications or contractual terms. One simple method of influence is to support delegated authorities by a firm and persistent emphasis on compliance with the public procurement law obligations. Personal and corporate liability for health & safety, equalities duties, anti-bribery processes, add a 'fear factor' which can reduce the debate into simple terms, but arguing for a 'sustainable' option over what appears less expensive in the short term can now be done more easily if whole life costs & such risks are considered. We have grown to 81% influence, making £8-£15m p.a. aggregated procurement efficiencies and retaining fair trade status over ten years.

We decided to review the APUC 'commodity' Risk Matrix and to gradually replace the current tracker with the UN Marrakech outputs for clarity to users to see where their buying decisions can have best (and worst) environmental, social and economic sustainability effects. We took legal, specialist human resources and equalities challenge unit advice on people matters (equalities, anti-corruption and bribery, workers' rights) to code priorities. Obviously this can only go so far, as individual ethics come into play, but our core values match the University's Strategic Plan; procurement staff hold to a professional ethical code as Members or Fellow of Chartered Institute of Purchasing and Supply (CIPS) [37]. A team briefing note explains the Marrakech outline way of thinking (Fig. 5).

Marrakech Outline – team briefing note Think “Purpose” not “Purchase” Think creatively.... Innovate..... be brave. Important to engage early on to facilitate discovery & supplier engagement. If service or product is out there on a managed contract, engage with supplier to discuss changes within their agreement which can limit SRS impact. “Close the loop” from acquisition to re-use to ultimate disposal. Ensure that you have a sound method to capture social responsibility and sustainability benefits and to measure. Communicate via agreed communications strategy the “good news”.

Figure 6: Marrakech Outline – team briefing note

From our spend categories (see Fig.2) and 'sub-commodities', we assessed across 6 key risks scored 0-3 for each risk with total commodity SRS risk score maximum of 18 (Table 1). Score >15 is a prioritisation for UN Marrakech highly relevant <http://www.ed.ac.uk/procurement/sustainableprocurement/sustainable-procurement/srs-risk-matrix>

Our category team leader, Stuart McLean led this and for the University is now helping to test and commenting on the current revisions and enhancements of Prioritisation Methodology (and Flexible Framework) for Scottish Government 'Embedding Sustainable Procurement in Scotland's Policies, Strategies and Systems' with Barbara Morton, who was Technical Advisor to the UN Marrakech Task Force on Sustainable Public Procurement.

Key:	>15 = Highly Relevant/risk, >11 = Medium Relevance/risk, > 9 = Low Relevance/risk	Marrakech Pre-Prioritisation		
Com Code	Commodity Code (Com Code) Description	Priority 1 (>15)	Priority2 (>11)	Priority 3 (>9)
A	The Arts, Audio-Visual & Multimedia Supplies and Services	0	11	14
B	Library & Publications	0	1	6
C	Catering Supplies & Services	0	5	14
D	Medical, Surgical, Nursing Supplies & Services	0	3	5
E	Agriculture/Fisheries/Forestry/Horticulture/Oceanographic Supplies etc	0	5	10
F	Furniture, Furnishings & textiles	0	2	15
H	Janitorial & Domestic Supplies & Services	0	4	9
J	Utilities	3	4	6
K	Computer Supplies & Services	7	12	15
L	Laboratory/Animal House Supplies & Services	5	40	85
M	Workshop & Maintenance Supplies (Lab & Estates)	0	1	7
P	Printing	0	3	5
Q	Telecommunications, Postal & Mail Room Services	0	5	7
R	Professional & Bought-in Services	0	4	0
S	Stationery & Office Supplies	0	2	2
T	Travel & Transport (incl. Vehicle hire & Subsistence)	4	13	17
U	Safety & Security	0	6	8
V	Vehicles (Purchase, Lease, Contract Hire)	0	5	8
W	Estates & Buildings	14	24	25

Table 1: Commodity Marrakech pre-prioritisation – risk matrix

In some more traditional public bodies, the more challenging stakeholders like students (EUSA or people & planet) and having successive elected Rectors from 'green' political persuasions, could be seen as unhelpful to the value for money targets, but although at times a lack of understanding of procurement laws can impinge, the long standing commitment of the University to work with EUSA on 'fair trade' is now enshrined in the Strategic Plan 2013-16 [3]. The Procurement teams are improving student experience by working through issues in the real-world environment of legal and policy drivers, against political agendas, commercial realities or information constraints. Our graduate trainee liaised with the SRS engagement team to design a survey on staff and student views of our teams' impact on sustainable procurement. This is part of the now well established Edinburgh Sustainability Awards which offer an opportunity for staff and students to make a difference and contribute towards the University plans by becoming more socially responsible and sustainable, not just in their buying. The awards are run by EUSA and the University's Department for Social Responsibility and Sustainability. [38] And 460 University Contracted Suppliers were surveyed for opinions on our sustainable procurement strategy, as part of Suppliers Charter and improvement plans.[this data will be available by the date of the conference]

Our students association (EUSA) had its largest turnout to vote for a policy matter, when its then President Will Garton, put a motion in 2003 that the University of Edinburgh should become the first Fairtrade University in Scotland, referred to in Harriet Lamb, CBE's book **"Fighting the Banana Wars and Other Fairtrade Battles"** [39]. Then fair trade was mainly hot beverages or catering, which is provided by EUSA student outlets or University's Accommodation Services e.g. in catered halls of residence, internal meetings, private commercial lets or external events. Assistant director (catering) Ian Macaulay became a UK education champion for fair trade, influencing procurement groups and supply chains. Fairtrade 'status' is certified by UK Fairtrade Foundation's 'five goals' http://www.fairtrade.org.uk/get_involved/campaigns/fairtrade_universities/about_fairtrade_universities.aspx



Figure 7: What is a Fairtrade University?

The updated Fair Trade policy (approved by SEAG and The University Court in 2013) reflects this ten year journey and refers not just to the 'Fairtrade' branded copyright <http://www.ed.ac.uk/about/sustainability/fairtrade/fairtrade-university/trade-policy> but is encouraging a deeper approach by both building a community of practice and also a related academic network which encourages debate in public lectures, seminars and social media and academic blog posts. Students visited local schools to spread fair trade stories, winning the best UK Fairtrade campaign award 2012. Our students' fair trade cafe in the chaplaincy won the city's Lord Provost fair trade community award 2010 for ethical societies to knitting soc. came weekly to a fairly traded feast. We give students a chance to meet fair trade producers in person every year and it has been great to educate (somewhat privileged) young people. Ben Miller, when a student, won Principal's Medal for Community work and Lord Provost's fair trade education award.

The business case for a specific research and policy officer to go 'behind the label' was made and part funded from procurement budget, after a number of student dissertations on fair trade, including PPP group MSc project [40] and a summer internship showed that teaching and research on related topics in the University was hard to identify or access for students (or staff), and many are confused by 'fair trade' vs 'Fairtrade' and so research on trade ethics is needed. Our Just World Institute leader, Professor Tim Hayward, agreed to convene a fair trade academic network.

As part of a strong campaign by people and planet group, our SEAG fair trade steering group recommended that the University join the Workers' Rights Consortium (WRC <http://www.workersrights.org/>) a New York nonprofit corporation, an independent, non-political labour rights monitoring organisation, which makes efforts to collaborate to improve the conditions of workers in the global garment industry. The WRC Code meets the International Labour Organisation standard <http://www.ilo.org/global/lang--en/index.htm>. SEAG approved after WRC

accreditation was adapted by our Director of Procurement to ensure compatibility with EU law, and then it was formally approved by The Court. As we collaborate on procuring garments, we have advised other UK universities. WRC have helped achieve the Bangladesh Fire and Safety Accord [41] with over 100 well-known brands, after the horrendous Rana Plaza disaster. As garments are a tiny portion of our procurement, we are now working to develop and implement, across 150 suppliers, initially those on framework agreements via APUC, a Supply Chain Sustainability policy [36] evidence of 'eco label' claims on environment, social, economic (tax payment behaviours) suitable for social audits over time. We believe the student leadership from Edinburgh, Aberdeen and National Union of Students -Scotland working with procurement people, environmental specialists as equals is unique and meets the Suppliers Charter in the Scottish Sustainable Procurement Action Plan 2009 [34].

We are independently assessed as '**superior**' in Procurement Capability Assessment [42] which includes Scottish flavour of the Flexible Framework [25] Question 4.5 is '**How does the organisation monitor progress towards demonstrating sustainable procurement practices and processes?**' and refers to the Flexible Framework levels.

Discussion: In the context of a global institution with strategic drivers for excellence, and academic freedom, with student activists and world experts at the University of Edinburgh, it is relatively easy to see sustainable and socially responsible procurement as a natural underpinning. Recent developments, partly described here, led to the Principal's medal for Outstanding Service being given to the Director of Procurement in 2011. But we are still learning and aim to continuously improve so that the University of Edinburgh '**influencing the world since 1593**' will still be able to continue to help future generations to meet the global challenges for another 400 years or more.

Acknowledgements

I would like to acknowledge the excellent work of our procurement team, in particular Stuart McLean, Evelyn Bain, George Sked and a special appreciation to Morag Eadie; For Fair Trade ten years: Liz Cooper Prof. T. Hayward, Ian. Macaulay, David Somervell, Angela Lewthwaite and new Director of SRS, Dave Gorman; Vice Principals N. Paul, M. Bownes, G. Boulton; Students leaders Will Garton, Ben Miller, Dan Abrahams, Philippa Faulkner, Max Crema, Kirsty Hughes, intern Sophie Whitehead; APUC Ltd: Barbara Munro, Emma Nicholson, Stephen Connor, Angus Warren; Special thanks to Barbara Morton, Technical Advisor to the UN Marrakech Task Force on Sustainable Public Procurement. Prof. Lesley Yellowlees and Principal & Vice Chancellor Professor Sir Timothy O'Shea for inspirational leadership and in my gratitude for the Principal's Medal for Outstanding Service.

References

- [1] © QS Quacquarelli Symonds Limited (1994-2013): QS World University Rankings 2013/14 <http://www.topuniversities.com/university-rankings/world-university-rankings/2013> (accessed 28.Nov.2013)
- [2] Scottish Government. (2012): SCOTTISH STATUTORY INSTRUMENTS 2012 No. 88 PUBLIC PROCUREMENT The Public Contracts (Scotland) Regulations 2012 <http://www.legislation.gov.uk/ssi/2012/88/made>
- [3] The University of Edinburgh (2012): Strategic Plan 2012-16 (accessed 28.Nov.2013) <http://www.docs.sasg.ed.ac.uk/gasp/strategicplanning/201216/StrategicPlan201216.pdf>
- [4] The University of Edinburgh (2014): Annual Review 2012/13 <http://www.ed.ac.uk/about/annual-review> (accessed 30.Jan.2014)
- [5] The University of Edinburgh (2013): Annual Report and Accounts for the year to 31 July 2013 <http://www.ed.ac.uk/schools-departments/finance/transparency/financial-statements/2010-19> (accessed 27.Jan.2014)
- [6] BiGGAR Economics (May 2012): Economic Impact of the University of Edinburgh's Commercialisation Activity, a report to Edinburgh Research and Innovation (internal report accessed 1.Nov.13)
- [7] The University of Edinburgh (2010): http://www.ed.ac.uk/polopoly_fs/1.59307!/fileManager/UoE-SRS-Strategy2010-20.pdf (accessed 28.Nov.2013)
- [8] John Beddington, UK Government Office for Science, (2009): Food, Energy, Water and the Climate: A Perfect Storm of Global Events? <http://www.dius.gov.uk/assets/goscience/docs/p/perfect-storm-paper.pdf> (accessed 27.Jan.2014)
- [9] Judgment of the Court (Fifth Chamber) of 3 October 2000. - The Queen v H.M. Treasury, ex parte The University of Cambridge. - Case C-380/98 (accessed EurLex 31.Jan.2013).
- [10] University of Edinburgh, School of Chemistry, website.
21% of academic and research staff are female (compared to 15.3% across the UK in 2007)
18% of our full professors are female (compared to 6% across the UK in 2007)
Relative proportion of females is slightly higher among permanent staff, and has held for the last 10 years.
- [11] The award is given for excellence in the advancement and promotion of the careers of women in science, engineering and technology (SET). Athena SWAN requires award holders to put in place policies to promote equality in areas such as organisational culture, work-life balance and promotion policies.
- [12] <http://www.rsc.org/AboutUs/News/PressReleases/2013/Lesley-Yellowlees-sexism-in-science.asp>
- [13] <http://www.chem.ed.ac.uk/news-events/news/cbe-professor-yellowlees> (accessed 31.Jan.2014)
- [14] <http://www.ed.ac.uk/news/staff/chemical-tracking-070813> (accessed 31.Jan.2014)
- [15] The University of Edinburgh (2006): INTERNAL AUDIT REPORT School of Chemistry 05/22
- [16] The University of Edinburgh, School of Chemistry. (accessed 06.Jan.2014): Sustainability. <http://www.chem.ed.ac.uk/about-us/safety-and-sustainability/sustainability>

- [17] Scottish Government. (2008) (accessed 06.Jan.2014): Public Procurement Reform Programme, Scottish Procurement Policy Handbook. <http://www.scotland.gov.uk/Resource/Doc/256155/0076031.pdf>
- [18] The Anatomy Museum, The University of Edinburgh. (accessed 06.Jan.2014): <http://www.anatomy.mvm.ed.ac.uk/museum/whatson-collections-burke.php>
- [19] The University of Edinburgh. (May 2013): University of Edinburgh Procurement Strategy 2012-16 http://www.docs.csg.ed.ac.uk/Procurement/policies_procedures/ProcurementStrategyMay2013.pdf
- [20] informal analysis of spend with SMEs, data from Scottish Procurement Hub for period FY 2012-13.
- [21] The University of Edinburgh (Approved 21 June 2010, Amended 20 December 2010, Amended 19 September 2011) (accessed 06.Jan.2014): DELEGATED AUTHORISATION SCHEDULE <http://www.docs.sasg.ed.ac.uk/GaSP/Governance/Governance/DelegatedAuthorisationSchedule.pdf>
- [22] Universities UK efficiency exchange (July 2013) Case study: strategic procurement <http://www.efficiencyexchange.ac.uk/wp-content/uploads/Sustainable-procurement-for-strategic-impact-University-of-Edinburgh-case-study-July-2013.pdf> (accessed 31.Jan.2014)
- [23] The University of Edinburgh Staff Bulletin (Autumn 2013): Procurement in spotlight http://www.ed.ac.uk/polopoly_fs/1.1268151/fileManager/131111autumn-bulletin-2013.pdf
- [24] HM Government (2005): Securing the future, delivering UK sustainable development strategy, Cm 6467 Printed in the UK for The Stationery Office Limited on behalf of the Controller of Her Majesty's Stationery Office 03/05, 176844 (pdf copy provided by Barbara Morton, 18.Dec.2012) Barbara Morton, Director Sustainable Procurement Ltd barbara@sustainableprocurement.eu.com
- [25] HM Government (2005): Procuring the Future Sustainable Procurement National Action Plan: Recommendations from the Sustainable Procurement Task Force, Department for Environment, Food and Rural Affairs (pdf copy provided by Barbara Morton, 18.Dec.2012) Barbara Morton, Director Sustainable Procurement Ltd barbara@sustainableprocurement.eu.com
- [26] The Scottish Government (March, 2006) Review of Public Procurement in Scotland - Report and Recommendations (accessed 27.Jan.2014) <http://www.scotland.gov.uk/Publications/2006/03/14105448/0>
- [27] The Scottish Government (accessed 31.Jan.2014) Scottish Model of Procurement <http://www.scotland.gov.uk/Topics/Government/Procurement/about/spd-aims>
- [28] The Scottish Parliament (2014): Procurement Reform (Scotland) Bill <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/68170.aspxPublic> Procurement Reform Bill (accessed 31.Jan.2014)
- [29] Legislation.Gov.Uk. The National Archives (2009): Climate Change (Scotland) Act 2009 <http://www.legislation.gov.uk/asp/2009/12/contents> (accessed 31.Jan.2014)
- [30] Universities and Colleges Climate Commitment for Scotland (2009): Climate Action Plans published by the EAUC Environmental Association for Universities and Colleges (2011) (accessed 27.Jan.2014) <http://www.eauc.org.uk/ucccf/home> ; University of Edinburgh plans <http://www.eauc.org.uk/ucccf/ccaps>
- [31] The University of Edinburgh (Dec 2013): 2012-13 Highlights Report <http://www.ed.ac.uk/about/sustainability/about/highlights-report/2012-13> (accessed 31.Jan.2014)
- [32] Higher Education Funding Council For England (2013): Measuring Scope 3 carbon emissions <http://www.hefce.ac.uk/pubs/rereports/year/2012/scope3carbon/#supply> (accessed 31.Jan.2014)
- [33] Fairtrade Foundation UK. (accessed 28.Nov.2013): About Fairtrade Universities and Colleges http://www.fairtrade.org.uk/get_involved/campaigns/fairtrade_universities/about_fairtrade_universities.aspx
- [34] Scottish Government. (2009): Scottish Sustainable Procurement Action Plan as applied in The University of Edinburgh <http://www.ed.ac.uk/schools-departments/procurement/sustainableprocurement/sustainable-procurement/flexible-framework> (accessed 06.Jan.2014):
- [35] Workers' Rights Consortium (2013): (accessed 28.Nov.2013): <http://www.workersrights.org/>
- [36] APUC Ltd (2013): APUC Supply Chain Policy as applied in the University of Edinburgh (accessed 06.Jan.2014): <http://www.ed.ac.uk/schools-departments/procurement/policies-procedures/apuc-supply-chain-sustainability>
- [37] Chartered Institute of Purchasing and Supply (2013): CIPS Code of Conduct <http://www.cips.org/en-GB/aboutcips/CIPS-Code-of-Conduct/> (accessed. 31.Jan.2014)
- [38] University of Edinburgh (2013): Edinburgh Sustainability Awards (accessed 27.Jan.2014) <http://www.ed.ac.uk/about/sustainability/what-we-do/awards/about>
- [39] Harriet Lamb, CBE (2008): Fighting the Banana Wars and Other Fairtrade Battles (Rider 2008)
- [40] University of Edinburgh (2011): MSc students : Fairtrade Engagement Strategy 2011 <http://www.docs.csg.ed.ac.uk/Procurement/FairTrade/EgagementStrategy2011.pdf> (accessed 31.Jan.2014)
- [41] Accord on Fire and Building Safety in Bangladesh (May, 2013): The International Labour Organisation (ILO) acts as the independent chair. "The undersigned parties are committed to the goal of a safe and sustainable Bangladeshi Ready-Made Garment ("RMG") industry in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures." <http://www.bangladeshaccord.org/> (accessed 27.Jan.2014)
- [42] Scottish Government. (2013) (accessed 06.Jan.2014): Procurement Capability Assessment 2013 <http://www.scotland.gov.uk/Resource/0042/00425955.pdf>

What are the challenges to sustainable procurement in commercial semi-state bodies in Ireland?

Joey Gormly
Dublin Bus/Dublin City University,
Dublin 7, Ireland
E-mail: joey.gormly2@mail.dcu.ie/joey.gormly@dublinbus.ie

ABSTRACT Sustainable procurement has been identified by the EU as a conduit to meet the Europe 2020 targets on climate change and energy sustainability. It is unclear as to what extent sustainable procurement is being practised in Ireland and what barriers there are to implementing it in organisations. This study provides the first complete insight into the use of sustainable procurement in Irish commercial semi-state bodies. It explores the extent and type of use of sustainable procurement plus identifies and examines the challenges to its use. The literature review analyses the use of sustainable procurement and identifies nine internal and six external barriers to the use of sustainable procurement.

A deductive approach is utilised in order to determine the barriers. Eleven participants, nine from the commercial semi-state bodies and two experts with knowledge of this subject, are interviewed using semi-structured questions. The research findings show that sustainable procurement is being practised in the majority of the commercial semi-state bodies while its application is primarily in the environmental and economic aspects. Eight existing internal barriers are found to be present and three new internal barriers are identified. Evidence of four out of the six external barriers identified in the literature is found.

Sustainable procurement is being practised by commercial semi-state bodies to varying degrees. Definition of sustainable procurement, the absence of mandatory guidelines, cost, time and a dearth of sustainable procurement knowledge by suppliers are some of the main barriers put forward by participants. More direction and support is required from the government and the EU to help overcome these barriers.

1. INTRODUCTION

The United Nation's commissioned report in 1987 entitled "Our Common Future" chaired by the Norwegian Prime Minister, Gro Harlem Brundtland advocated that long term strategies must be put in place to protect the environment and allow for sustainable development. This report, the third independent world commission of its kind, also highlighted the importance of food security, the danger of increasing population and the threat to species and our eco-systems (World Commission on Environment and Development, 1987). Over two decades later, in March 2010, the European Commission issued its 10 year strategy entitled Europe 2020, with five targets; employment, research and development, climate change and sustainability, education and fighting poverty and social exclusion. There are common themes between the UN and EU reports.

Public Procurement, by way of Sustainable Procurement (SP) or Green Procurement (GP), has been identified by the EU as one conduit which can greatly assist in attaining these targets (<http://ec.europa.eu/europe2020>). This is due to the influence that public procurers can have over the market as a result of the annual public expenditure of over two trillion Euros. The use of sustainable and green procurement criteria, in the procurement of goods, services and works, can assist in attaining these goals. Therefore the EU has decreed that SP should be utilised to achieve these targets (Buying Green 2011). Member states have reacted differently to the Europe2020 objective so in order to stimulate action in this area each member state has been encouraged by the EU to "adopt National Action Plans (NAPs) for greening their public procurement, outlining the priority objectives at national level and setting out the environmental criteria for some priority product categories" (Tarantini, Loprieno and Porta 2011, p.2473) in order to align its strategy with Europe 2020 targets.

It has been demonstrated that the rates of adoption of NAPs by EU member states vary however. According to a report entitled The Uptake of Green Public Procurement (GPP) published in 2012 the EU27 this rate of adoption may account for the high rate of uptake in GPP in some countries (e.g. Denmark over 80% uptake – NAP introduced in 1994 and revised in 2008) and the low rate of uptake in others (e.g. Ireland less than 20% uptake – though there was no NAP in place at the time of study it has since been published in 2012) (Appendix I). Some of the main findings of the study conclude that the uptake of core GPP criteria is on the increase, the uptake varies significantly across the 27 countries and that many authorities have difficulty in using GPP criteria in its procurement processes (European Commission 2012).

The Irish Government's own NAP, entitled 'Green Tenders', was launched in January 2012. Its objective is to assist public authorities in using GPP in order to procure more resource-efficient and environmentally friendly goods,

services and works with public money. It is apparent from this publication that there is a national agenda to utilise SP however it is still without real legislative obligation. As a result it is unclear as to whether it is actually being implemented by public and semi-state bodies and what, if any, barriers exist in preventing its use. Little research has been conducted in the use of SP in an Irish context, particularly from a commercial semi-state perspective. In light of this, a first qualitative insight into how SP is being practised in Irish commercial semi-state bodies will be conducted by exploring its use in these organisations. Secondly the research will attempt to ascertain what the barriers are to using SP and will then examine these barriers.

2. LITERATURE REVIEW

2.1 Introduction

It is widely acknowledged that public procurement is a key actor in stimulating economic activity throughout the EU. The role of procurement in organisations has increased in recent years particularly in public authorities as a result of the worldwide economic recession and the resultant decrease in funds for government expenditure. A greater emphasis, especially in Ireland, has been placed on the need for the reduction of costs and obtaining better value for money. By procurement it is understood that it includes;

all activities required in order to get the product from the supplier to its final destination...based on total cost of ownership (TCO), rather than price. (Van Weele 2010, p.407)

When procurement is carried out on behalf of the public, according to Uyarra and Flanagan (2010, p.6), it is the “acquisition of goods and services by government or public sector organizations” and according to McCrudden (2004) can assist in delivering government objectives like encouraging innovation in domestic supply markets, through the use of public money in supporting social and environmental aims. It is also noted by Thai (2001) as one of the key economic activities of government.

Environmental management has made it onto the agendas of organisations both in Ireland and the EU. This is reflected in the growth of quality environmental management system standards such as ISO14001 and Europe’s Eco-Management and Audit Scheme (EMAS) (Morton 2002). Sustainability and sustainable development has also gained more importance of late. The use of the term sustainable development “development which meets the needs of the present without compromising the ability of future generations to meet their own needs” (World Commission on Environment and Development 1987) was propagated by the Brundtland Report. Sustainability, as Shrivastava (1995, p.955) puts it, can be viewed as “the potential for reducing long-term risks associated with resource depletion, fluctuations in energy costs, product liabilities, and pollution and waste management.”

There is an abundance of definitions of sustainable development and sustainability but it is generally accepted that it refers to the consideration of the social, economic and environmental aspects of an organisation’s business and its interaction with these elements. However Carter and Rogers (2008) argue that a review of existing literature demonstrates that sustainability has not been defined and applied consistently in research. Elkington (1998, 2004) conceptualises it as the ‘triple bottom line’; the balancing of environmental, economic and social goals from a microeconomic viewpoint.

Carter and Rogers (2008) design that sustainability is now featuring in management and operations literature. It is not certain however if the application of the ideals of sustainability adds value to businesses and thereby increasing the chances of economic success as it appears that little grounded research has been carried out in this area. Such data would be of benefit to any organisation which has implemented sustainability measures recently and is looking to establish what, if any, added value was achieved. Equally an organisation looking to push through sustainable actions would gain from such research. The relationship between sustainability and procurement is one that also requires further exploration and will be discussed later in the literature review.

2.2 The Social, the Environment and the Economic

The development of the social, economic and environmental aspects of businesses has been evident for some years now. For instance ideas of social responsibility have been debated for decades. Davis (1960 cited in Carroll 1979, p.497), Eels and Walton (1961 cited in Carroll 1979, p.497) and Milton Friedman (1962 cited in Carroll 1979, p.497) all give their arguments concerning what they believed the social responsibilities of businesses to be. Inter alia McGuire (1963 cited in Carroll 1979, p.497) put forward the opinion that “the idea of social responsibilities supposes that the corporation has not only economic and legal obligations, but also certain responsibilities to society which extend beyond these obligations”. Manne (1972) believed that any act of CSR (Corporate Social Responsibility) on the part of an organisation should be purely voluntary.

Archie Carroll’s (1979) corporate social performance model (Fig. 1) looked at, among others, the legal, ethical, economic and environmental responsibilities that come with CSR both from a management and business perspective. His model was intended to assist management in understanding that social responsibility and economic

performance of businesses were not separate entities but a whole one. Consideration of social, economic and environmental factors by businesses is difficult as Hawkins (2006, p.12) states that “It is a complex task to factor sustainable, economic, environmental and social objectives into business decision making”. Baker (2002) writes in a similar vein about the promotion of sustainable development and the boundaries between the economic, ecological and social aspects of it.

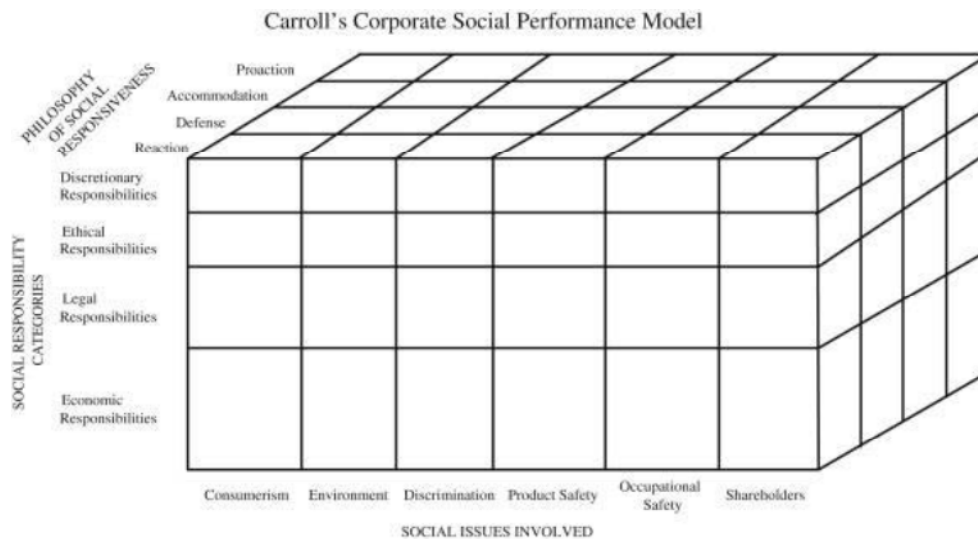


Figure 1: The Corporate Social Performance Model

2.3 Sustainability in Business

Organisations are increasingly adopting the concept of sustainability to assist in their quest for greater market share. Media, academic literature and company practices trends show that there has been an increase in concern in relation to sustainable development and also the affect that businesses can have on the environment and society (Boykoff and Boykoff 2007). This has been demonstrated by the introduction of the Dow Jones Sustainability Indexes by the Dow Jones and the FTSE4Good Index Series by the FTSE (Walker and Brammer 2012, p.1).

However is it possible for companies that engage in sustainable practices to achieve greater economic performances than companies who simply focus on economic performance alone? Hoffman and Bazerman (2005, p.16) encapsulate and diagnose this question succinctly:

The key to resolving this debate is the recognition that (social and environmental) behaviours are sometimes profit-compatible and sometimes not. When parties acknowledge this simple fact, it becomes easier to convince corporations to adopt (environmental and social initiatives) that are mutually beneficial.

In terms of procurement an assumption can be made to this effect also. However when compliance with EU public procurement directives is required it becomes a much more complex task. Within business disciplines comparative developments in social, environment and economic areas have been conceptualised. For example within business to business marketing enviropreneurial marketing looks at managing customer demand in a more sustainable manner. In has begun to incorporate the practice of greener strategies in their discipline. It was Varadarajan (1992) who first created the term enviropreneurial marketing and it was used to express the need for marketing to integrate environmental and entrepreneurial aspects into their marketing strategies. The initial concept of enviropreneurial marketing has been developed further by Banerjee et al. (2003) who advanced the idea of corporate environmentalism in two main elements; environmental strategy and environmental orientation.

Life Cycle Assessment is an effective tool that can be used across all disciplines such as engineering, science as well as procurement and evaluate the total cost of a product from beginning (birth) to its end (death). It is one of a group of similar terms given to methods of determining the overall cost of buying a product to an organisation. LCA can also be referred to as Life Cycle Cost (LCC) and Total Cost of Ownership (TCO) though TCO is more commonly used with regard to Information Communication Technology (ICT) products. Traditional supplier selection methods, which were based mainly on price, often deemphasised costs attributable to all aspects of a supplier's performance and usually disregarded internal costs. Taking account of all costs is a sustainable method of measuring the actual total cost of a product or service. Also it can incorporate the costs of order replacement, researching and selecting potential suppliers, receipt and inspection of goods, delivery costs, storage and end of life disposal.

LCA is a vital tool in SP and aids strategic cost management. Lysons and Farrington (2006, p.58) point out that there are advantages in terms of environmental factors, durability factors, obsolescence and changing demand when using LCAs. An example of its use can be found when trying to measure the total environmental impact of a product or service on the earth as evidenced by Tarantini, Loprieno and Porta's (2011) case study of windows in Italy. This study provides a thorough examination of a life cycle in terms of the actual production of the windows, its part in the building process, its phase in use and finally its end of life disposal. These examples show that businesses and their functions are aware of and are adopting ways of managing sustainability and the three elements (social, environment and economic) into their business strategies and operations. The emergence of SP since is one such policy or strategy to manage the environment from a procurement perspective.

2.4 Sustainable Procurement

SP also incorporates these three elements; social, environmental and economic. There are many definitions of SP. One such definition from The UK Sustainable Procurement Task Force states that it is;

a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment. (DEFRA 2006)

In simpler terms SP can be viewed as a method by which an organisation can improve the procurement of products or services by environmental, economic and social means (Oruezabala & Rico 2012, p.574). Sustainable purchasing, as Van Weele (2010) labels it, is more often referred to as Corporate Social Responsibility (CSR). Related terms include environmental purchasing (Morton 2002), socially responsible public procurement (SRPP) (EU Buying Social 2010), green supply chain management (Lamming & Hampson 1996), sustainable public procurement (Preuss 2009), purchasing social responsibility (Carter and Jennings 2002; Carter 2005) and environmentally preferable purchasing and green procurement (Tripathi & Petro 2010).

The use and awareness of SP is on the increase and in some organisations has moved to a strategic level. Nonetheless some confusion still subsists in the relationship between SP with its three fundamentals and GPP. Can GPP be labelled as a true subset of SP and is the integration seamless? Or is GPP a silo of its own? Either way discourse is vital to clarify their meanings and roles in order that they are understood and implementable by front line public procurers and relevant stakeholders.

Though SP has dined at the strategic table in some organisations its increase in importance has been slow. As far back as 1996 Lamming and Hampson (1996) wrote that at the time purchasing was starting to command a greater role in the future strategy of organisations and therefore needed to have the right policies in place to manage the issues, many of which would have an effect on the environment. Again Lamming (2002) and Morton (2002) insists that purchasing's place in today's organisational structure is becoming more important as it assumes a strategic and integral position. It may still be argued that procurement, including SP, is still trying to realize a more strategic role in organisations today. Strategic or not, it can be difficult to measure the extent of the use of SP both in private and public sector.

2.5 Guidance

Guidance in the form of legislation and policies can support public procurers in engaging in SP. Lamming and Hampson (1996, p.45) claim that in relation to decreasing the risks that businesses face from environmental issues, there is a small level of guidance available for them to do so in a constructive manner. The EU, to their credit, have published numerous guidance documents in this respect; Buying Social – A guide to Taking Account of Social Considerations in Public Procurement (2010), Buying Green – A Handbook on Environment Public Procurement (2011), Public Procurement for a Better Environment (2008a), Pre-Commercial Procurement (2007), Integrating Social Considerations into Public Procurement (2001) and Green Public Procurement – A Collection of Good Practices. Despite the development of these policies, guidelines and frameworks relatively little research has looked at the use of SP in the public sector (Preuss 2009; Walker and Brammer 2009; 2011; Oruezabala and Rico 2012).

In Ireland specific legislation and guidance can be found in the previously referred to Green Tenders (2012), the Strategy for Renewable Energy 2012-2020 by the Dept. of Communications, Energy & Nat Resources (DCENR 2012), Circular 10/2010 by the Dept. of Finance (2010), Using Public Procurement to Stimulate Innovation and SME Access to Public Procurement (DETE 2009), the Energy Efficient Public Procurement Regulations (2011) and the SEAI's (Sustainable Energy Authority of Ireland) National Action Plan. For example in the SEAI's Plan 2010-2015, the same EU objective of a 20% energy saving by 2020 is outlined. They also highlight "Green Procurement Practices employed by the Public Sector and all significant businesses" (www.seai.ie) as a means to accomplish this aim. However if publicly funded bodies are not using SP then Ireland may find it difficult to fulfil its 2020 EU energy mandate and there still exists the problem of gauging what, if any, SP is being practised in Ireland.

2.6 Commercial Semi-States in Ireland

It is important that when researching within the terms of reference that is the Irish commercial semi-states, that their meaning and the difference between it and the public sector is understood. Lee (2007) posits that:

Semi-state bodies are established by government, completely or partly with public funds, to undertake a specific commercial, promotional, regulatory or semi-judicial function in the public interest. A minister appoints a board of directors but the directors are obliged to implement government strategic policies and are accountable to government and the Oireachtas for their actions". The commercial semi-state bodies were expected to combine enterprise with public accountability. They were to have the flexibility and initiative of private enterprises but to observe a public interest mandate (Lee 2007, p.4).

Johnson and Scholes (2001) explain the differences between the public sector, semi-state and private sector in relation to their consideration of forces in the market. They state that organisations in the public sector are normally politically driven thereby meeting political demands whilst the semi-states are positioned in the middle between the polar opposites of the public sector and private sector. The major difference structurally between these organisational types is that a board of directors is appointed to a semi-state organization so that semblance of public control can be maintained by it and the appropriate government Minister (Johnson and Scholes 2001). So effectively semi-states are in some ways similar to public sector organisations though operating in commercial markets.

In terms of procurement some Irish commercial semi-states fall under the Utilities Directive 2004/17/EC (as opposed to the Public Procurement Directives 2004/18/EC) which is for entities operating activities in the utility sectors of transport, water, energy and postal services. The main differences here include the threshold levels and the procedure types that can be employed. However both directives allow for the use of SP the use of which will now be explored from existing literature.

2.7 Exploring the Use of Sustainable Procurement

Although SP's profile and influence is increasing in policy circles around the world, very little is known about the extent to which SP policies and practices are embedded within the practice of public procurement professionals globally (Walker & Brammer 2009, p.2). According to Srivastava (2007) and Vachon and Klassen (2008) existing literature on sustainable supply chain management has primarily focused on manufacturing in the private sector of which there is a considerable amount. A substantial amount of research has also examined features of SP in private sector organisations, often with an emphasis on manufacturing industries and the environmental dimension of sustainability (Simpson and Power 2005; Srivastava 2007; Svensson 2007).

Comparatively little articles have studied sustainable supply chain issues in a public sector context (Mitra and Webster 2008). Walker, Di Sisto and McBain (2008) ruminate as to whether this is due to a lack of environmental supply practice within the public sector or that it is just under-researched. A study which has been conducted in the public sector is Walker and Brammer's (2009) study of the use of SP in the UK public sector. Oruezabala and Rico (2012) assess the effect of sustainable public procurement on the management of suppliers in the setting of public hospitals in France. Walker and Phillips (2006) and Brammer and Walker (2011) also conduct research into SP in the public sector but from an international perspective.

Research, in both public and private sector, has tended to focus on issues such as SMEs (Greer 1999; Loader 2005, 2007; Glover 2008), sectors such as local government (Thomson and Jackson 2007; Preuss, 2007, 2009) specific geographical locations such as Northern Ireland (Erridge and Murray 1998; Murray 2000; Fee, Erridge and Hennigan 2002), California (Swanson et al. 2005), The Netherlands (Deboer and Telgen 1998) UK (Quayle 1998; Quayle and Quayle 2000; Walker and Brammer 2009; Pickernell et al. 2011).

2.9 Research into Sustainable Procurement in Ireland

It can be argued that very little research has been conducted into the use of SP in Ireland. A recent quantitative research was conducted in March 2012 by the National Procurement Service (NPS) entitled 'Opportunities in Public Sector Procurement'. This was the first national annual survey of public procurement practices in Ireland. The report gave a comprehensive view of the public procurement market in this country, from both the procurer and the supplier perspective and was conducted through the national tender website www.etenders.gov.ie and the findings in relation to SP have been interesting.

For example only 60% of public procurers stated that sustainability in the environment was an important/highly important concern. With regard to the sustainability of the local economy just over half of public procurement practitioners considered this to be an important/highly important concern while 37% indicated that it was neither important nor unimportant. Also nearly two-thirds of public procurers specified that access for SMEs to public procurement was important/highly important. So in these three areas related to SP a large tranche of public

procurers did not view sustainability of the environment and the local economy or SME access as important/highly important. Survey results did not take into account participants from the commercial semi-state separately so it cannot be determined whether the percentages are higher or lower for these entities alone.

In a related study undertaken by Sweeney (2007), though in a somewhat different context, of CSR in Irish businesses found that it is a relatively new development in Ireland as opposed to other areas in the world. Among the other findings was that both large and small companies had difficulties in defining CSR. In terms of barriers, larger firms believed SMEs may lack resources such as finances, HR or time however the SMEs stated that only cost was a barrier.

Other notable research carried out in an Irish context concerns a report by Ryan, Dunphy and Henry (2008) entitled “Study of Awareness & Knowledge of Sustainable Procurement among Procurement Professionals & Identification of Education & Training Needs”. It examines the amount of awareness and knowledge which procurement professionals possess in relation to SP and analyses what training and courses exist for sustainable procurement in Ireland. The main outcomes were that knowledge and comprehension of green/sustainable procurement were very small and also a requirement for training was identified. On the other hand, the second conclusion arrived at was that there was not a demand for green or sustainable procurement education.

Flynn et. al. (2012) look at a local authority’s attempt to use SP while keeping in line with its corporate objectives. This case study provides a concrete Irish example of sustainable public procurement in practise. Apart from the hereto mentioned cases it appears that little other research has been conducted of SP in Ireland particularly in commercial semi-state bodies. Therefore this research will attempt to follow on from these studies and also address a gap by exploring the use of SP in commercial semi-state context.

RESEARCH QUESTION 1: How is sustainable procurement currently being practised by commercial semi-state bodies in Ireland?

RESEARCH OBJECTIVE 1: To explore the use of sustainable procurement by commercial semi-state bodies in Ireland.

2.10 Barriers to Sustainable Procurement

New ideas and concepts often face challenges to their introduction and use. Surmounting these challenges will determine whether they are successful or not. SP is no different. Existing literature shows several investigations into the barriers that are preventing the use of SP. Preuss and Walker (2011) examine the different psychological barriers that slow the use of sustainable development in public procurement. Walker and Brammer’s (2009) study of SP in the UK public sector utilise open ended questions to elicit information with regard to the perceived barriers to and also what facilitated the practice of SP. Respondents provided twenty-one barriers and twenty-one facilitators.

Some studies have looked at both the barriers and drivers of SP. Walker, Di Sisto and McBain (2008) explore factors that drive and prevent organisations from implementing environmental supply chain practices in the private and public sectors. Walker and Brammer (2012) examine the relationship between e-procurement and SP, identifying factors that assist in this relationship but also factors that hinder it. Detecting the key sustainability performance drivers of corporate social performance is the subject of Epstein and Roy’s (2001) work whilst Walker and Phillips (2006) exploration of emerging issues with regard to SP discover issues, restrictions and suggestions to assist in the furthering of its use.

2.11 Barriers to Sustainable Procurement in Ireland

Implementing SP practices is a challenge facing all businesses in Ireland particularly public sector and semi-state bodies and this requires further investigation as a potential barrier to sustainable procurement. This research hopes to identify the barriers preventing the use of SP in Irish Commercial Semi-States. It is important to compartmentalise the possible barriers to SP in order to evaluate them appropriately. So, similar to Walker, Di Sisto and McBain (2008), Sharma et al. (2010) and Preuss and Walker (2011), the literature was examined from an internal and external perspective in order to identify barriers.

2.12 Internal Barriers to Sustainable Procurement

The barriers within organisations can often inhibit change, as a result of strict adherence to certain practices, punitive perspectives and/or the organisational culture (Gough & Scott 2001). It is important that the internal barriers can be identified in order that strategies can then be put in place to surmount them.

1 - Management: There is often no strategic role for procurement, sustainable or otherwise, at a high level of some organisations. Tripathi & Petro (2010) argue that functions within an organisation must be aligned in order to implement practises effectively. Hence to incorporate SP, a company must have an objective (from senior management) to improve their environmental and sustainability performance (Oruezabala and Rico 2012). Sweeney's (2007, p.519) study found that "All firms agreed strongly that the interest and involvement of senior management is crucial to the successful implementation of CSR." To draw parallels with a similar study, Quinn (1997) established that the existence of a positive relationship between the outlooks and interests of the managing directors and the level of CSR carried out by these organisations in the Irish sector.

Organisations today have competing objectives each vying for the most influence and is reflected by senior management's commitment in encouraging and enabling these objectives to be implemented and practiced. As a result management needs to nurture core values (such as SP) and integrate these into the culture of the organisation (Trevino *et al.* 2000; Joyner *et al.* 2002; Hammer 2004). Equally, if there is no management commitment then objectives, like SP, will not work (Min and Galle 1997; New *et al.* 2000). Similarly Walker *et al.*'s (2009, p.359) research recognises that a lack of organisational commitment is an impediment to SP. Hawkins (2006) speculates as to the reason why sustainability factors are not a priority for management.

In terms of leadership Menon and Menon (1997), Banerjee *et al.* (2003) and Hammer (2004), accentuate the importance of the role of management, proposing that leadership is vital in adopting green marketing strategy. Egri and Herman (2000) found that leadership styles and the personal values that leaders' have, such as an openness to change, can have a positive influence of a company's environmental strategy. If leaders are not open to change then this can negatively affect the strategy of a company. Walker *et al.*'s (2009, p.359) research recognises that barriers to SP experienced by practitioners include a lack of organizational commitment short-term thinking.

2 – Cost: Purchasing and procurement in general is growing in importance in companies and is also assuming a more strategic role. In tandem with this growth, a greater understanding, appreciation and concern has developed of the environment. Together purchasing and supply chain management can exert more influence on the market place. One issue or perceived problem with sustainable procurement is the cost element. Does environmental or greener purchasing negate achieving savings or imply a reduction in quality standards? This is certainly a challenge for companies (Morton 2002; Sharma *et al.* 2010; Oruezabala and Rico 2012).

Bowen *et al.* (2001) put forward the argument that financial incentive is the main reason for implementing a green supply chain in organisations. This is confirmed by Rao and Holt (2005) as they state that a positive relationship occurs between green supply chain management practices and organisations' competitiveness and economic performance. The limited resources of small companies and government pressure to aggregate contracts to extract financial savings are combining to have an effect on the use of SP (Walker and Preuss 2008).

SP is often viewed as opposing the main goal of procurement which is to reduce costs and attempts to implement SP can falter as a result of the cost, or perceived cost, implications (Walker *et al.* 2009). These costs are often a significant obstacle when trying to integrate environmental practices into standard supply practices (Min & Galle 2001, 2007). That performance measurement can focus mainly on savings and other economic aspects of an organisation, procurement managers will therefore be less motivated to introduce or implement sustainable practices (Preuss 2005).

3 – Time: Due to the current economic recession and the requirement for cost savings, short term needs are being prioritised over long term considerations such as the environment. So focusing on the traditional aspects of quality, delivery and cost exposes companies to short termism and also may restrict the supplier or manufacturer in utilising more sustainable processes (Hawkins 2006). Short-term thinking (Walker *et al.* 2009) and short-termism (Walker & Phillips 2006) are also identified as barriers in the research carried out. Can the length of time required to research and incorporate SP into procurement whilst ensuring it is related to subject matter be a barrier?

4 – Further Training: Gelderman *et al.*'s (2006) findings show that in terms of increasing compliance with public procurement directives, educating and training purchasers will be of significant assistance. The lack of training has been found to be a barrier to SP. Further training is therefore a requirement to overcome these barriers (Bowen *et al.* 2001; Walker and Phillips 2006). Preuss and Walker (2011) note that individual training for procurers should emphasise the importance of SP along with the financial targets. Hayes and Allison (1998) state that learning at all levels of an organisation is of vital importance in order for them to adjust to changes in the internal and external environments. However as the role of SP increases in importance, especially from a political perspective, training has been recommended to help procurers implement SP (Helm *et al.* 2005; DEFRA 2006).

5 – Conflict with E-procurement: It is possible that there may be conflict between the advantages that e-procurement can provide and SP particularly in relation to small and/or local suppliers. For example Walker and Brammer's (2009) research found that a large part of SP practiced in the UK centred on purchasing from small and local suppliers (Walker and Brammer 2009). This in itself demonstrates good SP in action. However later research conducted by the same researchers discovered that e-procurement policy and SP policy are conflicting policy objectives. This can occur for instance where local or small suppliers do not have or cannot afford the technology to use e-procurement and as a result cannot reduce the amount paper used in invoicing as opposed to e-invoicing (Walker and Brammer 2012, p.11).

6 - Individual versus Organisational: Though organizations develop recognized procedures and strategies which workers should follow as much as possible, these workers are also human beings and therefore have "their own individual strategies, based on their abilities, needs and goals. Resulting tensions lead to a series of internal and external adaptation processes within and beyond the organization" (Preuss and Walker 2011, p.495). This may be a barrier for organisations wishing to implement SP but do not have the support of some individuals.

7 - The Individual: A relationship has been found to exist between motivation and sustainability which emphasises the importance of 'environmental values' (Egri and Herman 2000) and for the championing of environmental issues (Anderson and Bateman 2000). If individuals consider compliance with environmental regulations as important then these individuals will achieve greater success in instigating green practices (Sharma 2000; Min and Galle 2001). On the other hand, these factors may decrease the motivation of an individual to assume the task of introducing sustainable development practices thereby creating a barrier (Preuss and Walker 2011).

Sutinen and Kuperan (1999) contend that individuals' own personal values influence their behaviour in terms of compliance. Compliance will decrease with regulations if moral responsibility is weakened and will influence others to imitate non-compliance thus creating further barriers. Therefore is actual enforcement the only way of changing this behaviour?

8 – Organisational Culture: Organisation behaviour is moulded by its norms, routines and cultures according to Douglas (1987 cited in Preuss and Walker 2011, p.497). Therefore an effective working organisation needs its culture and structure to be aligned (Handy 1993 cited in Burnes 2004, p.897). Some participants in Walker et al.'s (2009) study suggest that it is necessary for the culture of procurement to change so that SP can be used.

9 – Reluctance to Change: Altering how procurement staff work can be fraught with a pervasiveness of inertia and risk aversion (Preuss and Walker 2011, p.506). This reluctance to change is common with change, whether organisational or departmental. Their research also found that "intraorganisational adaptation processes within public sector organizations can create psychological barriers for sustainable procurement initiatives too" (Preuss and Walker 2011, p.507).

2.13 External Barriers to Sustainable Procurement

1 – Legislation and Compliance: Compliance with legislation and regulations can have a bearing on whether certain activities are carried out. Compliance can have a negative or positive influence. An example of a positive influence can be seen in reverse logistics (Chan et al. 2012) and also the recycling and remanufacturing of products. These activities are usually carried out as a result of regulation (Maxwell and Van der Horst 2003). However when regulations or legislation are unclear they can become an impediment to SP according to Morgan (2008, p.1246).

In terms of compliance, Tyler (1990) comments that public choice theory puts forward the idea that compliance is determined by whether a procedure is deemed fair and legitimate (cited in Sutinen and Kuperan 1999, p.179). From a psychology perspective it is commonly believed that a person's own values influence their compliance behaviour (Sutinen and Kuperan 1999). Kelman (1958 cited in Gelderman 2006, p.5) advises that compliance can have an adverse influence in situations where an individual complies as a result of a reward or to avoid punishment instead of its actual content. Therefore if SP was to be made mandatory by the EU would this have a negative influence on procurers who comply for the sake of complying? On the other hand should, as Gelderman (2006, p.5) points out, "compliance with the directives... be considered as a necessary condition not as a sufficient condition for the effectiveness of the public procurement regime". If yes then should this perhaps apply to SP in the EU also?

2 – Policy Entrepreneurs/Converts: An early study of the integration of environmental criteria into organizational buying processes by Drumwright (1994) found that two groups of employees play a special role. 'Policy entrepreneurs' are middle managers with a personal interest in greener approaches to purchasing, whose commitment arose from moral reasoning and not primarily from economic benefits. The other group are 'converts', who initially resist the policy but later became convinced of its merits. Notably, purchasing managers were not represented in either of the two groups.

3 – Cultural Relativism: Is SP predominantly a European or First World concern and therefore an Irish concern? A finding from Walker and Phillips (2006, p.574) relates to the idea of cultural relativism and that SP can be practised in a developed country whereas procurement in a developing country may be more concerned with the basics of procuring food instead of the consideration of sustainable or ethical issues of SP. Lodge (1990 in Maignan 2001, p.59) looks at the effect that national ideologies have on corporate social responsibilities in France, Germany and the U.S. He differentiated between the U.S. whom he believed were individualistic, focusing on the short term advancement of the individual. This contrasts with France and Germany whom he classified as having communitarianism ideologies which emphasised the requirements of the community. Maignan (2001) in her consumer survey on this topic found the above to be valid.

4 – Obligation: Similar to compliance, is obligation a barrier or a facilitator to SP? Levin and McDowell's (1983 in MacNeil 1985, p.501) definition of obligation "supposes that one engages voluntarily in an act that objectively imposes an obligation". As the government, and the EU for that matter, have not compelled organisations to use SP, is the fact that some organisations will not use SP mean they have not voluntarily engaged themselves in an obligation to use SP?

5 – Protectionism: Nielsen and Hansen (2001, p.258), write about buying behaviour in public procurement in the EU and state that "the preference of local public authorities for local suppliers will be evidence of protectionism". Conversely however SP advocates the social benefit of buying locally. Can a balance be found by public procurement practitioners? The study also highlights the challenge of ensuring that public buyers provide full transparency to the market in order to limit the preference for buying nationally. An international study on SP practices by Brammer and Walker (2011) found a somewhat strong focus on buying from small and local businesses which though good socially may also suggest an element of favouritism in procurement. It is conceivable that this could be viewed as a form of protectionism also.

6 – Supplier Knowledge: Another barrier found was that supplier expertise was poor in the implementation of aspects of SP (Oruezabala and Rico 2012). Research by Vachon and Klassen (2008) and Walker and Brammer (2012) shows that the greater the communication and collaboration with suppliers the better the sustainability and SP measures that can be introduced. If no real buyer-supplier relationship exists it is possible that this can restrict or even prevent the use of SP. If suppliers do not possess the requisite knowledge to provide information for a life cycle assessment (LCA) of a particular product (Tarantini, Loprieno, and Porta 2011) a buyer will not be able to utilise this aspect of SP.

2.14 Overview of Barriers The nine internal barriers found include resource difficulties (cost and time), management and leadership issues (commitment), individual (motivation) and organisational (culture, reluctance to change) needs and conflict with e-procurement (small/local suppliers). The importance of internal support in implementing new practices such as SP cannot be over stated and trying to overcome these barriers are significant challenges. The six external barriers involve legislation and policy, cultural relativism, obligation, protectionism and supplier knowledge. As opposed to internal barriers, it is much more difficult to surmount barriers that exist in the macro environment where procurement has relatively little influence. When paired with the internal barriers above the literature shows a substantial number of factors that have been found to prevent the use of SP in organisations. It is evident though that little research has focused on barriers in an Irish context and in particular a commercial semi-state context which this research will attempt to address and thus leads to the second and final research question and objective:

RESEARCH QUESTION 2: What are the barriers to using sustainable procurement to its fullest potential in commercial semi-state bodies in Ireland?

RESEARCH OBJECTIVE 2: To identify and examine the barriers to using sustainable procurement in commercial semi-state bodies in Ireland.

3. METHODOLOGY

An exploratory research approach utilising all strands of data was employed. Procurement managers and procurement executives were the intended interviewees. The broad idea of conducting research into SP was narrowed down from initially looking at the use of SP in a Irish public sector procurement setting to the more focused and unexplored context of Irish commercial semi-state bodies. It was important to ensure that clear research questions and objectives were set. Myers (2003, p.21) advises that "These questions should be framed in such a way that they are answerable empirically, i.e. by obtaining qualitative data...The questions should be

designed to answer a research problem”. The research question should be able to provide clear conclusions, in line with expected standards and not overly descriptive (Clough and Nutbrown 2012). So the following research questions and objectives were set;

Research Questions:

- (1) How is sustainable procurement currently being practised by semi-state bodies in Ireland
- (2) What are the barriers to using sustainable procurement to its fullest potential in Irish semi-state bodies?

Research Objectives:

- (1) To explore the use of sustainable procurement by Irish semi-state bodies.
- (2) To identify and examine the barriers to using sustainable procurement in semi-state bodies in Ireland.

The extant literature was reviewed next. A deductive approach was taken in this research and theories were assessed in relation to the data obtained. The researcher quickly acknowledged that literature concerning the use of SP in the private sector, green supply chain management and CSR, though not as relevant, was applicable. A gap in research was soon identified (the lack of research in Ireland especially in the commercial semi-states) which the proposed research aimed to fill (Wallace and Wray 2006, p.6).

A case study approach, defined as “a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real life context using multiple sources of evidence” (Robson 2002, p.178) was used for this study. The goal of the case study was to utilise the empirical evidence gained from people in real organisations in order to provide a unique contribution to existing knowledge (Myers 2009, p.73).

The research began with identifying the industry within which the organisation being interviewed operated in and its role within that industry. It was important to ascertain this early as the organisations operated in vastly different market areas from public transport, ports, broadcasting and energy to name but a few. Also many of the commercial semi-states are small in size and as a result do not have designated procurement departments; this was essential to establish early too. The research then focused on the following areas of each of the participants’ organisations; the role of procurement, Government/EU policy in SP, their knowledge of SP, the amount and type of SP practiced and the external and internal challenges to using SP. The importance of the Europe 2020 targets and the government publication of its NAP in January 2012 provided the background to the proposed research. The advent of procurement, including green procurement and SP, to the strategic level of some organisations means that SP is a topical subject. The setting of this research within the relatively narrow confines of the Irish commercial semi-state bodies means that these organisations and the procurement departments within, are the main stakeholders in this study.

The primary data collection method utilised in this case study was interview based and a qualitative approach will be necessary to analyse the information collated. Theory plays a central role in the formation of a basis of understanding of a subject in question, as well as identifying the research objectives that were purposeful and that would supplement existing research work. There is a vast amount of theory surrounding the subject of interviews and the process as a whole (Myers 2009; Saunders, Lewis and Thornhill 2003; Bryman and Burgess 2002) and these helped shape the design and structure of the interview questions as well as assisting with the analysis of the interviews. Non standardised semi-structured exploratory interviews were used in this instance. A potential problem with interviews as a method of data collection is that some interviewees may have certain beliefs about the response the interviewer expects and may therefore give what they consider to be a correct or expected response (Collis and Hussey 2003). To mitigate against this occurring Lee (1993) suggests that these problems can be overcome by increasing the depth of the interview.

In selecting interviewees a non-probability sampling technique was used as the majority of interviewees will be from a homogenous group; procurement managers, procurement executives or the people responsible for procurement in their commercial semi state organisations. There are twenty-eight such commercial semi-states. Six of these organisations are the same entity or procure on behalf of another entity which is under its remit; the RPA and Luas, CIE and Iarnród Eireann, RTE and Raidió na Gaeltachta. When this is factored in it can be taken that there are 25 commercial semi-state bodies that procure goods and services.

Each organisation was contacted to ascertain who the procurement manager was (different titles were used e.g. Head of Procurement, Chief Procurement Officer). As referred to earlier some semi-state bodies did not have procurement departments and so, depending on the internal structure of the organisations, this role fell under the remit of finance, operations administration and even in some cases the CEO (Chief Operating Officer). Then a letter of invite to participate in the study was sent to the relevant contact person of these 25 organisations. Out of the 25 letters sent 8 of these replied; 6 agreeing to participate in the study, one agreeing to pass it on to their board for them to make a decision (of which no further communication was received) and one declining on the basis of staff

resources. Follow up requests were sent via email, as outlined in the letter, to 5 of the contacts on the basis that they were more likely to acquiesce to the invite to participate; a further 4 replied with 3 more agreeing to the interview, one declining on the basis of work commitments and there was no response from the other contact.

Before commencing the interviews it was decided that the views of ‘experts’ would be of benefit to the research study something Walker and Brammer (2012) and Oruezabala and Rico (2012) employed also. Two individuals working in organisations with a significant interaction with and influence on public procurement agreed and were interviewed first before conducting the other nine interviews.

The data collected through the interviews is referred to as qualitative data. Saunders, Lewis and Thornhill (2003) describe this data that has not been quantified, non-numeric and is a result of all research strategies. Once the data has been collected it must be turned into results to be useful (LeCompte 2000). This is done through analysis. Analysis is akin to the taking apart and reassembly of puzzles (LeCompte and Preissle 2003 in LeCompte 2000, p.146) and is “invariably described as voluminous, unstructured and unwieldy” (Bryman and Burgess 2002, p.216).

4. RESEARCH FINDINGS

Nine commercial semi-state bodies participated in this research representing one-third of all commercial semi-state bodies in Ireland and an even higher figure of 37.5% when procurement on behalf of other bodies is taken into account. Of the nine commercial semi-state bodies that participated in this study two of them do not have designated procurement functions. These two organisations also were the smallest of the participants both in terms of turnover and numbers of staff. These organisations acknowledged the importance of procurement but were constrained by financial and human resources in having nominated resource for it.

The number of procurement personnel differed between organisations and so too did the level of procurement/purchasing/supply chain qualifications of staff in the organisations of which only two did not possess any. With regard to if the organisation possessed a sustainability or green policy; five organisations had such a policy, two had policy statements and one had no policy at all. Table 1 offers some of the above basic background information of each participant organisation.

P = Participant	P1	P2	P3	P4	P5	P6	P7	P8	P9
Procurement department present	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No
Procurement more imp in org. in recent years	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Procurement more strategic in org. in recent years	Yes	Yes	Yes	Yes	Not sure	Yes	Yes	Down the path towards it	Yes
Procurement qualifications in department/organisation	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No
Organisation sustainability / green policy in place	Yes	Yes	Statement only	Yes	Yes	Yes	Yes	Statement only	No
Sustainable Procurement policy in place	Yes	No	Part of Procurement Policy	Part of Procurement Policy	Part of Procurement Policy	Yes	No	Part of Procurement Policy	No
Approx. tender processes including SP in last 3 years	100	Don't know	24	100	80	Nearly all	Nearly all	Unsure as new to role	None

Table 1: Background Data on Participant Organisations

An understanding of the role that procurement had in each organisation was ascertained before moving to the main research topic of SP. For that reason participants were asked whether procurement had “assumed more importance in your company recently?” and if procurement had “assumed more of a strategic role within your organisation?” In relation to the first question all nine stated that procurement had become more important for reasons such as cost reduction, the economy, value for money, newly centralised department and legislation inter alia. While not as forceful as the previous, the responses to the latter were generally positive that procurement had taken on a more

strategic role in their respective organisations although two participants noted that a lot of the procurement practised was still reactive with another declaring that procurement was “down the path towards having a more strategic role”.

The Europe 2020 targets on reduction of greenhouse gas emissions, increase in energy efficiency and increase in energy from renewable resources is a significant driver of SP in public procurement within the EU member states. As these are the EU’s stated objectives the researcher attempted to gauge the amount of knowledge that each participant’s had of these. Four organisations knew of these targets, four had some awareness ‘vaguely’ and ‘broadly’ being two of the particular responses while one company had no knowledge.

4.3 Understanding of Sustainable Procurement

The researcher put a question to the participants regarding their understanding of SP. This followed on from the previous context of the Europe 2020 targets and the preamble included that the EU has identified SP as one of the methods to assist in meeting these targets. The definitions provided were varied and interesting. Only two responses included what can be considered as true definition of SP stating the three elements of social, environmental and economic.

One of the experts also included these three elements in his response by answering that it is a wide subject and “some people may define it just as green but SP can be around social issues, it can be around just long term environmental issues, it can be around employment issues, industry issues like SMEs”. The other expert commented on SP on a wider perspective to every other participant by commenting that “it’s really at the discretion of national authorities how to apply it as long as they adhere to the Treaty requirements. I think it’s quite difficult for the member states to follow and for the contracting authorities to follow”

Overall two common themes were apparent from the interviewees’ responses. Firstly there was the view of sustainability from an economic or cost perspective. Though economic, as per above, was only explicitly stated by two interviewees, the majority regarded sustainability in terms of better value for money in the long term. Some of the terms referenced were TCO, LCC, business can be made and long term viable solutions. One participant questioned the cost, to an organisation, of sustainability also. This awareness of the impact of cost is not surprising given the current economic condition of Ireland and is one of the main reasons why procurement has assumed more importance in organisations has detailed earlier in this section.

Secondly there was the acknowledgment of SP in terms of doing the right thing in relation to the environment and people. As one participant put it “From a philosophical level it’s trying to use more products that are sourced in a more sustainable manner....supply chain with more sustainable principles”. On a similar note an interviewee stated that sustainability was “only taking what we need and making sure there is something left”. Another gave an example of the Fair Trade coffee which they had included in the specification for their catering services tender. One of the nine participants had not heard of the concept previously and therefore did not define it.

In order to explore the use of SP in Irish commercial semi-state bodies as stated in the first research objective, it was interesting to discover what each participant thought the level (small, medium or large) of SP knowledge they and their department possessed. Only one interviewee stated that their knowledge was large and at the opposite end two did not have any knowledge. The common consensus was small, small to medium or medium with the majority conceding that more had to be done in this area.

Participants were next questioned as to their awareness of the government’s NAP ‘Green Tenders’ which was launched just over a year ago in January 2012. The data here were not in line with the trend of previous questions in relation to SP. Only three participants could definitively say that they were aware of it with three advising that they had no knowledge of it. However another interesting finding was that the participant who deemed their knowledge to be large and provided several examples of their use of SP to back up this contention, was only vaguely aware of the NAP. Similarly both participants that provided the academic definition of SP, were not aware of it specifically and broadly aware of it but not in detail. This suggests that the government’s guidelines concerning green procurement, which includes some elements of SP, is not reaching a significant number of procurers.

4.4 Use of Sustainable Procurement

In order to meet the first research objective in exploring the use of SP in commercial semi-state bodies in Ireland a simple yes/no question was asked of participants with regard to their use of it. The overwhelming response here was a positive affirmation. Two of the participants responded with no but it is supposed from other responses in the interview that they are actually engaging in SP, probably through the specification, but are not aware that they are because of a lack of knowledge.

The depth of the use of SP was then explored. Some proffered examples of their use such as the following inter alia; tyre mileage contract, recycling uniforms and shoes, office supplies, green cement, green electricity, catering, chemicals, low sulphur diesel, recycling, use of insects instead of chemicals and recycled concrete. These wide-ranging examples demonstrate the applications possible with SP and also the broad minded thinking on behalf of procurers within the participant's organisations.

Also several responses indicated that there was a designated sustainability/environmental section in the majority (and in some cases all) of all tender processes undertaken. One participant stated that in his organisation a sustainability award criterion, with a weighting of 5% or 10%, was predominantly utilised and "while not every procurement would have sustainability it would now be a conscious decision to take it out of the evaluation criteria whereas previously it would have been something that people may or may not have considered at all". A further two stated that sustainability is evaluated in the selection process where environmental policies and certifications of tenderers are requested as part of the evaluation. It was interesting to note that organisations are categorising sustainability differently; some use at selection stage while others use it at award stage.

In order to gain a better understanding of the use of SP the participants were asked what aspects of SP do they use most frequently when tendering; specification, selection stage, award criteria and/or contract performance clauses/SLAs? Four confirmed that they used SP in all areas and two acknowledged that they did not in fact use it as they did not, to their knowledge, engage in SP. Only one participant specifically avowed that SP was utilised in the contract clauses which the researcher found unusual due to need to enforce SP throughout the life of the contract. Those who answered "all" were then probed deeper in order to ascertain in what areas was it applied most. Overall there was a predilection to use SP in the award stage and the specification though one participant did profess that 'We struggled with putting it into award and around how we'd articulate that'. In a similar vein another declared that 'when you're evaluating the environmental piece it can be difficult'. Problems with evaluation, regardless of the tender stage, was a constant theme in the research particularly in relation to barriers and one that we will analyse in further detail later in this section.

When the expert was questioned as to whether he thought that SP was being used in commercial semi-state bodies he stated that he did not know but opined that there was a 'danger' that in a commercial setting that there may be a short term view taken of SP. He added that 'a lot of sustainable and green are long term issues where your payback is over the life-time of the purchase and some purchases that life-time could be 15 years' and continued that 'for anybody in a commercial semi-state or private sector organization who was flying the flag very high for green or sustainable I would imagine that they would have a tough enough battle'.

This researcher felt that it was important for this case study that some idea was garnered regarding the quantifiable use of SP in public procurement processes. Consequently the question was put to the participants as to approximately how many tender processes had SP been used in over the last 3 years. One participant, whose procurement department is clearly increasing its use of SP where possible, gave a figure of 24 and added "and its growing all the time as we revisit recurring tenders that come up for renewal such as our supply of ***** for the **** we'll be looking again now at revising the award criteria to take in the sustainability piece which wouldn't have been at the forefront when it was last done". This figure palliates in significance against participants who gave numbers of 100, 80 and approximately 100.

Two participants could not provide a quantity but mentioned again that they inserted an environmental section for nearly every tender. One procurement manager was new to his role and therefore could not specify the number of processes that SP was applied in. Though several examples were given of SP in this organisation it is still hard to ascertain the real extent of the use of SP. Another two participants could not affirm if its organisation were engaging in SP.

4.5 Findings: Barriers

In order to move into answering the second research question, a simple yes/no question was asked of participants concerning SP; was it a good tool for purchasing sustainably. Six answered positively while the other three declared that they either that they did not know or did not use it enough to give a judgement. Revelatory findings were observed from two of the participants; one participant that answered positively to this question though he mentioned earlier that he did not use SP and another participant who deemed that he had not used SP enough to determine if it was a good tool even though previously he stated that a sustainability piece was used nearly of his pre-qualification questionnaires (PQs).

A funnel approach was utilised in the questioning technique by narrowing the focus of the next questions in order to address the research question in more detail. In that regard the researcher then questioned why/how SP was a good tool for purchasing sustainably. One response was that if SP was used the market would follow. Another said that it

was a good tool but “you have to turn it into something that’s measurable” while one more said that there was not enough understanding of SP “and potentially means different things to different people”. Lastly one participant speaking specifically about one of his main procurement exercises was “not really sure how effectively we could put in criteria relating to green”. It is noted that already some potential barriers have been put forward.

4.6 Why Sustainable Procurement is not being practised in Commercial Semi-States

The participants did not know if SP was being used in the other commercial semi-state bodies however this was followed by a hypothetical and deductive question; “why are some semi-states using SP and others not?”. By framing the question in this manner it was hoped that more honest and opinionated answers would be forthcoming as it was not directly related to the participant’s own organisation. Some of the responses included laziness, time, resources, lack of knowledge at senior level and laziness. Other notable reasons were that organisation may be waiting for an official guidance on it and buy in from a management level. On a more positive note one of the participants opined that nobody would disagree with SP as it was common sense but there was a cost factor and therefore you have the balance the two.

A recurring sentiment with some of the participants was one of potential risk and fear particularly in the current climate where more suppliers are challenging procurement decision and sometimes getting legal opinion. As SP can involve more subjectivity than other criteria, this can leave an organisation more open to a challenge from an unsuccessful tenderer. As one interviewee put it can be “more intimidating for people in procurement to actually include criteria that are... more subjective and less tangible”. This participant also warns that there is a “potential fear factor about getting into sustainability debates with suppliers on relative characteristics and strengths” of their tender proposal.

The subject of fear continues when participants are questioned regarding the challenges to implementing SP in general, though on this occasion it is the fear of a perceived cost which isn’t necessarily there, is seen as a barrier. On the same matter of cost another participant states that there is a cynicism regarding the whole green agenda and the cost will be more. The same participant then bemoans the fact that though there may be justification to go for the sustainable option “but the money is just not there and that’s a hard win. When money gets tight it is hard to go for the sustainable option”. There is a general discourse of cost versus sustainable throughout the interviews with participants arguing both sides. For example a later response asserts that growth in the market is a barrier but “you know demand will create supply which will create obviously economies of scale a reduction in costs”.

A commonality of responses can be identified by the fact the majority specify internal barriers to this general question. Education of people was put forward as a barrier in one response and similarly another said that a lack of expertise was a barrier. This particular organisation has no procurement department and views “procurement as being an overhead that’s now been foisted upon us so we have just absorbed it”. It is not clear whether this person would like to have a dedicated procurement department or procurement officer to be able to overcome this expertise barrier or if he does not place an importance on the role procurement; this is something the research should have probed further.

One participant however is clear about the role of procurement and argues that organisations who just see procurement as an add-on will struggle with SP and assisting in meeting the Europe 2020 targets. He continues that it is hard to determine what SP is legally allowable under the procurement directives while another adds to this cogently arguing that “There probably should be more directives from the govt. like maybe mandating a little bit more on what we do here”. One expert referred to the legal complexity of it warning that “procurement as it exists, sustainable or not, is a complex enough issue as is so anything that is layered into and any further complexity that’s layered in, is in my experience is resisted or avoided”. The other expert acknowledges the complexities of trying to implement SP and adds that the “fear of litigation is quite real”.

A recurrent theme of defining SP as a challenge emerges through the interview stage. An expert worries that the issue of adding the actual specifications of eco-labels and equivalents to tender documents is becoming counter-intuitive and also questions how to measure the greenness of something. A semi-state participant outlines his organisation’s SP definition barrier as follows;

Does anyone know exactly what it is? Is it buying more environmentally or energy efficient products? Is it buying off companies that have a better environmental ethos? Is it buying off a co. that provides employment in Ireland relative to the one in the UK or Europe?

Getting business users on board and buy in from senior management are further barriers put forward by two participants. The latter noted that “An alignment of the procurement strategy with the overall corporate strategy” was of upmost importance but also cautioned that the right environmental factors are necessary and “it’s probably easier to do this in better times rather than recessionary times because there is such a focus on costs”. One external

barrier mentioned was the fact that suppliers are often not particularly good at selling the return on investment (ROI) on green or energy efficient products. The participant concedes that “I think that’s a barrier where they are selling a perceived benefit but they can’t validate what the figures look like”

4.7 Internal Barriers

The deductive approach this research is utilising in this case study has already established that there are barriers to using SP in Irish commercial semi-state bodies and already the previous broad, open questioning employed in the last section has elicited confirmation of this. Next the researcher probed specifically for exact internal and external barriers. In some interviews participants were prompted where necessary in order to gain a deeper understanding of the barrier types present in their organisations.

In terms of internal barriers some participants repeat their answer or elaborate on it, from the previous question relating to the challenges, in general, of implementing SP. For example one participant noted that getting business users on board originally. Then this further emphasised by adding that there is a reluctance to change on behalf of the business users. When questioned was this reluctance coming from senior management it was revealing that the participant replied that “No, it’s very much supported by senior management. It tends to be the users in the business who might not be inclined to embrace it”. Fear or unwillingness to change was another response. However two other participants when prompted if there was an organisational reluctance to change both responded positively; one said that tough change isn’t easy that the Irish adapt well to it while the other admitted that change is constant in his organisation and that there was no reluctance to change.

One participant adds weight to the argument that senior management support is not always a barrier due to the fact that in this particular organisation senior management have seen the savings made from sustainable initiatives. No “specifically identifiable internal barriers other than the Champion, to take the lead, identify the benefits accruing to the organisation” was put forward by another participant. When the issue of time is suggested by the researcher as a possible barrier the participant agrees and further adds that:

Probably the key, more real barriers I suspect would be understanding and ensuring that there is a common agreement on what SP is. Understanding and agreeing the potential value to the organisation in pursuing this. Making sure that we have the right tools to implement it and understanding the KPIs or the success measures are.

Four other participants similarly note that time is a factor preventing the use of SP however paradoxically one participation refutes this argument, stating that the implementation of SP has been a progression over the last of couple of years and that these things take time. The question of value from the last participant is omnipresent in the other participants thinking and is the reality that most organisations in Ireland face in the current recession. As one participant points out that there is a challenge in “turning sustainable proposals into understandings of clear competitive advantage – in other words something that delivers value”. Various other internal barriers put forward included cynicism again, criteria and scoring, resources and more guidelines.

4.8 External Barriers

As per the internal barriers, participants were questioned specifically as to what barriers, outside of their organisation, did they perceive there to be restricting the use of SP. Again interviewees were prompted to elicit further information on external barriers. Also some re-emphasised previous points made earlier in the interview such as the right tools, the right measures, defining SP and validation of a perceived benefit.

Suppliers and the environment/market is mentioned by five of the participants as barriers; “the lack of understanding in the marketplace, at all levels small, medium and large of SP and how it affects the public, semi-state and utility sector”, the costs of some sustainable products were prohibitive (30-40% higher) and “that sustainability on the supplier side is probably not currently where it should be in terms of modernisation, to be sustainable requires an investment”. One of the experts on the other hand details the costs to suppliers of certification and life cycle costs as an added burden for suppliers trying to sell into the public and semi-state sectors.

Restrictions and the bureaucracy involved in semi-states as opposed to the private sector is a new barrier identified by one of the participants. Also the procurement guidelines fit for the bigger organisation but don’t fit for the smaller ones. Thoughts on guidelines, directives and legislation are repeated in this research process in relation to SP and the issue of the lack of obligation or mandatory requirement to use it is mentioned by four participants. One participant states that the “whole carrot and stick approach” would work because semi-state bodies would have to comply with it but suggests that “the market and people will drive it (SP) that would be a better approach than obligation”. One expert is concerned about the challenges that lobby groups bring externally and the different

advocates for green and against green. The importance of having a vibrant, competitive marketplace is stressed and that by using SP one is aware of danger of limiting the market to one or two players.

From an EU perspective the same expert that some directives, concerning energy efficiency and sustainability, have been diluted somewhat by now instructing that “you have to buy the most energy efficient good or service subject to it representing VFM”. The other expert believes that “a lack of clarity in the directives in the national action plans it’s going to be a mine-field” and believes that the absence of harmonisation in implementing SP both at an EU level in terms of NAPs and across organisations within member states is an external barrier.

5. DISCUSSION AND FINDINGS

5.1 Introduction

This paper provides the first systematic study of the use of SP in Irish commercial semi-state bodies. The findings confirm that SP is being practised in these organisations and that there are challenges furthering its use. This section will now address each research question and objective separately, by linking the research findings with the literature review to highlight new findings.

5.2 Research Question Number One – Exploration of Use of Sustainable Procurement

Research Question 1: How is sustainable procurement currently being practised by commercial semi-state bodies in Ireland?

Research Objective 1: To explore the use of sustainable procurement by commercial semi-state bodies in Ireland.

5.3 Knowledge of Sustainable Procurement

In order to practice SP procurers must possess, at least, some basic knowledge of SP and how to apply it. Ryan, Dunphy and Henry’s (2008) case study looks at the awareness and knowledge of SP among procurers in Ireland. Its main outcomes were that knowledge and comprehension of green/sustainable procurement were very small. Though defining SP does not necessarily lead to comprehension, the majority of participants did demonstrate throughout the study that they had a reasonably high knowledge of SP. Seven of the nine participants are able to give practical explanations of SP and another provides an example of his organisation’s sustainability practices without directly answering the question. Only one out of nine participations, whom had never heard of the concept, could not define it. However there is no real correlation between participants’ knowledge of SP and participants’ awareness of Green Tenders, the government’s NAP. Three did not know of it and four were only vaguely familiar with it. There is a possible lack of communication and support on behalf of the government in this respect.

Communication is also deemed a barrier to using SP by one participant who in relation to a charter recalled “ringing up whatever dept. it came from and saying is this legislation, is this mandatory or guidelines? Guidelines mean very little because you know you can adhere to guidelines but you don’t have to stick to the letter of the law”. If the EU, and by extension the government, want procurement to be a key economic activity (Thai 2001) and to support environmental and social goals (McCrudden 2004), then greater support is necessary.

5.4 Is Sustainable Procurement of Value to an Organisation?

Hoffman and Bazerman (2005) consider that social and environmental practices are sometimes of benefit to a business and sometimes are not. This is an on-going debate which involves not only SP but all sustainable practices whether environmental, economic or social. It is an issue that a number of the participants struggled with in this research along with assessing the actual value that SP can bring. As one participant put it “if it is something that’s good you should be able to put a value on it. Whether that value is an economic or a social or an environmental or an efficiency value”. Business case, business benefit, added value, success measures and maximise value are the various terms used by the participants to convey the economic importance of SP. This proves that the majority of the interviewees will not practice SP unless there is a real, demonstrable value to be gained from it. It also highlights the difficulty, as Hawkins (2006) points out, of taking account of economic, social and environmental factors in the decision making of business.

5.5 Type of Sustainable Procurement Practised

The research shows that seven out of the nine organisations are practising SP and that the remaining two organisations it seems are practising it without realising it. Contrary to previous findings (Brammer and Walker 2011) relating to SP in the public sector internationally, this study does not demonstrate social considerations (buying from small and local businesses) as the main type of SP used. Environmental aspects, as discovered in Oruezabala and Rico’s (2012) study, such as green vehicles, green cement, recycling and economic considerations including the use of TCO/LCA/LCC and adding value are much more prominent. In fact there was very little discourse regarding the social aspects intrinsic to SP. It does raise the issue of whether the social element of SP is

being considered as much as (or at all) the environmental or economic elements of SP in Irish commercial semi-state bodies. Should social procurement therefore continue to be included under the term SP? Or should it be considered in isolation? (McCrudden 2004).

5.6 Application of Sustainable Procurement

The researcher wanted to explore where SP was applied within the tender process; i.e. the specification, selection criteria, award criteria or contract clause performance. Little if any research has been carried out on this facet of SP. The findings revealed that the majority of participants were predisposed to incorporating SP considerations in the specification and award criteria. The latter finding is surprising in that there is more of an inherent risk of using it at award stage rather than at selection stage particularly, as one participant admitted, that trying to articulate SP at this stage can be difficult. This also bears little relationship to the risk of a challenge that some interviewees noted as a barrier to SP. This may suggest that the procurers are experienced professionals, adept at applying SP thus nullifying any potential risk or fear that internal stakeholders may have of incorporating SP into a tender process. Another finding of note was the use of SP in pre-sourcing.

5.7 Use of Sustainable Procurement

The European Commission report regarding the uptake of GPP in member states in 2012 represented Ireland's use at less than 20%. If one was to measure this figure against commercial semi-states alone it would show that the European Commission figure bears no relationship to the findings that seven of the nine participants, at least, practice SP. Akin to the findings by Walker and Brammer (2009) of SP in the UK, ample evidence is found of nascent SP practices that are in place. It is also conceded by most of the participants that more knowledge needs to be accumulated in this area. As one participant, who had given himself a small to medium SP knowledge rating, put it "we're doing a huge amount more work now in sustainable issues around procurement than we would have been doing 2/3 years ago....but there's a huge amount to learn in it".

That an improvement of SP knowledge is necessary is supported by another participant who vowed to increase his knowledge in light of partaking in the case study because "your questions have caused me to question myself and I said no to a couple of them (questions) and I thought I was up to speed on it". Though it was hard for interviewees to quantify during the interview the number of tender processes which contained SP over the previous three years, indicative figures provided are largely positive. With four of the participants stating that a sustainability/environmental section is included in all tender processes (unless irrelevant) and another participant whose organisation has applied SP in approximately 80 tenders, the data shows that the use of SP is high.

5.8 Main Findings in Response to the Research Question Number One

The research findings show that a certain amount of SP is being practised in Irish commercial semi-state bodies. The extent of this use varies from some organisations that apply it to every process to one organisation which to its knowledge does not engage in it at all. The awareness of and knowledge of SP was reasonably high though the government's NAP was not as well known. The majority of participants use the environmental and economic aspects of SP with little evidence of the use of social aspects found. Specification and award stages are the preferred conduit of SP from the data though responses show that it used in the selection and contract stage also. Overall SP is being utilised by Irish commercial semi-state bodies though a lot more needs to be done in increasing the quantity and amount within the actual tender process.

5.9 Research Question Number Two

Research Question 2: What are the barriers to using sustainable procurement to its fullest potential in commercial semi-state bodies in Ireland?

Research Question 2: To identify and examine the barriers to using sustainable procurement in commercial semi-state bodies in Ireland.

Introduction: It is known that there are barriers to using SP in Irish commercial semi-state bodies. The research data has proved this theory and found numerous internal and external barriers. This section will look at each barrier identified in the literature to see if it is germane to the context of the commercial semi-state bodies in Ireland too. Care is also taken to ensure any new barrier found is disclosed.

5.10 Internal Barriers to Sustainable Procurement

Nine barriers in total were discovered in a review of the extant literature. The researcher will examine each one individually to determine whether evidence is found to corroborate existence of this in an Irish commercial semi-state setting.

1 - Management: Support from management for SP was put forward by a small number of participants as a barrier. One participant agrees with Tripathi & Petro's (2010) argument that an alignment to organisational strategy is

necessary. The experts interviewed both concurred that the role of senior management was important with one expert emphasising the role of policy makers too. The policy makers' roles are important and Brammer and Walker (2011, p.472) state that they "need to be mindful of the emphasis they place on the various aspects of SP, as different interpretations are apparent in different countries, and there is no right way to approach SP".

An unanticipated research finding is that senior management in some organisations are supportive of SP. However some participants found the real difficulty to be in convincing business users of the merits of SP. This contrasts with Quinn (1997) and Sweeney's (2007) assertions that senior management involvement is critical to SP/CSR initiatives. Nonetheless it does suggest that senior management may need to encourage SP more in order for it to be integrated into the operations and culture of an organisation (Trevino *et al.* 2000; Joyner *et al.* 2002; Hammer 2004).

2 – Cost: Throughout the case study the balance between cost and the value of a product/service is considered. The current economic climate means that financial savings and a reduction of expenditure are being prioritised in all organisations. The perceived cost of SP is noted by several participants as a barrier (Walker *et al.* 2009). Justification for paying extra for a more sustainable product/service is as one participant declares 'a hard win'. Participants urge caution with regard to extra payment for more sustainable products/services (Min and Galle 2001; Brammer and Walker 2011) without added value (Morton 2002; Sharma *et al.* 2010; Oruezabala & Rico 2012). Cost will continue to be a factor, rightly or wrongly, for the foreseeable future as one participant theorises; "I do think deep down the whole sustainability thing is very much aligned or associated with the recessionary times and I think when it does come out on a global scale I think the knock on effect will be SP, sustainable thinking".

3 – Time: Four participants agree that time is a barrier to implementing SP (Hawkins 2006). It is observed that though the time taken to use SP is a barrier no participant explicitly stated that SP was being neglected as a result of short termism (Walker and Phillips 2006; Walker *et al.* 2009). On the contrary the necessity of long term, sustainable thinking was at the forefront of many participant responses. One participant contradicts this consensus by deeming that laziness on behalf of the procurer is one reason why SP is not practised more as "the amount of effort between a sustainable and non-sustainable tender is minimal". Perhaps the use of templates for recurring contracts should be advocated to reduce the time involved in using SP.

4 - Further Training: The need for training and education is identified in the research data and agrees with existing findings on this topic (Bowen *et al.* 2001; Walker and Phillips 2006). This correlates with an Irish study (Ryan, Dunphy and Henry 2008) which identifies a requirement for training due to SP knowledge gap. When asked if they would undertake SP training all answered yes (except one who wants benchmarking with peers). The earlier study (Ryan, Dunphy and Henry 2008) also indicates that no demand exists for green or sustainable procurement education. The research data contradicts their 2008 finding and is maybe representative of a change in outlook by procurers since. This is possibly as a result of EU/government guidelines or of a more professional and knowledgeable number of procurement professionals. Significantly two participants noted that there does not seem to specific SP training or courses available, a gap that the government or the NPS needs to address. If training does not exist, one option to overcome this as recommended by one of the participants and from international research (Brammer and Walker 2011; Preuss and Walker 2011) is to share learning across organisations/countries for the benefit of all.

5 – Conflict with E-Procurement: No interviewee raised SP as a possible conflict with e-procurement (Walker and Brammer 2012). In fact surprisingly there is no mention of technology/ICT by participants in this study. It should be added that e-procurement seems to be in its infancy in Ireland and therefore may become a barrier in the future.

6 - Individual versus Organisational: Preuss and Walker (2011) remark that individuals have their own goals, needs and strategies which may not be in alignment with that of their organisation. Some participants state that getting the business users to implement SP practices or to see the potential value of sustainable products/services is a barrier. It is arguable that this is an example of an individual's strategies or decision making taking precedence over those of the organisation. One interviewee stressed that "people tend to only see where the business benefit is and it is harder to sell a business benefit if it's conceptual".

7 - The Individual: The importance of the individual in an organisation and how he or she responds to organisational strategy is addressed in the previous section. There is evidence that an individual can influence other individuals within an organisation in terms of the environment (Anderson and Bateman 2000; Egri and Herman 2000). The lack of a champion "to take the lead, identify the benefits accruing to the organisation" is put forward by one participant as a barrier. Without champions or leaders in an organisation it is possible that SP will not develop even with senior management backing. The findings do not indicate whether compliance (Sutinen and Kuperan 1999) would be successful or not, on an individual basis alone, in increasing the use of SP.

8 – Organisational Culture: There was little reference to organisational behaviour or culture in the interviews. One participant when questioned as to whether the culture of his organisation may be a barrier stated that though change is not easy the Irish were good at adapting. This links with the theme of reluctance to change as discussed in the next section. The research data demonstrates that it is certain individualistic (the business users) values rather than the organisation's as a whole that requires changing. Cynicism was put forward as a barrier by one participant in relation to the "whole green agenda" and so it can be contended that cynicism, as an aspect of organisational culture, is found to be a barrier to SP use.

9 – Reluctance to Change: Some examples of reluctance, unwillingness and fear of change are found in the research data. In one case this reluctance to change is attributed to the fear of something new. Similar to the section on cost one participant asserts that a "big challenge is the fear of a perceived cost which isn't necessarily there". Organisational change and all that it entails can be difficult (Preuss and Walker 2011) but as one participant said that his organisation had gone through so much change since the recession that everybody is used to change and there is no reluctance. This may be characteristic of many organisations today and resistance to the introduction of new practices, such as SP, may be significantly less as a result. It may therefore be the best time to introduce SP practices into organisations.

New Internal Barriers Found:

- 1 Right Tools: Two participants identified the need to have the right tools to apply SP. One participant maintained that "making sure that we have the right tools to implement it" was a barrier. The other participant bemoaned the fact that a toolkit was not given to procurers to assist in implementing SP practices.
- 2 Applying SP Criteria: Two interviewees spoke about the difficulty in the application of sustainable criteria. One had difficulty in evaluating the environmental section while another had trouble in structuring the criteria and the weighting to include SP.
- 3 Defining SP: The majority of participants struggle with the concept of SP and by extension how to measure it. Frustration was evident in these instances and as one participant suggests "maybe there is some guru in government that has the answer, what does SP mean and how does it add value?" Sweeney's (2007) research also found defining CSR difficult while some interviewees wished that a formal definition could be provided.

5.11 External Barriers to Sustainable Procurement

Six external barriers were found in the literature by this researcher. These six will be analysed in order to determine their validity in the context of Irish commercial semi-state bodies. As before, any new external barrier identified will be included.

1 – Legislation and Compliance: The research findings agree with Morgan's (2008) assertions that unclear regulations or legislation can be a barrier to SP. The definition, and as a result, the understanding of SP is somewhat muddled by the directives/NAP thus preventing further use of SP in some organisations. Brammer and Walker (2011) observe that where SP is legislated for it seems to be applied but if voluntary directives are in situ then other priorities (e.g. cost) take precedence. One participant admitted that guidelines "mean very little" and argued that mandatory guidelines could assist the advancement of SP both internally to stakeholders and also to organisations.

Another opined that compliance would work but would not be the best option. As Tyler (1990) comments it may not be deemed fair or legitimate and its success may still depend on the individual (Sutinen and Kuperan 1999). If the government intends to meet its Europe 2020 targets then compliance with using SP should be mandated as a necessary condition (Gelderman 2006).

2 – Policy Entrepreneurs/Converts: External policy that is not compulsory, for example SP, often requires what Drumwright (1994) refers to as 'policy entrepreneurs' in order to integrate them into an organisation. A policy entrepreneur or champion was identified as an internal barrier to SP but could conceivably remain here also. As one of the experts interviewed noted "the main players I would argue is however the middle-management people who are the doers and have a responsibility morally and otherwise to consider these issues, but to consider them in a balanced way".

3 – Cultural Relativism: It is not clear if cultural relativism was singled out as a barrier to SP. Ireland as a nation has gradually increased in its awareness of environmental and social issues and though some participants stated a fear of change or cynicism as internal barriers no common theme was evident in this regard. It is believed that cultural relativism is therefore not an impediment to SP in Irish commercial semi-state bodies.

4 - Obligation: Many participants note a lack of obligation to using SP as a barrier to implementing, furthering its use or pushing for a more sustainable product/service option. McDowell's (1983 in MacNeil 1985, p.501) assertion that voluntary engagement automatically enforces obligation is not found to be valid from the research data collated. One participation states that if SP is made obligatory then it will be implemented "as a semi-state has to comply". Sufficient evidence from the interviews suggests that discourse should take place, both at a national and EU level, on this issue.

5 - Protectionism: No discernible data was found from the interviews in relation to element of protectionism. Overall there was little reference to social aspects of procurement let alone buying from small or local suppliers.

6 - Supplier Knowledge: Five participants commented on the lack of understanding of suppliers of SP as a barrier (Oruezabala and Rico 2012). When asked if SP requires a better buyer-supplier relationship six of the participants agreed (Vachon and Klassen 2008; Walker and Brammer 2012) with one positing that "a lot of supplier awareness in public environment comes from what they learn from buyer".

On this theme of developing buyer-supplier relationships in relation to SP, a participant asserted that "it needs to reach a level of sophistication where you can evaluate and take on board what the supplier is offering". The lack of validation of data by suppliers on sustainable products and services was a challenge that one participant found difficult to overcome. Two other responses noted the importance of taking the TCO of a product or service into account (Gardner 1987; Ellram and Siferd 1998; Carter and Jennings, 2002; Lapašinskaitė and Boguslauskas 2005; Lysons and Farrington 2006; Tarantini, Loprieno and Porta 2011). The findings suggest that more needs to be done both by the government, industry groups, procurers and suppliers themselves to ensure that suppliers possess sufficient knowledge to meet the market demands that SP will create.

5.12 Main findings in response to the second research question

Barriers exist preventing the implementation of SP practices into Irish commercial semi-state bodies. The qualitative data collection has proceeded to narrow the focus and identify these actual barriers. Of the nine internal barriers found from the literature review, all except one, conflict with e-procurement, were stated as barriers by participants. In addition new barriers were uncovered; defining SP, applying SP criteria and possessing the tools to apply SP. With regard to the six external barriers uncovered in the literature two of them, protectionism and cultural relativism, were not found to a relevant barrier in this research setting. No new external barriers were identified.

6. SUMMARY AND CONCLUSIONS

According to Environmental Protection Agency (EPA) report published in April 2013 there is a significant risk that Ireland will not meet its Europe 2020 targets. Public procurers through engagement with SP have a responsibility to assist the country to achieve these targets (Murray 2001; Preuss 2007, 2009; Walker et al. 2009). As the findings highlighted earlier show, the level of awareness of these targets by the participants is not as high as one would expect. The research does indicate that in general there is a large amount of SP being practised by participant organisations with some well ahead of others. Knowledge and understanding of SP by the participants is high which is a vital foundation for the implementation of this practice. This use is illustrated by the numerous and varied examples given by the interviewees of SP in the findings section.

The research data overall provides a good insight into the use of SP in Irish commercial semi-states thus answering the first research question; How is sustainable procurement currently being practised by commercial semi-state bodies in Ireland? This is answered by exploring the use of SP and one of the main themes occurring throughout is the importance of achieving value when using SP. The participants are adamant that a "competitive advantage" must be obtained when using SP. The accountability entrusted upon the participants as a result of being responsible for procurement in their organisations means that the financial aspects of every tender process is most salient. Therefore VFM still seems to be a priority over sustainable objectives however seven out of nine participants insist that a balance can be achieved between reducing costs and purchasing sustainably whilst maintaining quality.

Economic and environmental are the aspects of SP predominantly applied by the participants however the lack of discourse and examples in relation to social considerations is potentially worrying. It is not evident from this case study if social aspects of SP are or are not being considered by commercial semi-state bodies. Nevertheless further research is required to identify if social aspects of SP is being applied and if not, are there specific challenges preventing its use. Seminal data in an Irish context is obtained on the actual application of SP in tender processes where little research has been conducted heretofore. The overriding use is in the specification and award criteria while many participants comment on how difficult SP is to evaluate as it is often intangible and subjective as opposed to other criteria.

The data confirms the presence of barriers within organisations to implementing SP practices. The literature review revealed more internal barriers than external barriers and the research findings corroborate this. Eleven internal barriers in total were found including three not identified in the review of the literature. Cost, senior management buy in, time, fear of risk/cost, the requirement for further training and the role of the individual are some of the internal barriers found which have been observed in previous research findings. This demonstrates that an amount of work still needs to be done on educating, training and empowering both procurers and stakeholders alike in order to increase the use of SP. A positive view though can be taken of these internal barriers, as Walker et al (2008) accentuate, in so far as they are within the realm of influence of the participants plus senior management and it is therefore possible to overcome.

New internal barriers such as defining SP, applying SP criteria and having the right tools to implement SP are identified. The definition of SP is a main concern for several of the participants and one of the experts. This is an issue that needs to be addressed at EU or government level. It is hoped that these three findings will contribute to a deeper understanding of the topic of SP outside of what is available from existing literature.

The lack of understanding by suppliers and the marketplace of SP was one of the main external barriers put forward by interviewees. In addition there was a considerable amount of discourse on legislation and directives. Also discussed was whether SP should be made mandatory or not, on which there was general agreement that this would work as semi-state bodies would therefore have to comply however some believed this was not the best process. Overall of the six external barriers identified in the literature review evidence of four was found in this research setting.

Research Limitations: There are several limitations to this study. Though a good representation of commercial semi-state bodies (one-third) participated in this research there is the possibility of bias as it is possible they were interested in and/or already using SP. The opposite may be the case for those who do not use SP and therefore chose not to participate in the research. The researcher did attempt to reduce this risk of bias by clearly stating on the invite letter that it was not necessary for the organisation to be using SP to take part in the study. These organisations may therefore have other barriers preventing the use of SP which cannot now be identified.

It is conceivable that the review of the extant literature by this researcher did not capture all the barriers found in previous research. Although a significant amount of work was read it is inevitable that other barriers may have been missed. Another limitation is that the research is cross-sectional and therefore participants may have only referenced current and recent work in their responses thus preventing a fuller vision of SP in their organisations.

Future Research: Future research could take account of the public sector as a whole or as a separate body of research from commercial semi-state bodies and the results could then be compared. A quantitative approach may work better in this case due the high number of public sector bodies and also to better quantify the actual use of SP in terms of tender processes conducted, areas of application of SP and the aspects of SP used (environmental, social and economic). This could also take account of the drivers, as well as the barriers, to using SP.

Possible future research may consider a longitudinal study, as opposed to cross-sectional, in one organisation that has just implemented SP practices or a number of organisations who are trying to increase the use of SP. A further area for research, as already alluded to, could be an exploration of the use of social aspects of SP in a Irish commercial semi-state body and/or public sector context. It could examine if it is being used more, less or on a par with environmental and economic SP considerations in tender processes and the reason for this level of use.

These research findings show that SP is being practised in some commercial semi-state bodies. Existing and new barriers to using SP have been identified. Much existing research has identified barriers to SP in an international context (Brammer and Walker 2011) and in a public sector setting (Walker and Brammer 2009; Oreuzabala and Rico 2012). However the extant literature did not produce evidence of research carried out specifically in commercial semi-state bodies which are in some ways similar to public sector organisations though operating in commercial markets (Johnson and Scholes 2001). The researcher is optimistic that these findings will add greater understanding to use of SP in public procurement.

Acknowledgements

Thank you to my employer Dublin Bus for providing financial support for the Masters in Strategic Procurement, Dublin City University. I would like to thank Emma McEvoy, my supervisor, for her guidance throughout the research for my dissertation.

References

- A.B. Carroll. (1979): A Three-Dimensional Conceptual Model of Corporate Performance. *Academy of Management*, Oct 1979 pp.497 – 505.
- A.D. Janckowicz. (2000): *Business Research Projects*. 3rd ed. London: Thomson Learning.
- A.J. Hoffman and M.H. Bazerman (2005): Changing environmental practice: understanding and overcoming the organizational and psychological barriers. Harvard Business School working paper, No.05-043.
- A.J. Van Weele. (2010): *Purchasing and Supply Chain Management*. 5th ed. Hampshire United Kingdom: Cengage Learning EMEA.
- A. Bryman and R.G. Burgess. (2002): *Analyzing Qualitative Data*. 2nd ed. London: Routledge Group.
- A. Erridge and G. Murray. (1998): The Application of Lean Supply in Local Government: The Belfast Experiments. *European Journal of Purchasing and Supply Management*, 4, pp.207-221.
- A. Erridge and S. Henningan. (2007): Public procurement and social policy in Northern Ireland: the unemployment pilot project. Piga, P. and Thai, K.V. (Eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing*, PrAcademics Press, Boca Raton, FL, EU, (2012).
- A. Glover. (2008): *Accelerating the SME Economic Engine through Transparent, Simple and Strategic Procurement*. London, UK: HM Treasury.
- A. Menon and A. Menon. (1997). *Enviropreneurial Marketing Strategy: The Emergence of Corporate Environmentalism as Market Strategy*. *Journal of Marketing*, 61(1), pp.51-67.
- A. Pickernell, G. Kay, G. Packham and C. Miller. (2011): Competing Agendas in Public Procurement: An Empirical Analysis of Opportunities and Limits in the UK for SMEs. *Environment & Planning C: Government and Policy*, 29(4), pp. 641-58.
- B. Banerjee, E.S. Iyer, and R. K. Kashyap. (2003): Corporate Environmentalism: Antecedents and Influence of Industry Type. *Journal of Marketing*, 67(2), pp.106-122.
- B. Burnes. (2004): Emergent change and planned change – competitors or allies? The case of XYZ construction. *International Journal of Operations & Production Management*, 24(9), pp.886-902.
- B. Joyner, D. Payne and C. Raiborn. (2002): Building Values, Business Ethics and Corporate Social Responsibility into the Developing Organisation. *Journal of Developmental Entrepreneurship*, 7(1), pp.113–131.
- B. Morton. (2002): Purchasing and ‘green’ issues. IN: Day, M. Gower Handbook of Purchasing Management 3rd Edition. Aldershot, England: Gower Publishing Ltd. pp.207-222.
- C.J. Gelderman, P.W.T. Ghiljsen and M.J. Brugman. (2006): Public procurement and EU tendering directives-explaining non-compliance. *International Journal of Public Sector Management*, 19(7), pp.702-14.
- C. Carter and M. Jennings. (2002): Social responsibility and supply chain relationships. *Transportation Research Part E: Logistics and Transportation Review*, 38(1), pp.37-52.
- C. Carter. (2005): Purchasing social responsibility and firm performance: the key mediating roles of organizational learning and supplier performance. *International Journal of Physical Distribution & Logistics Management*, 35(3), p.177-194.
- C. McCrudden. (2004): Using public procurement to achieve social outcomes. *Natural Resources Forum*, 28(4), pp.257-267.
- C. Robson. (2002): *Real world research: a resource for social scientists and practitioner-researchers*. Oxford, UK: Blackwell Publishing.
- C.P. Egri and S. Herman. (2000): Leadership in the North American Environmental Sector: Values, Leadership Styles, and Contexts of Environmental Leaders and Their Organizations. *The Academy of Management Journal*, 43(4), pp.571-604.
- Centre for European Policy Studies and College of Europe, (2012): *The uptake of green public procurement in the EU27*. Brussels: Centre for European Policy Studies and College of Europe.
- D.F. Simpson and D.J. Power. (2005): Use the supply relationship to develop lean and green suppliers. *Supply Chain Management: An International Journal*, 10(1), pp.60-8.
- D.M. Gardner. (1987): *The product life cycle – A critical look at the literature*. University of Illinois, BEBR Faculty working paper, No. 1336. University of Illinois.

D. Maxwell and R. Van der Horst. (2003): Developing sustainable products and services. *Journal of Cleaner Production*, 11(8), pp.883-895.

Department for Environment, Food and Rural Affairs (2006): Procuring the Future—The Sustainable Procurement Task Force National Action Plan [Online]. Available from: <http://www.sustainabledevelopment.gov.uk/publications/procurement-action-plan/documents/full-document.pdf>.

Department for Environment, Food and Rural Affairs. (2007): Securing the future: UK Government Sustainable Procurement Action Plan Incorporating the Government response to the report of the Sustainable Procurement Task Force. London: DEFRA.

Department of Communications, Energy and Natural Resources (2012): Strategy for Renewable Energy: (2012-2020) [Online]. Available from: www.dcenr.gov.ie.

Department of Communications, Energy and Natural Resources (2012): Ireland's Second National Energy Efficiency Action Plan to 2020) [Online]. Available from: www.seai.ie

Department of Enterprise, Trade and Employment. (2009): Using Public Procurement to Stimulate Innovation and SME Access to Public Procurement [Online]. Available from: [http://www.djei.ie/publications/trade/\(2009/procurementinnovationgroup.pdf](http://www.djei.ie/publications/trade/(2009/procurementinnovationgroup.pdf)

Department of Finance. (2010): Department of Finance Circular 10/2010: Facilitating SME Access to Public Procurement. [Online]. Available from: <http://www.procurement.ie/publications/circular-1010-facilitating-sme-participation-public-procurement>

Department of the Environment, Community and Local Government. (2012): Green Tenders – An Action Plan on Green Public Procurement [Online]. Available from: [http://www.environ.ie/en/Environment/SustainableDevelopment/GreenPublicProcurement/News/MainBody.29\(206.en.htm](http://www.environ.ie/en/Environment/SustainableDevelopment/GreenPublicProcurement/News/MainBody.29(206.en.htm)

Dublin City University Procurement Research Group, (2012): Opportunities in Public Sector Procurement: The National Procurement Service Annual Survey 2012. Dublin.

E. Hawkins. (2006): Corporate Social Responsibility: Balancing Tomorrow's Sustainability and Today's Profitability. Hampshire: Palgrave MacMillan.

E. Uyarra and K. Flanagan. (2009): Understanding the Innovation Impacts of Public Procurement. Manchester Business School, Working Paper, No. 574. Manchester Business School.

Environmental Protection Agency. (2013): Ireland's Greenhouse Gas Emission Projections 2012-2030. Wexford: Environmental Protection Agency.

European Commission. (2001): Integrating Social Considerations into Public Procurement [Online]. Available from: http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#europe2020

European Commission. (2007): Pre-commercial Procurement: Driving innovation to ensure sustainable high quality innovation in Europe [Online]. Available from: http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#europe2020

European Commission. (2008): Think Small First: A "Small Business Act" for Europe. [Online]. Available from: <http://ec.europa.eu/enterprise/policies/sme/small-business-act/>

European Commission. (2008a): Public Procurement for a Better Environment [Online]. Available from: http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#europe2020

F.E. Bowen, P.D. Cousins, R.C. Lamming and A.C. Faruk. (2001): The role of supply management capabilities in green supply. *Production and Operation Management*, 10(2), pp.174-189.

F. Lee. (2007): Ireland's semi-state bodies in a time of change. UCC, Department of Government working paper series, No. 4. Cork, University College Cork.

G. Albano, K. Snider and K. Thai. (2012): Charting a Course in Public Procurement Innovation and Knowledge Sharing. Florida: PR Academic Press, Florida.

G. Murray. (2000): Effects of a Green Purchasing Strategy: The Case of Belfast City Council. *Supply Chain Management: An International Journal*, 5(1), pp.37-44.

G. Johnson and K. Scholes. (2010): Exploring Public Sector Strategy. England: Pearson Education.

- G.R. Sharma, A. Iyer, A. Mehrota and R. Krishnan. (2010): Sustainability and business-to-business marketing: A framework and implications. *Industrial Marketing Management*, 39(2), pp.330-341.
- G. Svensson. (2007): Aspects of sustainable supply chain management (SSCM): conceptual framework and empirical example. *Supply Chain Management: An International Journal*, 12(4), pp.262-266.
- H. Greer. (1999): *Small Firms and Public Procurement in Ireland: A Study for the Department of Enterprise, Trade and Employment*. London, United Kingdom. Network Resources Limited.
- H. Manne. and H.C. Wallich. (1972): *The modern corporation and social responsibility*. Washington D.C. American Institute for Public Policy Research.
- H. Min and W.P. Galle. (1997): Green Purchasing Strategies: Trends and Implications. *International Journal of Purchasing and Materials Management*, 33(3), pp.10–17.
- H. Min and W.P. Galle. (2001): Green Purchasing Practices of US firms. *International Journal of Operations & Production Management*, 21(9), pp.1222-1238.
- H. Walker and S. Brammer. (2009): Sustainable procurement in the United Kingdom public sector. *Supply Chain Management: An International Journal*, 14(2), pp.128 -137.
- H. Walker and S. Brammer. (2012): The relationship between sustainable procurement and e-procurement in the public sector. *International Journal of Production Economics*, pp.1-13
- H. Walker, and L. Preuss. (2008): Fostering Sustainability through Sourcing from Small Businesses: Public Sector Perspectives. *Journal of Cleaner Production*, 16, pp.1600-1609.
- H. Walker, L. Di Sisto and D. McBain. (2008): Drivers and barriers to environmental supply chain management practices: Lessons from the public and private sector. *Journal of Purchasing & Supply Management*, 14, pp.69-85.
- H. Walker, R. Spencer, J. Miemczyk and T. Johnsen. (2012): Sustainable Procurement: Past, present and future. *Journal of Purchasing & Supply Management*, 18, pp.201–206.
- H. Walker, S. Gough, E.F. Bakker, L.A. Knight and D. McBain. (2009): Greening Operations Management: An Online Sustainable Procurement Course for Practitioners. *Journal of Management Education*, 33, pp.348-369.
- I. Maignan. (2001): Consumer's Perceptions of Corporate Social Responsibilities: A Cross-Cultural Comparison. *Journal of Business Ethics*, 30, pp.57-72.
- J. Collis and R. Hussey. (2003): *Business Research*, 2nd ed. UK: Palgrave MacMillan.
- J. Hayes and C. Allison (1998): Cognitive style and the theory and practice of individual and collective learning in organisations. *Human Relations*, 51(7), pp.847-871.
- J. Quinn. (1997); Personal ethics and business ethics: the ethical attitudes of owner/managers of small business. *Journal of Business Ethics*, 16(2), pp.119-27.
- J. Thomson and T. Jackson. (2007): Sustainable Procurement in Practice: Lessons from Local Government. *Journal of Environmental Planning and Management*, 50(3), pp.421-444.
- J.G. Sutinen and K. Kuperan. (1999): A socio-economic theory of regulatory compliance. *International Journal of Social Economics*, 26(1/2/3) pp.174-193.
- K. Loader. (2005): Supporting SMEs through Government Purchasing Activity. *The International Journal of Entrepreneurship and Innovation*, 6(1), pp.17-26.
- K. Loader. (2007): The Challenge of Competitive Procurement: Value for Money versus Small Business Support. *Public Money and Management*, 27(5), pp.307-314.
- K. Lyons and B. Farrington. (2006): *Purchasing and Supply Chain Management*. 7th ed. Great Britain: Financial Times/Prentice Hall.
- K. Morgan. (2008): Greening the realm: sustainable food chains and the public plate. *Regional Studies*, 42(9), pp.1237-1250.
- K.V. Thai. (2001): Public Procurement Re-examined. *Journal of Public Procurement*, 1(1), pp.9-50.
- L. DeBoer and J. Telgen. (1998): Purchasing Practice in Dutch Municipalities. *International Journal of Purchasing and Materials Management*, 34(2), pp. 31-41.

- L. Helm, S. Billiald, K. Harrison and J. Cavanagh. (2005): Sustainable procurement in central government. London: National Audit Office.
- L. Preuss. (2005): The Green Multiplier: A Study of Environmental Protection and the Supply Chain. Basingstoke: Palgrave Macmillan.
- L. Preuss. (2007): Buying into our Future: Sustainability Initiatives in Local Government Procurement. *Business Strategy and the Environment*, 16, pp.354-65.
- L. Preuss. (2009): Addressing Sustainable Development through Local Government: The Case of Local Government. *Supply Chain Management: An International Journal*, 14(3), pp.213-223.
- L.K. Trevino, L.P. Hartman and M. Brown. (2000): Moral Person and Moral Manager: How Executives Develop a Reputation for Ethical Leadership. *California Management Review*, 42(4), pp.128-42.
- L.M. Anderson, and T.S. Bateman. (2000): Individual Environmental Initiative: Championing Natural Environmental Issues in U.S. Business Organizations. *Academy of Management Journal*, 43(4), pp.548-70.
- L.M. Ellram and S.P. Siferd. (1998): Total cost of ownership: A key concept in strategic cost management decisions. *Journal of Business Logistics*, 19(1), pp.55-84.
- M. Drumwright. (1994): Socially responsible organisational buying: environmental concern as a non-economic buying criteria. *Journal of Marketing*, 58, pp.1-19.
- M. Hammer. (2004): Deep change; how operational innovation can transform your company. *Harvard Business Review*, pp.84-93.
- M. Quayle. (1998): The Impact of Strategic Procurement in the UK Government Sector. *International Journal of Public Sector Management*, 11(5), pp.397-413.
- M. Quayle and S. Quayle. (2000): The Impact of Strategic Procurement in the UK Further and Higher Education Sectors. *International Journal of Public Sector Management*, 13(3), pp.260-284.
- M. Saunders, P. Lewis and A. Thornhill. (2003): Research methods for business students. 5th ed. New York: Prentice Hall.
- M. Swanson, A. Weissman, G. Davis, M.L. Socolof and K. Davis. (2005): Developing priorities for greener state government purchasing: a California case study. *Journal of Cleaner Production*, 13(7), pp.669-77.
- M. Tarantini, D.A. Loprieno and P.L. Porta. (2011): A life cycle approach to Green Public Procurement of building materials and elements: A case study on windows. *Energy*, 36, pp.2473-2482.
- M. Wallace and A. Wray (2006): *Critical Reading and Writing for Postgraduates*. London: SAGE Publications Ltd.
- M.D. LeCompte. (2000): Analyzing Qualitative Data. *College of Education*, 39(3), pp.146-154.
- M.D. Myers. (2009): *Qualitative Research in Business & Management*. London: Sage.
- M.T. Boykoff and J.M. Boykoff. (2007): Climate Change and Journalistic Norms: A Case Study of U.S. Mass-Media Coverage. *Geoforum in Press*, 38(6), pp.1190-1204.
- My Market Research methods. [Online]. Available from: [http://www.mymarketresearchmethods.com/wp-content/uploads/\(2011/10/The-Market-Research-Process.jpg](http://www.mymarketresearchmethods.com/wp-content/uploads/(2011/10/The-Market-Research-Process.jpg)
- N. Ryan, A. Dunphy and A. Henry. (2008): Study of Awareness & Knowledge of Sustainable Procurement among Procurement Professionals & Identification of Education & Training Needs. University College Cork: Cleaner Production Promotion Unit.
- Office of the Attorney General. (2011): European Union (Energy Efficient Public Procurement) Regulations (2011 [Online]. Available from: [www.irishstatutebook.ie/\(2011/en/si/0151.html](http://www.irishstatutebook.ie/(2011/en/si/0151.html)
- P. Clough and C. Nutbrown. (2012): A Student's Guide to Methodology. 3rd ed. London: Sage Publications.
- P. Rao and D. Holt. (2005): Do green supply chains lead to competitive and economic performance? *Journal of Operations and Production Management*, 25(9), pp.898-916.
- P. Shrivastava. (1995): The role of corporations in achieving ecological sustainability. *Academy of Management Review*, 20(4), pp.936-960.

- P.R. Varadarajan. (1992): Marketing's Contribution to Strategy: The View from a Different Looking Glass. *Journal of the Academy of Marketing Science*, 20 (Autumn), pp.323-43.
- R. Fee, A. Erridge and S. Hennigan. (2002): SMEs and Government Purchasing in Northern Ireland. *European Business Review*, 14(5), pp.326-334.
- R. Kahn and C. Cannell. (1957): *The Dynamics of Interviewing*. New York and Chichester: Wiley.
- R. Lamming and J. Hampson (1996): The environment as a supply chain management issue. *British Journal of Management*, 7(1), pp.45-62.
- R. Lamming. (2002): Purchasing and organizational design. IN: Day, M. *Gower Handbook of Purchasing Management* 3rd Edition. Aldershot, England: Gower Publishing Ltd. pp.9-22.
- R. Lapašinskaitė and V. Boguslauskas. (2005): The maintenance cost allocation in product life cycle. *Engineering Economics*, 4(44), pp.7-23.
- R.M. Lee. (1993): *Doing Research on Sensitive Topics*. London: Sage.
- S. Baker. (2006): *Sustainable Development*. Great Britain: Routledge.
- S. Brammer and H. Walker. (2011): Sustainable procurement in the public sector: an international comparative study. *International Journal of Operations & Production Management*, 31(4), pp.452-476.
- S. Gough and W.A.H. Scott. (2001): Curriculum development and sustainable development: practices, institutions and literacies. *Educational Philosophy and Theory*, 33(2), pp.137-152.
- S. K. Srivastava. (2007): Green supply-chain management: a state-of-the-art literature review. *International Journal of Management Reviews*, 9(1), pp.53-80.
- S. Mitra and S. Webster. (2008): Competition in remanufacturing and the effects of government subsidies. *International Journal of Production Economics*, 111, pp.287-298.
- S. New, K. Green and B. Morton. (2000): *Buying the Environment: The Multiple Meanings of Green Supply*. In S. Fineman *The Business of Greening*. London: Routledge, pp.35-53.
- S. Sharma. (2000): Managerial Interpretations and Organizational Context as Predictors of Corporate Choice of Environmental Strategy. *Academy of Management Journal*, 43(4), pp.81-97.
- S. Tripathi and G. Petro. (2010): Evolving Green Procurement and Sustainable Supply Chain Practices in the Organizations: A Framework to Align Functional Strategy Implementation to Organization's Corporate Social Responsibility (CSR). *Objectives in Management Convergence*, 1(1), pp.24-32.
- S. Vachon and R.D. Klassen. (2008): Environmental management and manufacturing performance: The role of collaboration in the supply chain. *International Production of Economy*, 111, pp.299-315.
- T.R. Tyler. (1990): *Why People Obey the Law*. New Haven and London Yale: University Press.
- U-M. Nielsen and L.G. Hansen. (2001): The EU Public Procurement Regime - Does It Work? (2001. *Intereconomics*, September/October, pp.255-263.
- World Commission on Environment and Development. (1987): *Report of the World Commission on Environment and Development: Our Common Future*. World Commission on Environment and Development.

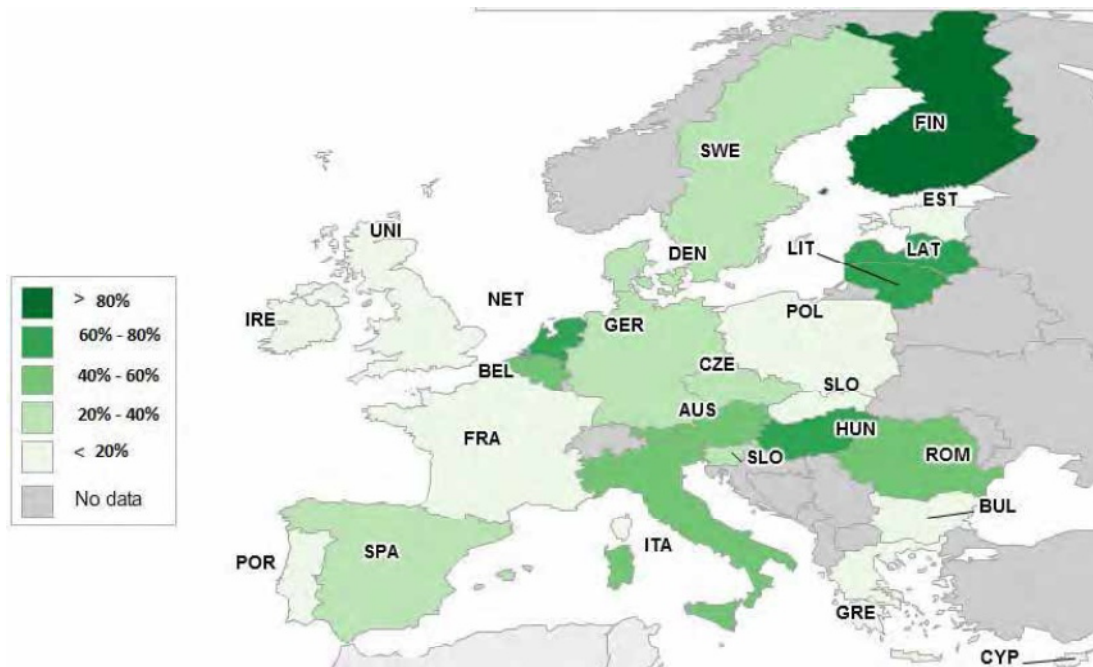
www.ec.europa.eu/europe2020

<http://www.wrap.org.uk/>

Fig. 1: The Corporate Social Performance Model. Source. A. B. Carroll (1979): A Three-Dimensional Conceptual Model of Corporate Performance. *Academy of Management*, p. 503, fig. 3)

APPENDIX I – The Uptake of GPP in the EU 27 countries

Share of Value of All Contracts in 2009 and 2010 Including GPP Criteria by Member State



Source: Centre for European Policy Studies and College of Europe. (2012): The uptake of green public procurement in the EU27. Brussels: Centre for European Policy Studies and College of Europe, p.41-42.

Promoting human rights compliance through public procurement (regulation): the new European Directive¹

Myrthe Vogel¹

¹ Vrije Universiteit Amsterdam,
De Boelelaan 1105,
Amsterdam, Netherlands
E-mail: m.vogel@vu.nl

1. Introduction

In recent years, the attention for corporate social responsibility has increased both society-wide as at the level of the European Union and its Member States.² This attention is not only focused on private businesses, but also on public authorities. Public authorities in Europe buy goods and services from the market for a total value of approximately 420 billion euro per year (in 2010).³ Therefore, they have, apart from their ability to stimulate corporate social responsibility (CSR) by using conventional regulatory means, yet another powerful tool to do so. Public authorities are able to act as a ‘launching customer’ and strategically use their purchasing power in order to influence the manner in which private businesses produce and deliver their products and services from the perspective of CSR.⁴ Although this term (CSR) formerly mainly implied ‘buying green’, CSR is much broader nowadays. Apart from the pursuit of green or environmental criteria, social criteria too form an important element of the current concept of sustainability. On their part, these social criteria can also be divided into two categories. Whereas ‘internal social goals’ such as promoting re-employment and – with regard to the users of a product – *design for all* criteria have been a focus point in practice and regulation for quite a while now, the attention for the – more externally oriented – integration of human rights considerations in public procurement (regulation) is much more recent and therefore less developed. There is, however, a clear and undeniable trend of more and more Member States and purchasing authorities trying to promote the compliance with human rights – in particular labour rights – by economic operators in the performance of public contracts.

The scope Member States (national legislators) and public authorities have to stimulate CSR goals through public procurement (regulation) is determined by the European Directives (and the interpretation thereof by the European Court of Justice). With the entering into force of the new Directives, this scope has been fairly revised. Not only do the new Directives, in contrast to the current ones, explicitly focus on promoting the use of public procurement in support of *societal goals*⁵ (as the promotion of strategic use of procurement in general is one of the two main goals of the revisions⁶), they also have a greater focus than the current Directives, within the aforesaid context, specifically on the promotion of *human (labour) rights compliance* through public procurement (regulation).⁷

It can, however, be questioned to what extent the new regulation will actually clarify what Member States and contracting authorities are allowed (or maybe even obligated) to do in this respect.

This paper will illustrate that, although the scope to do so seems to have been expanded, the new Directive will also set the ground for further discussion and legal uncertainty in this field. This illustration will be based on an analysis of two of the most striking new provisions within the proposed Directive, relevant with regard to promoting human rights considerations in public procurement (regulation).

2. Article 18 (2); A new and extensive duty for Member States and contracting authorities?

One of the most notable alterations in the new Directive with respect to promoting human rights compliance through public procurement is the introduction of a new and extensive duty for Member States in article 18 (2):

Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Although the wording of the article does not leave much ambiguity about the question *whether* Member States have a *duty* (instead of a possibility) in this respect, it is much less clear about the *content* of this duty.⁸

The measures that shall be taken, must *ensure* that ‘economic operators’, when performing public contracts, *comply* – instead of: ‘are stimulated to comply’ - with the obligations referred to in art. 18(2), amongst which obligations in the field of social and labour law.⁹ This compliance is thus no longer solely the responsibility of the economic operators themselves, Member States too have an explicit duty in this respect.¹⁰

But what is the content of this duty? According to art. 288 TFEU, Directives in general impose duties upon Member States to achieve a certain results.¹¹ Hence the question is what is the result the Member States are obligated to achieve? It does not seem plausible to assume that Member States are expected to take measures that *will* actually *have* the effect that economic operators comply with the obligations referred to. For whether or not these operators will comply is (also) dependent on the individual choices of the contracting authority and of the economic operators concerned (which will be based on a broad cost/benefit analysis, only partially influenced by the existing legal context such as applicable regulation and contractual conditions). If we would interpret the duty in the aforementioned way, this would thus amount to a duty that would be neither feasible nor realistic. All the more striking is the fact that the legislator indeed did choose the rigorous formulation ‘*shall* (instead of *may*) take measures to *ensure* that economic operators *comply*’ instead of a less demanding formulation such as ‘shall take measures to *promote*’ or ‘*stimulate* that economic operators comply’.

If one would try to come to a more feasible and realistic interpretation, this wording seems to imply that in any case, the effectiveness of the possible measures should *at least* be thought about. Moreover, it does not seem compatible with this firmly formulated duty, to take measures with a voluntary character, such as measures of Member States allowing contracting authorities the liberty to decide not to take into account the compliance of economic operators with the referred norms in their procurement procedures or measures of contracting authorities allowing¹² economic operators to perform the contract without complying with the referred norms.

Originating from this strict formulation of Article 18(2), that seems to impose an obligation on Member States to *guarantee* (ensure) the actual compliance by economic operators and at the same time taking into account the fact that it is in reality not possible to *guarantee* (ensure) actual compliance by *any* measure, in my opinion the most sound interpretation of art.18(2) is to assume that Member States have a duty to create a legal framework in which the chances on economic operators performing public contracts violating the norms art. 18(2) refers to, are as limited as possible. Although Member States will – as it was argued – not be able to *guarantee* that this framework *will in fact* always lead to compliance by economic operators, they will in my opinion thus need to *guarantee* that the established framework stimulates this compliance (by (all) economic operators performing public contracts) *as much as a legal framework is able to*. In other words, the result Member States are obligated to achieve is in that view not so much a ‘*factual* effectiveness guarantee’, but more a ‘*legal* effectiveness guarantee’. Not the actual effectiveness needs to be ensured, but the fact that the legal framework is drafted in such a manner, that the likelihood of (actual) effectiveness is safeguarded as much as possible (*i.e.* a guarantee that the measures taken ensure the largest expectable effectiveness). This interpretation would in my opinion be the most feasible view in line with the strict wording of art. 18(2), for it formulates a more concrete duty which will make it easier for Member States to determine what is expected of them and for others to assess whether Member States do comply with this provision. However, even in the scope of this more concrete obligation, in my opinion, it will still be difficult to determine this. If, for example, a national legal framework imposes a duty on contracting authorities to include in their contract clauses an obligation for economic operators to comply with certain social standards when performing the public contract, and if this framework does not provide the contracting authority with a possibility to actually verify whether the performing economic operators do indeed comply with these standards¹³ and to take effective action if they appear not to, the probability that this legal framework is actually effective is very small – if not nil –. In such a case it can be assumed that this framework does not meet the requirements of art. 18(2), interpreted as elucidated above (for the framework does not create the largest probability of effectiveness). Even if however, the legal framework *does* provide for such possibilities, the question whether this makes the likelihood of (actual) effectiveness as large as possible, is still difficult to answer. For one could also argue that in order to comply with art. 18(2), as interpreted as above, a Member State may not suffice with creating a *possibility* for contracting authorities, but has a duty to impose an *obligation* (including a possible remedy) upon contracting authorities to effectively include human rights considerations in procurement procedures and to verify the

information provided by economic operators in such procedures. This again, would depend on the question whether one would expect that imposing a duty on contracting authorities will be more effective than ‘only’ creating a possibility for them.¹⁴ In other words, although within this less strict interpretation of art. 18(2) Member States would not have the impossible duty to ensure that their measures *will* be effective, they would still have to find a way to determine what will be the most effective measures. For on the basis of the strict wording of art. 18(2), it is in my view indisputable that Member States at least have a duty to take the measures that will in all likelihood be the most effective. This would in my view – unlike *ensuring* compliance – be a more realistic task for Member States, but not an easy one. For effectiveness (that can be expected) of measures – especially within the scope of human rights – will be hard to quantify. Moreover, it can in any case not be assessed by merely looking at the legal framework itself, because the extent to which a measure is effective depends largely on the individual choices of contracting authorities and economic operators.

Although I am of the opinion that the obvious intention of the provision – *i.e.* to establish that Member States become more aware of the effectiveness of the measures taken with regard to achieving sustainable goals – is a good one, art. 18(2) causes much uncertainty with regard to the exact content of the duty imposed on Member States. This will not only lead to legal uncertainty for Member States but, in addition, as a result of this unclarity, will presumably prevent the provision from having any remedial effect. In general, if a Directive imposes an obligation on Member States which is not performed correctly, the Commission, as well as other Member States can take action.¹⁵ But if it is unclear what exactly it is that is expected from the Member States on the basis of art. 18(2), it will obviously be very difficult, if not impossible, to establish that a Member State has failed to comply with this obligation.

Although art. 18(2) is formulated very rigorously, it therefore seems to be much more a (quite vague) signal than a duty that is likely to actually bring a change. Of course there will be Member States that will take measures to promote compliance by economic operators performing public contracts with the standards referred to, which measures could possibly even be considered to meet the result required by art. 18(2). However, it might be argued that the Member States doing so, will be those that are already willing to take such criteria into account in their role as a purchaser. They will probably not do this *because* of the newly introduced obligation of art. 18(2), but irrespectively of this. Member States that do not see the need to take environmental and social criteria into account in their procurement procedures, will in my view not be stimulated by art. 18(2) to do so.

3. Article 67; Real MEAT and MEAT on the basis of mere price?

One of the most popular manners to take into account social criteria within public procurement procedures is to include these as award criteria. The revised provision with regard to the possibilities Member States and contracting authorities have in this respect, can be found in article 67 of the new Directive.

The most striking difference between article 67 and its predecessor article 53 (Directive 2004/18) – and at first sight a good illustration of the broadened scope for strategic use of public procurement in the new Directive – relates to the fact that the award of public contracts on the basis of mere price is no longer allowed. At least that *seems* to be the clear intention of the reform. For instead of the choice that art. 53 provides between awarding on the basis of the lowest price only and awarding on the basis of the most economically advantageous tender’ (MEAT) – which options were still included in the original reform proposal¹⁶ – art. 67(1) determines: ‘*contracting authorities shall base the award of public contracts on the most economically advantageous tender*’. However, the message of paragraph 1 suddenly becomes a lot less clear when reading paragraph 2: ‘*The most economically advantageous tender*’ (...) ‘*shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing (...) and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects (...)*’. It follows from this that it is still possible to award the contract on the basis of mere price – in fact, contracting authorities are, unlike under the former provision, obligated to include a price or cost aspect in their award criteria¹⁷ – only this is now called awarding on the basis of MEAT.¹⁸ Taking into account that this final wording is probably the result of a political compromise, might make this mixed message less surprising, it does not make it less confusing. For until now, MEAT meant that the contract was awarded on the basis of the best price-quality ratio (assessed on the basis of several criteria, which did not necessarily have to include a price element) *instead of* on the basis of the lowest price criterion.¹⁹

As it was argued, the new regulation seems to create a new distinction by defining MEAT as *either* what was up to now known as the (mere) lowest price criterion *or* what was already called MEAT – *with the difference* that now, a price element has to be included²⁰ –, namely the price-quality ratio. Apart from this unclarity, this will in my opinion cause difficulties when applying the existing policy documents and case-law of the CJEU, for these are based on different definitions of the same concepts. (This is particularly surprising, because the Commission itself explicitly expressed the intention to ‘keep continuity in the use of notions and concepts that have been developed over the years through the Court’s case-law and are well known to practitioners’.)²¹ An Explanatory Note in this

respect would therefore be very welcome. For now, one can only assume on the basis of article 67 of the new Directive that the difference compared to article 53 described above is not what it seems to be: the award of a public contract on the basis of mere price is still possible, albeit that Member States now have the option to restrict or prohibit this.

But it is not only uncertainty article 67 brings us. Similar to what article 42 determines in the area of technical specifications, article 67 provides a clearer scope – certainly relevant regarding the issue of sustainable criteria – as to what (categories of content) the award criteria may comprise (par. 2) as well as to when these criteria are considered to be sufficiently linked to the subject matter of the contract (par. 3). This is mainly done by giving examples – much more than the current Directive does – of criteria that are allowed. Concerning the first question paragraph 2 – unlike the current Directive that only refers to *environmental* criteria – defines that award criteria determining the best price-quality ratio may include ‘environmental *and/or* social aspects. (...) *Such criteria may comprise, for instance: (a.) Quality, including (...) social (...) characteristics and trading and its conditions*’. Formerly, the initiative proposal for the new Directive clearly limited the scope for inclusion of social award criteria, for these might only regard ‘the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract’.²² In the Dutch coffee-case however, the CJEU broadened this scope substantially by stating – with reference to EVN Wienstrom – that ‘there is nothing, in principle, to preclude an award criterion from referring to the fact that the product concerned was of fair trade origin’.²³ The Commission seems to have followed this line in the final proposal. Of course, one could still wonder exactly what kind of social criteria are allowed (especially with regard to the principle of proportionality), but combining the fact that trading conditions (in general) are explicitly allowed and social criteria (in general) are too, fair trade criteria seem to now fall within the scope of article 67.

As regards the question when a certain criterion is considered to be sufficiently linked to the subject matter of the contract, article 67(3) also provides us with a clearer scope. Until now, the link to the subject matter of the contract-test was quite vague.²⁴ Article 67(3), however, now sheds some new light on this test (and thus on the possibilities contracting authorities have to include *i.a.* CSR criteria within the limitations of public procurement regulation) by explicitating that ‘*award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:* (a.) *the specific process of production, provision or trading of those works, supplies or services; or (b.) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.*’. (As it was argued, according to paragraph 2, these criteria can also refer to social aspects.)

This provision too, is consistent with CJEU case law. The fact that it is not required that award criteria form part of the material substance of the ‘end product’, can in my view already be deducted from the EVN Wienstrom-case²⁵ and the Concordia-case,²⁶ but has more recently also been ruled in the Dutch Coffee-case.²⁷ Also, the fact that the use of a certain production process can be included as an award criterion and can thus be linked to the subject-matter of the contract, seems to be in line with case-law like EVN Wienstrom.^{28 29} On the basis of 67(2), this applies to both environmental and social factors.

Most striking within the provision of art. 67(3) is the fact that the legislator evidently decided to remove all doubt, if any, regarding the question what stages of the life cycle of purchased goods have a sufficient link with the subject-matter of the contract, by including the words ‘*at any respect and at any stage of their life cycle*’. Whereas one could – before this new provision – have thought that the link-test limited the scope for inclusion of social and environmental criteria as award criteria, given the stage of the life cycle they referred to, it is now clear that this is not the case, provided that these criteria *relate* to the purchased goods. With this new and broad definition, this last requirement therefore seems to be the *only* test that needs to be passed with regard to the subject-matter of the contract-test. If it is no longer questionable whether this requirement (a sufficient link to the subject-matter of the contract) (also) refers to the stage of the life cycle of the purchased goods (the ‘distance’ of the end product one could say), one could wonder what is then still left of it. If not this, what does ‘sufficient link to the subject-matter’ (which seems to be redefined within article 67 with the words ‘refer to the goods to be provided’) then mean? In my opinion, the only way to interpret this newly formulated scope is by taking a look at the only CJEU case in which a concrete limitation was deducted from this requirement, the EVN Wienstrom case. In that case, not the question whether the criterion concerned referred to a stage of the life cycle that was too far away from the ‘end product’ was the focus, but the question whether this criterion referred to the (amount of) products purchased by the contracting authority or to the general policy of the tenderer. Reading the wide scope of article 67 in conjunction with the CJEU case-law (apart from EVN Wienstrom the Dutch Coffee-case³⁰), in my view it is exactly this aspect that is now the only limitation to be deducted from the sufficient link to the subject-matter test.^{31 32}

Obviously, the fact that there is now a quite clear and broad definition of the sufficient link to the subject matter of the contract-test is helpful. It remains, however, unclear whether this definition is also applicable within the scope

of the other provisions requiring the fulfilment of this test, for example article 42(1) with regard to technical specifications. The fact that one of these articles – namely art. 70 with regard to contract performance conditions – explicitly refers to the definition of the test in art. 67(3), while others – like art. 42 (technical specifications) and 43(1)(a) (labels) – do not, increases that lack of clarity. Is the link to the subject-matter test of art. 42 and 43 different from the one in art. 67 and 70? In my view that is not probable, for the ratio of the requirement in each of these articles is the same: the principle of proportionality. Therefore, chances are that the CJEU will have to clarify whether the definition of art. 67 (3) applies to every stage in which this link is set as a precondition.³³ However until then, the fact that the definition of the concept is placed within one specific article, and the fact that some articles do and some do not refer to this definition, leaves, in any case, undesirable room for discussion.

Article 67(4) too, could on the one hand be seen as a step forward with respect to promoting compliance with human rights through public procurement and on the other as a possible ground for legal uncertainty. Apart from explicating some conditions we already know from the Preamble in the former Directive and the CJEU case law³⁴ – resulting from the general principles – (namely: the criteria may not have the effect of unrestricted freedom of choice and shall ensure the possibility of effective competition³⁵), article 67(4) determines that the award criteria ‘*shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria*’. This too, was already elucidated by the CJEU, which, in the EVN Wienstrom case, clarified that contracting authorities can only set criteria against which the information provided by the tenderers can *actually be verified*.³⁶ The current Directive – drafted after the Wienstrom case – however, does only contain a provision *within the Preamble* with regard to the specificity and measurability of award criteria. This determines that award criteria need to ‘allow the level of performance offered by each tender to be *assessed* in the light of the object of the contract (...) and the value for money of the tender to be measured’.³⁷ Apart from the fact that the legislator has now chosen to include this aspect within the Directive itself, the most striking difference is that the *effectiveness* of the verification made possible by the specifications is explicitly set out as a relevant factor. Although this is not completely new in terms of content – given that it is quite similar to what was determined in the EVN Wienstrom case (which contains the wording ‘*actually verified*’, see above) – it does illustrate the relevance the legislator obviously assigns to the aspect of effectiveness. And rightly so, especially from the perspective of human rights compliance, for the greatest challenge one encounters when including human rights considerations in a public procurement procedure is to find a way to effectively verify the due observance of these criteria. This is not only necessary from the perspective of legitimacy having regard to the general principles of equality and transparency, but also from the perspective of efficacy. For it seems self-evident that only given such effective verification, including these criteria will have an actual effect on the extent to which economic operators will comply with the human rights provisions concerned. (For that matter, on the basis of art. 18(2) achieving this aforesaid effect is no longer a goal contracting authorities can decide to set themselves, it is the result Member States (and – on the basis of the Preamble – possibly also contracting authorities³⁸) are now obliged to pursue. By imposing a duty on contracting authorities to set ‘*specifications that allow the information provided by the tenderers to be effectively verified*’, article 67(4) fits within the objective of article 18(2).) However, in this respect too, as it was also argued in the context of article 18(2), one could wonder what such a duty will mean in concrete, given that it will be difficult to determine whether the established specifications do in fact enable the contracting authority to *effectively* verify the provided information. It will therefore be difficult for both contracting authorities to determine what is expected of them and for others to determine whether a contracting authority complies with the duty article 67(4) comprises.

Besides the requirement of paragraph 4 that the specifications that are set must enable effective verification, it also contains – unlike the current Directive – a duty for contracting authorities to actually effectively verify the accuracy of the information and proof provided by the tenderers (art. 67(4) *in fine*). As it was argued above, both from the perspective of the promotion of human right compliance as from the perspective of the principle of equal treatment³⁹ such verification is desirable.⁴⁰ However, according to paragraph 4, this duty only exists ‘in case of doubt’. This raises the question what exactly is meant by ‘verification’, for it is clear that – *irrespective* of the existence of any doubt that can be raised – the contracting authority will always have to assess the information provided by the tenderers. Assumably, verification means – after having received proof and other information (see par. 4 *in fine*) – the carrying out of other actions to check whether the provided information is in accordance with the facts. What these actions may involve, however, and thus what the contracting authority is allowed to do and to require from the tenderer concerned, is in my opinion unclear. Although the new Directive – with a view to reducing the administrative burden – quite specifically determines limitatively what means of proof contracting authorities are allowed to require within the scope of exclusion grounds and selection criteria (art. 60) and introduces the European Single Procurement Document in this respect (art. 59), these rules only regard the verification (‘examining’) with respect to selection criteria and exclusion grounds. Does this mean that, in case art. 60 does not apply, all means are allowed? Considering the aforementioned objective of reducing the administrative burden, this does not seem assumable, but the provision of art. 67(4) does not provide for any other scope either. Therefore, the question what means may be used within the scope of the verification of art. 67(4) seems difficult to

answer.⁴¹ This leaves contracting authorities a seemingly wide scope of discretion. In addition to this, they will have to face the problem of a lack of clarity. Not only with regard to the means of verification that could be used, but also with regard to the way in which this verification should be performed effectively within the boundaries of the general principles. One might, for example, imagine that the decision of the contracting authority to verify the information of one of the tenderers, and not verify the information provided by another, could influence the outcome of the procedure. The implication of this is that the said decision needs to be objectively justified in order to prevent that the principle of equality will be violated.⁴² According to the wording of art. 67 (4), however, the only criterium that will be relevant when determining whether the contracting authority will have to verify, is whether the contracting authority is in doubt. Obviously, this is a subjective criterion. That raises the question whether a contracting authority can choose to verify the information of one of the tenderers on the basis of mere doubt regarding the tender of the latter (as the wording of art. 67 seems to imply) or whether this should be justified on the basis of objective grounds. Vice versa, in search for the precise ambit of the contracting authority's duty to verify, one could wonder what the exact scope is for contracting authorities to decide *not* to verify. On the basis of article 67(4) the answer is 'in case of doubt', but does this mean the duty does not exist if the contracting authority – subjectively – assumes the information is correct while there are objective grounds for doubt? Or is it possible for a competitor to demand verification regarding another tender by providing the contracting authority with information that should – objectively – be regarded as ground for causing doubt? In my opinion, the answer lies in the application of the principle of equality to the facts and circumstances of the case at hand. However, while one of the main goals of the Directive is to provide contracting authorities with a clearer view on the boundaries set by the general principles in concrete parts of the procurement procedure, neither article 67, nor the Preamble creates any scope with regard to this question.

Moreover, if the answer indeed lies in the application of the equality principle, and if one would assume that this principle could in any stage of the procurement procedure be ground for a duty to verify, it could be questioned whether the inclusion of a specific duty within the scope of award criteria, will not – instead of what is intended by including this specific provision (in the regulation) – give rise to more legal uncertainty. For the fact that – with regard to the award criteria the – the directive does include the said duty whereas it does not do so regarding other aspects of the procurement procedure, such as the assessing of technical specifications, raises the question whether such a duty is perhaps non-existent or different in the other stages of the procedure.

4. Conclusion

With the introduction of art. 18(2) it has become undeniable that Member States will need to contemplate about what measures have to be taken to effectively stimulate compliance of economic operators with applicable obligations in the field of environmental, social and labour law. With regard to the extent to which Member States are and can be expected to actually achieve compliance by economic operators – e.g. whether this includes a duty to perform control, as the Preamble seems to imply⁴³ – however, art. 18(2) leaves us with legal uncertainty. Moreover, determining what measures will (or can be expected to) be most effective, will be a complicated task for Member States. For the (expected) effectivity – especially with regard to compliance with human rights and labour law obligations – is difficult to quantify.

In line with art. 18(2), the scope to include human rights considerations as award criteria seems to have been expanded. At the same time, the new provision with regard thereto creates new ground for discussion. For on the one hand, the link to the subject-matter of the contract is substantially clarified in art. 67(3). It is now clear that this requirement does not limit the possibilities to include social award criteria with regard to the production process, the trading of the purchased goods or other stages of the life cycle thereof. Moreover, art. 67(3) clearly states (in coherence with the Dutch Coffee-case) that it is irrelevant whether these factors form part of the material substance of the subject-matter of the contract. This, in my opinion, means that the only limitation which the “link to the subject-matter of the contract” requirement brings, is that the award criteria may only regard the amount of goods purchased, and not the general policy of the tenderer. On the other hand, it is unclear whether this definition of the link to the subject-matter of the contract also applies outside the scope of art. 67, for example with regard to technical specifications. Furthermore, art. 67 introduces a new view on the meaning of MEAT, inconsistent with the current directive, policy documents and case-law, which will assumably cause difficulties when applying these within the scope of the new provision. Finally, art. 67(4) imposes a duty on contracting authorities to *effectively* verify the information provided by tenderers within the scope of the award criteria. However, neither art. 67 nor the Preamble provides a scope regarding the means that may be deployed in this respect. Also, with regard to the boundaries of the discretionary power of the contracting authority when deciding (*not*) to verify the information provided by one or more tenderers, the new regulation provides no clarity.

Although these are only two of the new provisions that the proposed directive contains, they are exemplary for many of the other revised or newly introduced provisions relevant with regard to promoting human rights

considerations in public procurement (regulation).⁴⁴ For they clearly intend to expand the possibilities in this respect, but at the same time will create new ground for discussion.

References

¹ Unless stated otherwise, within the context of this paper, ‘new’ or ‘proposed Directives’ will refer to the most recent version of the new procurement Directive: EP, European Parliament legislative resolution of 15 January 2014 on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011)/896).

² For a few examples, see: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm; COM (2010) 2020 final. Communication from the Commission. *Europe 2020. A strategy for smart, sustainable and inclusive growth*; EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010; EC, *Buying Green: Handbook on green public procurement 2nd edition*, European Commission 2011; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, Human Rights Council Document A/HRC/17/31, United Nations General Assembly (March 21st 2011); T.E. Lambooy, *Corporate Social Responsibility. Legal and semi-legal frameworks supporting CSR*, Deventer: Kluwer 2010; L.J. Ankersmit & J.C. Lawrence, ‘The future of environmental labeling: US – Tuna II and the Scope of the TBT’, *Legal Issues of Integration* 39, no. 1 (2012); 127 – 147.

³ European Commission - Press Release “External public procurement initiative - Frequently Asked Questions” *Europa* 21 March 2012, www.europa.eu (search for MEMO/12/201).

⁴ This latter phenomenon is known as ‘socially responsible purchasing’ (SRP).

⁵ See for example COM (2011) 896 (final). EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, recital 2.

⁶ Within the proposed Directive this strategic use covers the use of procurement with a view to various sustainability goals and with a view to the objective of innovation. See EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final, p. 2 and 9.

⁷ See for example EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 (final), p. 10; And EP, European Parliament legislative resolution of 15 January 2014 on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011)/896), recital 37, art. 18(2), art. 57(1)(f) and (4)(a), art. 67(2) and art. 69(2)(d).

⁸ The Directive only contains a duty for Member States. The Preamble (recital 37) however, also addresses contracting authorities. Given that provisions within Directives are binding upon the Member States to which they are addressed, according to art. 288 TFEU, one could wonder how this should be interpreted.

⁹ See art. 18(2) and Annex X of the new Directive.

¹⁰ Although one could perhaps assume a positive obligation for Member States and contracting authorities on the basis of the Treaties concerned (this is one of the objects of the author’s phd-research), until now, such an obligation was never defined in the field of promoting human rights compliance through public procurement. There is in any case not such an integration requirement with respect to human rights as there is regarding ‘green goals’ in Article 11 TFEU. Also see the new Directive, recital 91.

¹¹ See art. 288 TFEU: ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’

¹² With ‘allowing’ is *not* meant the fact that it will, self-evidently, always remain possible that an economic operator – despite of the measures taken – will indeed violate the obligations concerned. Much more it refers to the question whether the framework is established in such a way, that it is probable that such violations will be discovered (e.g. by verification during the performance phase) and that the contracting authority will take action to remedy this situation.

¹³ Although the new Directive does not contain an explicit duty to verify, the Preamble does explicitly pay attention to this aspect with regard to art. 18(2). For recital 40 determines: ‘Control of the observance of these environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure. That is when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders.’ Whether this means that contracting authorities have an obligation to perform control in the relevant stages of the procurement procedure or that – if contracting authorities would like to carry out control – they will have to do this in the relevant stages of the procedure, is not clear. Also unclear is why the legislator has chosen to explicitly pay attention to this very relevant aspect of promoting compliance with the mentioned standards, but at the same time failed to include any provisions in the Directive itself. In my opinion, this will not make the message of the legislator any clearer for Member States and contracting authorities.

With regard to the subsequent question what should or could be done on the basis of possible negative results of such control, neither the Directive nor the Preamble provides any scope. Apart from the obligation to exclude economic operators when it is established that there is a mandatory ground for exclusion, a general duty to act upon negative results is not stipulated. One could, however, wonder whether such an obligation could be drawn from the general principles such as the principle of equality (but that question falls outside the scope of this paper).

Finally, a striking aspect within the Preamble regarding this duty to perform control, is that the contract performance stage is not one of the stages mentioned as relevant stages within which the *control* should be performed (see recital 40). If this has been a conscious choice of the legislator, this would mean a substantial change compared to the current Directive and policy documents. For these indeed assign the contract performance clauses as a good, if not the best way to include social and environmental criteria (see for example: Directive 2004/18, art. 26 and EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010, p.43). This would, in my vision – from the perspective of human rights compliance – be a good development, for inclusion within the other stages enhances the possibilities to effectively and timely discover possible violations by economic operators and to timely take action. On the other hand, one could argue

these possibilities will be reduced by the strict regulation with regard to the means of proof that may be required, amongst which art. 59 with regard to the European Single Procurement Document.

¹⁴ Whether this is the case, is in my opinion not a legal question, but one that can only be answered from a social-psychological perspective. It is not my opinion that this in all cases should be the decisive factor, but I am of the opinion that art. 18(2) *does*. On the other hand, the Preamble, recital 37, states, that ‘the measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment’ and ‘in a way that does not discriminate directly or indirectly’. Surprisingly, this is not determined with regard to the measures themselves, but solely in respect of the *application* thereof. The reason for this could be that the measures themselves are intended to promote compliance with i.a. International Treaties, which rank higher in the legal hierarchy than the principles of Union law do.

¹⁵ See art. 258 and 259 TFEU.

¹⁶ See COM 2011/896 final. EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, art. 66, which contained the option to award on the basis of ‘the lowest cost’. This already was slightly different from the ‘lowest price’ criterion of art. 53 Directive 2004/18. In the final version of the new Directive, this ‘lowest cost’ criterion is deleted as such and included within the MEAT criterion. See C 191/84, Opinion of the European Economic and Social Committee, on the ‘Proposal for a Directive of the European Parliament and of the Council (...) COM 2011/895, COM 2011/896, COM 2011/897, paragraph 1.14, in which it is advised to use the lowest price criterion as an exception, rather than the rule. Also: C 391/49, Opinion of the Committee of the Regions on ‘Public procurement package’, paragraph 22, in which the Committee advocates sustaining the ‘lowest *price* criterion’, because in the opinion of the Committee the ‘lowest *cost* criterion’ is ‘more connected with the most economically advantageous tender’ and would therefore be confusing.

¹⁷ Under the current Directive, contracting authorities may – when awarding on the basis of MEAT – decide to award on the mere basis of qualitative criteria, for article 53 does not require to include a price element (see art. 53(1)(a) Directive 2004/18).

¹⁸ Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts (par. 2, *in fine*). Moreover, contracting authorities may also include a fixed price or cost, which will focus the competition on quality criteria only (par. 2, third alinea). In this case however, it will in my opinion only be possible to achieve the best price-quality tender, if the contracting authority has sufficient knowledge of the market to determine a realistic price, especially if compliance with human rights and labour clauses is required.

¹⁹ See for example, Commission v. Netherlands, Case C-368/10, recital 86 referring to art. 53(1)(a) of Directive 2004/18: ‘The most economically advantageous tender being (that) which (...) [etc.] offers the best value for money’ and recital 84: If the contracting authority decides to award (...) to the tenderer who submits the economically most advantageous tender (...) the contracting authority must base its decision on various criteria’; Also see Directive 2004/18, recital 46, third alinea: ‘In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority.’ And EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010, p.37: ‘Since the most economically advantageous tender or best-value tender always combines two or more sub-criteria’.

²⁰ As explained above, under the new provision, contracting authorities are obligated when awarding on the basis of MEAT to include a price element in their award criteria. Therefore, in fact the ‘new’ MEAT-criterion and the current one are not the same either, also see reference 17.

²¹ See EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 (final), Explanatory memorandum, p. 8.

²² COM 2011/896 final. EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, Preamble recital 41.

²³ See Commission v. Netherlands, Case C-368/10, par. 91.

²⁴ Introduced in the Concordia-case (CJEU 17 September 2002, C-513/99), the exact meaning of this link was never clarified, neither by the Commission, nor by the CJEU. Only in the EVN Wienstrom-case the CJEU has clarified that including an award criterion that exceeds the volume of consumption to be expected in the context of the procurement, is not sufficiently linked to the subject matter of the contract (Wienstrom EVN v. Austria, CJEU 4 December 2003, C-448/01, par. 68 – 71).

²⁵ For this case regarded the production method of electricity, which was not seen as a problem by the CJEU (recital 34).

²⁶ Concordia v. Finland, CJEU 17 September 2002, C-513/99 (Concordia).

²⁷ Commission v. Netherlands, Case C-368/10, par. 91: ‘There is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof’.

²⁸ Although the CJEU in the EVN Wienstrom-case does not explicitly state that award criteria relating to the production process can have a link to the subject-matter of the contract while art. 67(3) *seems* to state that this is *always* the case, in my view they both establish that these criteria *can* have a link to the subject-matter of the contract. For firstly the Wienstrom-case does clearly imply this, by determining that award criteria relating to the production process can be included as award criteria. And secondly, with regard to art. 67(3): after stating that these criteria ‘*shall* be considered’ to have this link, art 67(3) states that this is not *always* the case, but only if the criteria ‘relate to the works, supplies or services to be provided under the contract’. Both the Wienstrom-case as art. 67(3) therefore mean the same: that award criteria relating to the production process *can* have a sufficient link to the subject matter of the contract. Also see reference 31.

²⁹ The current Directive only determines this with regard to technical specifications, see Annex VI 1(a) and Preamble, recital 29 of Directive 2004/18.

³⁰ Commission v. Netherlands, Case C-368/10, par. 90.

³¹ In Wienstrom EVN v. Austria, CJEU 4 December 2003, C-448/01, par. 34, the CJEU states that ‘Community law (...) does not preclude a contracting authority from applying a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that the criterion is linked to the subject matter of the contract, etc (...)’. It thus follows that the fact that the criterion refers to a specific process of production, does *not* imply that this criterion can *not* be sufficiently linked to the subject-matter of the contract. In the EVN Wienstrom-case, this link is subsequently considered to be absent on the basis of the

fact that the award criterion concerned exceeded the amount of electricity purchased by the contracting authority. The CJEU thus sees this as the limitation deriving from the link to the subject-matter requirement.

The legislator of the new Directive *seems* to go further than the CJEU, by stating that award criteria relating to the production process *have* a sufficient link to the subject-matter of the contract. But in my view the legislator actually follows the same line of reasoning established in the EVN Wienstrom-case, only using different terms. Because, by clarifying that award criteria referring to the production process etc. can (namely: ‘shall (...) *provided that*’, see reference 28) be considered to be linked to the subject matter of the contract (art. 67(3)), the legislator establishes the same as the CJEU did in the Wienstrom-case by stating that ‘Community law does not preclude a contracting authority from applying a criterion requiring that the electricity supplied be produced from renewable energy sources’. Secondly, by stating that this is only true if the award criterion ‘relate to the works, supplies or services to be provided under that contract’ (art. 67(3)), the legislator in my view means to establish the same as the CJEU did by the phrase ‘provided that the criterion is linked to the subject matter of the contract’, by the CJEU explained as described above. For in my opinion, this last ‘criterion’ of art. 67(3) (that the award criteria need to *relate* to the works, supplies or services purchased), can only be interpreted as referring to the limitation established in the Wienstrom-case: that award criteria may not exceed the amount of products purchased by the contracting authority. For every other possible explanation of this ‘refer’-limitation is explicitly allowed by art. 67(3). Therefore, the most sound interpretation of art. 67(3) is in my view that the legislator has narrowed down the link to the subject matter – by explicitating that it does not interfere with criteria referred to in art. 67(3) – to the limitation that was already established in the EVN Wienstrom-case.

³² Although art. 67 refers to ‘the production, provision or trading of *those* works, supplies or services’ (par. 3(a)), on the basis of which one could reason that this does not include the production, provision or trading of *parts of* those goods, this does not seem to be the intention of the legislator (‘where they relate to the works etc *in any respect*’). Moreover, this interpretation would conflict with the Dutch Coffee case, in which the CJEU determined that Max Havelaar criteria were suitable to be included as award criteria (provided that the underlying criteria would be included, equal labels would also be accepted and the general preconditions would be fulfilled). For the award criteria concerned (the Max Havelaar criteria) see to the fair trade origin of *parts of the subject-matter of the contract*’ (see recital 90). Apparently, the fact that an award criterion only regards *parts* of the subject-matter of the contract is for the CJEU not problematic.

This could in my opinion however lead to a practical problem, for it could be difficult to determine how far in the supply chain one could still speak of ‘parts of the purchased goods’. In that respect, this case does in my view leave room for discussion.

³³ The CJEU decided something similar in the Dutch Coffee-case, applying the rules regarding labels to award criteria, whereas the legislator had placed these rules within the specific context of technical specifications (art. 23(6)). See *Commission v. Netherlands*, Case C-368/10, par. 94-97.

³⁴ See Directive 2004/18 Preamble, recital 46, first and third alinea; *Commission v. Netherlands*, Case C-368/10, par. 87 and CJEU 17 September 2002, C-513/99 (*Concordia*), par. 61.

³⁵ Regarding this last criterium one could wonder – especially in the scope of high level sustainable criteria – what it means in concrete. Would including an award criterion and assigning a substantial weight to this, interfere with this provision if, expectedly, only one possible tender will be able to meet this criterion? Assumably, this will depend on the extent to which the reasons for including this criterium can be objectively justified and are proportionate with respect to the subject-matter of the contract. However, this topic falls outside the scope of this paper.

³⁶ *Wienstrom EVN v. Austria*, CJEU 4 December 2003, C-448/01, par. 44 t/m 52: i.a. ‘an award criterion that is not accompanied by requirements which permit the information provided the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement’. Also see EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010, p. 39.

³⁷ See the new Directive, Preamble, recital 46.

³⁸ See paragraph 2 of this paper and the new Directive, Preamble, recital 37.

³⁹ For the principle of equality requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless objectively justified (*Fabriscom*, joined cases C-21/03 and C-34/03, par. 27). If the extent to which tenders meet the award criteria would not be verified, obviously, chances are that this principle would be violated.

⁴⁰ One could also argue that contracting authorities – in general – have a duty to verify all information provided by tenderers on the basis of the principle of equal treatment. This topic however falls outside the scope of this paper (but is one of the objectives of the author’s phd-research).

⁴¹ Regarding the scope article 60 refers to, it is maybe even more striking that whereas this provision states to apply to article 57, it does not provide a provision for article 57(4)(a), referring to compliance with 18(2).

⁴² See reference 39.

⁴³ New Directive, Preamble, recital 40.

⁴⁴ Also with regard to the broadened scope for sustainable technical specifications, selection criteria, exclusion grounds and the greatly expanded provision regarding subcontractors, there is a lot to be said. These issues are the object of the author’s phd-research.

The Reform to EU Utilities Procurement: Smart, Sustainable and Inclusive?

Dr Eleanor Aspey

The University of Manchester
Oxford Road
Manchester M13 9PL
United Kingdom
Email: eleanor.aspey@manchester.ac.uk

1. Introduction

As is common in countries across the world, one of the major concerns for the countries of the European Union (EU) in recent years has been recovery from the global financial crisis. In an attempt to help Europe on the road to recovery, President Barroso announced in 2010 that the EU was setting out a new growth strategy for the coming decade, known as ‘Europe 2020’ [1]. The Europe 2020 strategy is based around three priorities; ‘smart’ growth (developing innovation); ‘sustainable’ growth (developing a greener and more resource efficient economy) and; ‘inclusive’ growth (improving employment and social cohesion). These aims will be achieved primarily through seven flagship initiatives which set out specific goals, but will need to be supported more widely through the EU legal regime.

Public procurement is mentioned throughout the 2020 strategy as a potential method for supporting the three 2020 growth priorities and was therefore a key area for development. In December 2011, the European Commission duly announced that they had begun the process of reforming the procurement regulatory regime applicable in the EU [2]. It was noted that public procurement had been set as one of the EU’s twelve priority projects with which the Commission aimed to “relaunch the single market for 2012”, with improvement of the single market being seen by the EU as one of the most effective means of recovering from the financial crisis [3]. The Commission set out three main aims for the procurement reform process: to simplify the rules and increase flexibility; to encourage access to public procurement for small and medium sized enterprises (SMEs); and to facilitate a ‘qualitative improvement in the use of public procurement’ by ensuring greater consideration of social and green issues in procurement [2]. It is in this final aim that the impact of the 2020 strategy can be seen the most.

Based on the three aims above, the Commission set out two proposals for revision to the current directives on public procurement, one regulating public sector procurement (COM(2011) 896 – “the new Public Sector Directive”) and one regulating utilities procurement (COM(2011) 895 – “the new Utilities Directive”), with a further new directive on concessions procurement planned for proposal at a later date. After consideration of those proposals by the European Parliament and by the Council, the proposed final text of both directives was set out on 5th September 2013. The Parliament adopted this final version of the new Directive on 15 January 2014 and this paper will use the article references from that version [4]. This paper will examine the extent to which the planned reforms to the EU procurement regime support the aims of the 2020 strategy, providing procuring entities with opportunities for innovative, social or green procurement.

In particular, this paper examines the reform to procurement within the utilities sector. Although much smaller than the public sector, the utilities sector is still a significant sector of the EU economy, awarding approximately 10% of all procurement contracts in the EU each year, and 17% of the total contract value [5]. It is also arguable that social and green concerns are of particular importance in the utilities sector. Many of the sectors (particularly energy, water and transport) have great environmental impact, and there are also social and labour concerns given a recent growth amongst the utility sector for outsourcing to developing countries [6]. There is therefore the potential for real impact on social and green issues through the regulation of procurement in this area, helping to boost ‘sustainable’ and ‘inclusive’ growth.

The paper will begin with an overview of the current EU regulatory regime on utilities procurement, providing a general background to the discussion of the reforms (Section 2). Section 3 will then evaluate the relevant reforms in the new regime in light of the Europe 2020 aims, highlighting any positive changes and discussing any remaining constraints in the law and missed opportunities for improving procurement in this area. It will be shown that overall the reforms are a positive step, clarifying many of the issues which concerned utility procuring entities under the current law and showing the potential for green and social procurement in the EU in the future.

2. Overview of current EU utilities procurement

The primary source of the EU's regulatory regime on procurement is the Treaty on the Functioning of the European Union (TFEU). While the Treaty does not mention procurement explicitly, a number of the provisions do potentially have an impact on public and utilities contracts, with the most significant being the free movement provisions (covering the free movement of goods (Article 34 TFEU), freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU)). The Treaty provisions set out predominantly negative obligations, prohibiting procuring authorities from setting requirements which discriminate, either directly or indirectly, against goods or services from another Member State. Following Case C-324/98, *Telaustria Verlags GmbH v Telekom Austria AG* [2000] E.C.R. I-10745, however, the TFEU rules also impose some limited positive obligations relating to the transparency of the procurement proceedings, including a requirement that the contract be advertised.

The EU supports and expands upon the free movement provisions with secondary legislation which regulates procurement more directly, setting out more detailed rules relating to the conduct of the procurement process including precise rules on award procedures. For utilities, this regulation is currently found in Directive 2004/17/EC ("the 2004 Utilities Directive"), with the remedies for breach of the procurement rules being set out in Directive 92/13/EEC. The rules set out in this secondary legislation only apply to contracts over a set monetary threshold, revised every two years (the current thresholds can be found in Regulation 1336/2013). Under Art. 40 of the 2004 Utilities Directive, utilities have a free choice between three award procedures; the open procedure (a strict tendering procedure in which no limit is set on the number of tenderers), the restricted procedure (a strict tendering procedure with a limited number of tenderers) and the negotiated procedure (a flexible procedure allowing discussion with potential suppliers, who may be limited by number). In order to use the negotiated procedure there must either be a prior call to competition in accordance with Art. 42 or one of the exceptional situations set out in Art. 40(3) must apply.

The 2004 Utilities Directive covers three categories of body (see Art. 2(2)); contracting authorities (covering state, regional or local authorities or bodies covered by public law), public undertakings (companies subject to the dominant influence of a public authority), and private entities which operate on the basis of special or exclusive rights. Special or exclusive rights are defined as legislative, regulatory or administrative rights which limit the exercise of the specified utility activities to one or more entities and substantially affect the ability of other companies to carry out those activities (Art. 2(3)). The applicability of the TFEU free movement obligations to these private bodies is unclear and so the 2004 Utilities Directive also includes references to the same obligations in its text (for example, a general principle of non-discrimination is set out in Art. 10), ensuring that the complete range of EU rules apply where the contract is over the threshold regardless of the type of procuring entity in question.

Regardless of which of the three categories above a procuring entity falls under, they will only be covered by the 2004 Utilities Directive when they carry out one of the activities listed in the Directive, and then only in relation to a contract awarded for the purpose of that activity. The relevant activities are listed in Arts. 3-7 of the Directive, and cover contracts in the fields of energy (the production, distribution and supply of gas, electricity and heat, and exploration and exploitation of oil, gas, coal and other solid fuels), water (the operation of a fixed network for the provision, transport or distribution of drinking water), transport (covering the operation of railway, tramway, trolley bus, bus or cable services and airport and port terminal services) and postal services. For contracts for any other activities, contracting authorities and public undertakings will be covered by the comparable public sector procurement directive, Directive 2004/18/EC, while private bodies with special and

exclusive rights will be fully unregulated. Connected to this, Art. 12 of Directive 2004/18/EC explicitly excludes contracts for the utility activities set out above from the scope of that Directive, meaning that contracting authorities or public undertakings which would otherwise be covered by the public sector rules are subject only to the 2004 Utilities Directive rules for procurement in those areas.

As regards the inclusion of green and social issues in procurement, important for the Europe 2020 agenda as discussed above, the current law is generally vague. The possibility of such issues often appears to be not considered at all or to be considered only as an afterthought. Some potential policies are clearly prohibited under the EU regime; for example, awarding a contract to a supplier on the basis that they promise to hire local unemployed labour clearly breaches the EU requirement of non-discrimination on the basis of nationality. In most cases, however, it is simply not clear from the wording of the directive or from case law whether or not a particular policy is allowable. Implementing green or social policies therefore currently requires utilities to balance the possible risk of legal challenge against the potential benefits of the policy, a difficult balance to make given the lack of clarity in the law. The constraints under the current law are somewhat under-discussed in relation to the utilities sector, but Arrowsmith and Maund set out a discussion of the potential areas of concern in this sector [6]. This author has also previously discussed the areas identified by procurement practitioners as having the most impact on labour issues in particular [7]. The following section will discuss in more detail those areas of concern for green and social procurement which will be changed under the new Utilities Directive.

3. Key Areas of Reform

There are four areas within the reform of the utilities regulatory regime in which changes to the law could potentially impact on the areas of the Europe 2020 strategy and green or social procurement. These are discussed below in the order in which they would generally arise in a procurement process. The section will begin by considering the impact of the introduction of a new award procedure for utilities, innovation partnerships (Section 3.1.). It will then discuss the amendments to the rules on setting the technical specifications of the product or service to be procured (Section 3.2.), before considering the changes to setting contractual conditions applicable on the winning tenderer (Section 3.3.) and the criteria for awarding the contract (Section 3.4.).

3.1. Innovation Partnerships

Under the current law, there are no specific rules or guidance relating to developing innovative products or services; the assumption was that contracts for these purposes could be adequately provided for under the existing award procedures. Art. 40(3)(b) of the 2004 Utilities Directive allows a contract which is purely for the purpose of research and development to be awarded without a prior call for competition but notes that this can only be done where the contract is not done with the aim of securing profit or recovering the costs of the research and development. Apostol notes that this requires a full competitive award procedure where the contracting entity hopes to purchase the goods or services which have been researched at the end of the process [8]. The current system therefore potentially requires two separate contracts for innovative products, one for research and one for the subsequent purchase, providing little benefit within the procurement process for developing new products rather than simply purchasing those which are already in existence.

To combat this problem, the new Utilities Directive sets out an innovation partnership procedure (Art. 49), which sets up a long-term structured partnership between the contracting entity and a private contractor covering both a research phase and subsequent purchase (provided the end product meets the required performance and cost levels) in one contract. Recital 59 of the new Utilities Directive notes that this procedure is intended to be used “[w]here a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market”. Procurement of goods already on the market should therefore be completed by one of the existing award procedures and contracts for pure research and development remain one of the exemptions to the general rules and can be procured without a call for competition (see Art. 50(b) of the new Utilities Directive).

The innovation partnership is, as would be expected for a procedure designed to procure a currently unknown product or service, a relatively unstructured award procedure based on negotiations with the prospective partners. However, some guidance is provided in Art. 49 as to the expected procurement process. Following Art. 49(2), the process must be structured in successive stages which follow “the sequence of steps in the research and innovation process”. While the Article provides some examples of stages, including manufacturing, provision of services and completion of works, it does not provide an exhaustive list or any more complete definition of research and innovation. Utilities would therefore appear free to structure the process as they wish so long as there are definite stages within that process. Those which wish more guidance could perhaps follow the pre-commercial procurement guidelines designed by the European Commission for research and development unregulated by the procurement regime [9]. Targets must be set for the end of each stage and, based on the completion of those targets, utilities may choose to terminate the innovation partnership or reduce the number of partners at the end of each stage (Art. 49(2)).

The Directive is, however, very vague on the requirements for the actual purchase stage. The only guidance given is that the value of the product or service should not be “disproportionate in relation to the investment for their development” (Art. 49(7)). Apostol notes that the provision is “poorly drafted”, allowing not only a large amount of discretion in deciding value, but also not making it clear if there are any limits on the subsequent purchase, in theory allowing a contracting entity to decide to purchase the product or service only after it was commercially available on the market which would limit the utility of the provision [8].

Overall, the new innovation partnership procedure offers significant potential for developing innovative products and services and therefore supporting smart growth. Equally, it can potentially support the other Europe 2020 aims through the increased ability to innovate green and social products and services. However, the vagueness of the provision, particularly in regards to the subsequent purchase, may limit the uptake of the procedure in practice and it is regrettable that there was not greater detail provided in the Directive.

3.2. Technical Specifications

The technical specifications of a contract set out exactly what it is that the utility wishes to buy. Under the 2004 Utilities Directive, these should set out the “required characteristics of a product or service” and for works contracts should also allow the relevant material, product or supply “to be described in a manner such that it fulfils the use for which it is intended by the contracting entity” (Art. 1, Annex XXI). These definitions are retained in Art. 1, Annex VIII of the new Utilities Directive. The point at which the utility chooses what to buy offers significant potential for meeting the Europe 2020 aims by choosing innovative, green or socially sustainable products. Innovation in particular has always been encouraged at this stage by allowing the use of functional technical specifications which enable tenderers to suggest innovative methods of meeting the contracting entity’s needs (Art. 34(3) 2004 Utilities Directive; see now Art. 60(3) new Utilities Directive). This section will focus on two potentially important areas for the Europe 2020 aims where the current law lacks clarity; setting requirements relating to the production methods of a product and requiring compliance with a particular product label.

Production methods

The production process of a particular product may raise environmental or social concerns which a procuring entity may wish to change or minimise by setting certain production requirements. For example, an entity may wish to require that the product they purchase was produced by employees who benefited from certain labour guarantees. On the green side, the entity may wish to ensure that the product is produced in an environmentally sustainable manner. However, the extent to which procuring entities can set such production requirements is unclear under the 2004 Utilities Directive as the issue is not mentioned; the only guidance given relates to setting the requirements of the product or service itself, not the way in which it is made or provided.

The European Commission appeared to interpret the current law in a very conservative manner, effectively prohibiting the use of such production methods. Focusing on the statement in Annex XXI for works technical specifications, set out above, which requires that the specifications should allow the product to ‘fulfil the use for

which it is intended', the Commission suggests that production matters could therefore only be considered where they had a real practical impact on the characteristics of the product, whether visible or invisible [10-11]. This appears to prevent any social or green production requirement which will not physically change the product, such as fair trade standards, or where any physical change would be minimal and not impact the actual use of the product, for example recycled paper. The European Commission also suggested that setting social/labour production methods in particular could be seen as an unlawful restriction on trade as it would be difficult to apply only to the workforce working on the particular workforce and might require a supplier's whole business to be changed [12].

Kunzlik, however, has argued that the reasoning of the European Commission is flawed [13]. The Commission states within its guidance that a requirement that electricity be sourced from environmentally friendly sources would be acceptable [10-11]. This, Kunzlik argues, contradicts the Commission's own argument that production requirements must have an impact on product characteristics since green energy is indistinguishable at the point of consumption from energy generated from non-sustainable sources [13]. Given this and the 2004 Utilities Directive's silence on the issue, it is at least arguable that production requirements are allowable under the current law so long as they comply with the general principles of EU law (i.e. are transparent and non-discriminatory) and they accurately define what the contracting authority wishes to buy, which may include a wish to purchase a sustainable product [14].

The reforms set out in the new Utilities Directive clarify the law and confirm that production requirements are allowed. Art. 60(1) of the new Utilities Directive states that technical specifications:

“may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle *even where such factors do not form part of their material substance*, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives” (Emphasis added)

This suggests that the conservative interpretation of the European Commission, if it was ever valid, is no longer applicable as the production methods required do not have to impact on the actual substance of the product or service (and it is perhaps notable that the highlighted section of Art. 60 above was not present in the original proposal by the Commission, being added later by the Council). This supports the Europe 2020 aim of promoting sustainable growth by making it clear to contracting authorities that they are free to require that their goods and services are produced or provided in an environmentally sustainable manner. On this point it should also be noted that the technical specifications now clearly allow contracting authorities to set requirements for any point in a product's life cycle, which provides the potential for requirements to be set relating to environmentally sound disposal or recycling. It may also allow consideration of labour issues which arise when the product is sold at the various stages of the supply chain, rather than simply at manufacture, which is a key issue for many fair trade organisations.

The impact that the change will have on social production requirements, potentially important for the inclusive growth goal of Europe 2020, is less clear. The removal of the requirement that the production method must impact the characteristics of the product suggests that workforce criteria should be allowable just as environmental production requirements are, but the requirement in Art. 54 that the production requirements be linked to the subject-matter of the contract could prove more problematic for social criteria. The issue previously highlighted by the European Commission that workforce production requirements may require changes in the wider business still stands; it will be difficult for a supplier to change their workforce practices only in relation to the workforce working on the particular contract with the procuring entity both practically (e.g. identifying the relevant members of staff) and ethically (because one subsection of the workforce will now have higher working standards than the others). This may therefore prevent the use of social production requirements in practice.

Labelling requirements

When setting out its requirements in the technical specifications, a procuring entity may wish to do so by reference to a particular product or service label, either nationally or internationally recognised. Doing so means the procuring entity does not have to either work out the precise requirements of the product itself or check that the tenders meet those requirements beyond checking that they have validly acquired the label, saving time and money. It is also especially useful when setting environmental or social requirements where the procuring entity may lack the relevant expertise to set particular requirements, and being able to rely on an accepted external standard will therefore enable the procuring entity to have greater certainty in the validity of the requirements.

Despite the benefits of using labelling requirements in technical specifications, in order to minimise the risk of national discrimination the current law only allows reference to environmental eco-labels which meet certain specified requirements set out in Art. 34(6) of the 2004 Utilities Directive. The Article allows contracting entities to refer to the detailed specifications of “European or (multi-) national eco-labels, or ... any other eco-label”, either wholly or in part; it does not appear that they can simply refer to the label without also setting out the actual specifications. Equally, while contracting entities may state that any product or service which holds the requisite label is presumed to comply with the technical specifications, they must accept “any other appropriate means of proof” (Art. 34(6)) which the contracting authority must check is compliant with the label requirements. Taken together, these points remove many of the time benefits from using a label.

There is no provision within the 2004 Utilities Directive specifically for the use of any social or labour related labelling requirements. The issue was considered by the European Court of Justice (ECJ) under the comparable public sector provision (Art. 23, Directive 2004/18) in Case C-368/10, *European Commission v Kingdom of Netherlands* (judgment of 10 May 2012). Here, it was required that the product supplied to the contracting authority complied with the Max Havelaar and EKO labels, with a later clarification that labels which were based on equivalent or identical criteria would also be accepted. Consistent with the rules on eco-labels, the ECJ held requiring compliance with a label was unlawful; the actual requirements of the label had to be set out and compliance with the requirements checked.

Under the reformed law, the rules on labelling requirements are set out in Art. 61 of the new Utilities Directive. This allows contracting entities to “require a specific label as means of proof that the works, supplies or services correspond to the required characteristics”. This should generally remove the need to set out the detailed requirements of the label in full. Contracting entities are, however, required to accept all equivalent labels and it is not clear from the directive’s wording who has the responsibility for proving equivalence. Arguably the responsibility would be best placed on the supplier, who has the best capability for showing how their product meets the requirements of the label and how they are equivalent, in which case this provision should ease the current burden on contracting authorities for examining compliance. Equally, Art. 61(1) now only requires that a contracting authority accept other appropriate means of proving compliance from suppliers where that supplier can show they have “demonstrably no possibility of obtaining the specific label indicated by the contracting entity or an equivalent label within the time limits for reasons that are not attributable to that economic operator”, which again should significantly limit the amount of time used checking compliance. This should therefore encourage contracting entities to use social and environmental labels more widely, boosting sustainable and inclusive growth in line with Europe 2020.

The main issue remaining with the reformed law is a limitation set out in Art. 61(1)(a) which states that a label can only be required where “the label requirements *only* concern criteria which are linked to the subject-matter of the contract” (emphasis added). This may prevent reference to labels which consider a wide range of potential environmental and social concerns or those which are attached to businesses rather than products as there will be requirements within the label which are not specific to the particular contract awarded (see, for example, the Fair Trade label, which has generic requirements in addition to product-specific). In such a situation, the law reverts back to the current situation; Art. 61(2) states that contracting entities “shall not require the label as such” but should define the technical specification by reference to those parts of the label requirements which are relevant to the subject matter. This may discourage contracting entities from considering labels in such situations, given the difficulty in sorting through potentially lengthy and complex social or environmental

requirements to pick out the relevant issues, especially where they are not social or environmental experts themselves.

3.3. Contract Conditions

Contracting entities may wish to set out contractual conditions which set standards for the winning supplier to comply with over the course of the contract. They are beneficial for contracting entities as they allow a supplier's compliance with the particular standards in question to be checked throughout the contract performance period, unlike most other checks in a tender process (e.g. award criteria) which examine compliance only at that particular point in time [7]. Such conditions could potentially be useful for developing innovation over the course of a contract, and for ensuring compliance with green and social requirements.

The current law relating to the inclusion of contract conditions is set out in Art. 38 of the 2004 Utilities Directive:

“Contracting entities may lay down special conditions relating to the performance of the contract, provided that these are compatible with Community law ... The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”

The main issues which arise here relate to the interpretation of the phrase ‘performance of the contract’. The wording of the provision mirrors that of the public sector directive (see Art. 25, Directive 2004/18) which is generally taken to prohibit any conditions not related to contract performance [15]. However, if including contract conditions unrelated to the performance were allowable, this would be beneficial for social procurement in particular, enabling a contracting entity to be sure that good employment practices were being followed in the supplier's business as a whole. It would also allow conditions which, while not directly related to the contract performance, supported the wider goals of the contracting entity, e.g. conditions for the education and training of a particular sector of the population affected by the contract. Such conditions would therefore be very useful for development of inclusive procurement under the Europe 2020 strategy.

Arrowsmith and Maund have argued, however, that the interpretation of ‘performance of the contract’ should be more flexible for utilities [6]. They suggest that if utilities cannot include contract conditions going beyond performance, they should logically be unable to exclude firms for reasons unrelated to contract performance, but this is potentially allowable for utilities. Art. 54 of the 2004 Utilities Directive states that contracting entities may exclude or select tenderers “according to objective rules and criteria”, wording which is maintained in the reformed law (see Art. 78(1) new Utilities Directive). There is no link to the contract mentioned in this Article and it would therefore appear lawful for a utility to exclude/select tenderers on the basis of more general matters applying to the whole business of the tenderer (and this appears to have been how UK utilities have interpreted the provision [7]). This raises the illogical situation in which a utility can exclude a potential tenderer for an issue which they are not lawfully able to include in the contract. If this more liberal interpretation had been adopted in the reforms, it would have clarified the law and also provided further opportunities for boosting social and green procurement by enabling wider use of contract conditions.

The reform to the law, however, appears to confirm that the conservative view of the law is correct and conditions unrelated to performance are not allowable. Art. 87 of the new Utilities Directive states that special conditions can be set by a contracting authority “provided that they are linked to the subject-matter of the contract”. ‘Subject-matter’ is given a relatively broad interpretation in Art. 82(3) as anything which “relate[s] to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle”, but still clearly rules out conditions relating to a supplier's business as a whole. This potentially hinders opportunities for inclusive growth through booting employment throughout the business. It also means the problem identified by Arrowsmith and Maund that utilities can potentially exclude suppliers for an issue they cannot legally include as a contract condition remains, and it is regrettable that the opportunity was not taken to link up the law in a coherent manner during the reform [6].

The reform does, however, have the benefit of clarifying what precisely is meant by performance through the reference to ‘subject-matter’. The broad definition provided potentially also allows for conditions supporting the main contract, such as education/training requirements for those working on the contract, given that these can be seen as ‘relating’ to the product or service procured. The definition in Art. 80 is also widened from the definition in the 2004 Utilities Directive to add ‘innovation-related’ and ‘employment-related’ to social and environmental conditions in the list of allowable considerations, which may hopefully inspire utilities to include such conditions more commonly in the future.

3.4. Award Criteria

Issues of innovation and green or social concerns can also be included in the award criteria which are used to evaluate the tenders. This method allows the utility to balance the importance of the particular issue against other relevant issues such as cost and quality, enabling a relatively nuanced consideration of the different concerns. This is therefore a particularly good area for consideration of the Europe 2020 aims, enabling them to be balanced against the need for value for money which is equally important for developing economic growth.

The rules relating to award criteria are currently set out in Art. 55 of the 2004 Utilities Directive. This allows utilities to award tenders on one of two grounds: lowest price or ‘most economically advantageous tender’ (MEAT). Where MEAT is chosen as the basis of award, Art. 55(1)(a) sets out a list of potential considerations such as technical merit and security of supply. Environmental characteristics are expressly included as a potential consideration. There is no mention of either social or innovative concerns but the ECJ held in Case C-513/99, *Concordia Bus Finland v Helsingin Kaupunki* [2002] ECR I-7213 that the list provided in the directive is non-exhaustive, therefore potentially allowing the inclusion of such issues in the award criteria.

Any award criteria included must, however, be “linked to the subject-matter of the contract” (Art. 55(1)(a), 2004 Utilities Directive), raising similar issues therefore as contract conditions (see above, section 3.3.). There is some debate over the meaning of ‘subject-matter’ under the current law. Arnould, for example, suggests it should be given a narrow interpretation linking it to the technical specifications of the contract (and therefore suggesting production requirements could not be examined at this stage, see Section 3.2. above) [16]. Arrowsmith took a more liberal view, suggesting award criteria could be included for any issue which could lawfully be included as a contract condition and therefore enabling award criteria on a wider range of environmental and social issues [17]. The new Utilities Directive clarifies this confusion by providing a definition of ‘subject-matter’ in Art. 82(3) which is also used for contract conditions (see above, Section 3.3.), and which follows the definition used for technical specifications in Art. 60(1), allowing award criteria to consider factors which are relevant at any stage of the life cycle, even where those factors do not form part of the material substance of the product. This provides a coherent approach across all stages in the procurement process and is broad enough to cover a wide range of possible considerations (though as with contract conditions, award criteria looking at the supplier’s business as a whole will be prevented, see Section 3.3. above).

The first notable change to the award criteria system in the new Utilities Directive is the removal of lowest price as a separate criterion such that MEAT is now the only allowable award basis (Art. 82(1)). According to Recital 94 of the new Utilities Directive, the change was made to ensure the award criteria provisions were “presented in as simple and streamlined a way as possible”. The notion of MEAT is, however, given an interpretation which makes it clear that financial concerns are still intended to be a major part of tender evaluation. Art. 82(2) states that the MEAT should be identified “on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing ... and may include the best price-quality ratio”. Recital 95 emphasises that it is possible to award a tender “on the basis of either price or cost effectiveness only”, making it clear that lowest price is still a viable award option. However, the change of wording of the Article presents options such as life-cycle costing and price-quality analysis as the default, with price alone being an exception, which may well encourage the uptake of such forms of tender analysis more commonly and, correspondingly, increase the use of award criteria examining innovative, green and social issues. Supporting this, Art. 82(2) has an amended list of suggested criteria which specifically lists social and environmental aspects and innovative characteristics as potentially relevant to quality.

One of the most important changes which will impact particularly on the sustainable growth aim of Europe 2020 is the introduction in Art. 83 of a life-cycle costing system. This is specifically mentioned in Art. 82(1) as a potential means of determining cost effectiveness. The system sets out two main types of costs which can be considered by utilities using the system when relevant; costs borne by the utility (Art. 83(1)(a)) and costs imputed to environmental externalities (Art. 83(1)(b)). The costs borne by the utility cover not only the acquisition costs but also use, maintenance and costs of disposal, which should help to deter contracting entities from choosing a non-sustainable product over a more sustainable option purely due to a lower initial purchase cost. Environmental externalities cover issues such as the cost of pollutant emissions. Art. 83(1)(b) provides that these can be included only if their monetary value can be determined and verified in accordance with certain requirements set out in Art. 83(2) based around non-discrimination, transparency and accessibility. These requirements could potentially deter utilities from including the costs of such externalities in their tender evaluation, as they may lack the necessary expertise for determining a satisfactory system. However, Art. 83(2)(a) notes that a system for repeated application can be used if it is non-discriminatory, which raises the possibility of having a system externally designed by a qualified body and then used for future tenders by the utilities, reducing the potential difficulties in this area. Overall, together with the inclusion of the costs borne by the utility over the life of the product being more clearly considered, the system in Art. 83 appears to be a promising development for sustainable procurement.

4. Conclusion

The Europe 2020 growth strategy focuses on promoting smart, sustainable and inclusive growth. This paper has examined the impact of the proposed reforms to the EU utilities procurement regime on the development of those goals, particularly by improving the inclusion of innovative, green or social concerns in procurement. It can be seen that several of the reforms have the potential to improve the inclusion of such concerns. The most dramatic change is the inclusion of a completely new award procedure, the innovation partnership, which aims to help utilities work closely with a private partner to develop new products or services, and which is clearly linked to the Europe 2020 aim of smart growth. Other more subtle changes may have an equally important impact, however. In particular, the change to the definition of technical specifications which makes it clear that consideration of production and disposal issues is allowable should allow much greater consideration of green issues and boost sustainable growth, and will be well supported by the introduction of specific rules on life-cycle costing in award criteria. Equally, recognition of the benefits of allowing contracting entities to require compliance with certain product labels should ease the administrative burden of considering social and green issues and hopefully increase their use.

There are some issues with the reforms, however. The changes to the requirements for contractual conditions retains the problems the previous law had in examining issues related to a supplier's whole business, not only preventing useful green and social conditions in such an area but also retaining the difficulty in reconciling the law in this area with the ability to look at a supplier as a whole in exclusion/selection criteria. It is also unfortunate that the rules on innovation partnerships are not more precise, especially when regulating the final purchase of the innovative product or service, as this may hinder the actual uptake of the procedure significantly.

Overall, though, the reforms are a positive step, with many of the grey areas in the law clarified and greater flexibility for considering innovative, green and social issues in procurement. The procurement reforms should provide a valuable addition to the EU's overall mission to improve growth as set out in Europe 2020.

Notes

Section 2 of this paper is based on the overview of EU procurement set out in E. Aspey, (2012), "Labour Considerations in EU Procurement: A Study of UK Utilities", 37(3) *European Law Review* 294-313, at 297-299.

References

- [1] European Commission, (2010), *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020
- [2] European Commission, (2011), *Modernising European public procurement to support growth and employment*, IP/11/1580
- [3] European Commission, (2011), *Twelve projects for the 2012 Single Market: together for new growth*, IP/11/469
- [4] European Parliament, *Procurement by entities operating in the water, energy, transport and postal services*, text adopted 15/01/14, TA-PROV (2014)0026, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=20140115&secondRef=TOC&language=EN> [accessed 17/01/14]
- [5] PricewaterhouseCoopers, London Economics and Ecorys, (2011), *Public procurement in Europe: Cost and effectiveness*, report prepared for the European Commission, available at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf [accessed 11/01/14]
- [6] S. Arrowsmith and C. Maund, (2009) “CSR in the Utilities Sector and the implications of EC procurement policy: a framework for debate”, Ch. 12 in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, (Cambridge: Cambridge University Press)
- [7] E. Aspey, (2012), “Labour Considerations in EU Procurement: A Study of UK Utilities”, 37(3) *European Law Review* 294-313
- [8] A. Apostol, (2012), “Pre-commercial procurement in support of innovation: regulatory effectiveness?” 6 *Public Procurement Law Review* 213-225
- [9] European Commission, (2007), *Pre-commercial procurement: Driving innovation to ensure sustainable high quality public services in Europe*, COM(2007) 799
- [10] European Commission, (2001), *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*, COM(2001) 274
- [11] European Commission, (2011), *Buying green – a handbook on green public procurement*, (2nd ed), (Luxembourg: Publications Office of the European Union)
- [12] European Commission, (2001), *Interpretative communication of the Commission on the Community Law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, COM(2001) 566
- [13] P. Kunzlik, (2009), “The procurement of ‘green’ energy”, Ch. 9 in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, (Cambridge: Cambridge University Press)
- [14] C. McCrudden, (2007), *Buying Social Justice: Equality, Government Procurement and Legal Change*, (Oxford: OUP)
- [15] S. Arrowsmith, (2005), *The Law of Public and Utilities Procurement*, (2nd ed), (London: Sweet and Maxwell)

[16] J. Arnould, (2004), “Secondary Policies in Public Procurement: The Innovations of the new Directive” 13 *Public Procurement Law Review* 187

[17] S. Arrowsmith, (2009), “Application of the EC Treaty and directives to horizontal policies: a critical review”, Ch. 4 in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, (Cambridge: Cambridge University Press)

SME policies in public procurement: time for a rethink?

Caroline Nicholas¹ and Michael Fruhmann^{2*}

¹International Trade Law Division
United Nations Office of Legal Affairs
(UNCITRAL Secretariat)
1400, Vienna, Austria
E-mail: caroline.nicholas@uncitral.org

²Bundeskanzleramt-Verfassungsdienst
Ballhausplatz 2
1014 Vienna, Austria
E-mail: michael.fruhmann@bka.gv.at

*The opinions in this paper are personal, and not and are not to be viewed as representing official views of the United Nations or the Government of Austria

“Micro, small and medium-sized enterprises (SMEs) are the engine of the European economy. They are an essential source of jobs, create entrepreneurial spirit and innovation in the EU and are thus crucial for fostering competitiveness and employment....” (Günter Verheugen, Member of the European Commission, Responsible for Enterprise and Industry, in EC/Enterprise and Industry). Looking beyond the EU, SMEs *“constitute the vast majority of business establishments, are usually responsible for the majority of jobs created and account for one third to two thirds of the turnover of the private sector,”* (OECD/UNIDO, 2004)). As a result, governments of countries at all levels of economic development pursue policies to support SMEs (Storey, 1999).

This paper will consider the economic rationale behind such SME policies, how they may be pursued through public procurement, and whether and how their effectiveness can be evaluated. It will conclude with some considerations for policy-makers in public procurement. It will not analyse social and political justifications for SME policies per se, though it is acknowledged that righting historical disadvantage and supporting minorities in public procurement can have consequential economic benefits.

The two main economic policy considerations revolve around (a) improving SME participation in the public procurement market, with a view to enhancing competition and hence value for money, and (b) awarding more procurement contracts to SMEs, with a view to encouraging entrepreneurship and innovation, and thereby job creation, economic growth and development to the benefit of wider society. While this paper draws heavily on authoritative works on SME policies, it is not intended to provide a comprehensive survey of the economic literature on the subject. Rather, it seeks to highlight some of the published findings on the scope and impact of SME policies, and to urge policy-makers to seek and consider empirical evidence and move to policy, rather than the other way around.

Statistics on SMEs and the public procurement market

The volume of statistics on SMEs in many systems amply demonstrates that SMEs overall constitute the overwhelming majority of all enterprises (to report on them in detail exceeds the scope of this paper, but an example is found in EC, 2003). For example, in the EU, 99.8% of enterprises in the non-financial sector are stated to be SMEs (representing 67% of the total non-financial employment), and 92% of the total business sector is estimated to be micro-enterprises, with fewer than 10 employees (de Kok et al, 2011). SMEs comprise over 99% of the UK's 3.8m businesses, and provide 56% of its private-sector employment and 52% of total UK turnover (Small Business Service (SBS), 2004, cited in Zheng et al, 2006). In South Korea, the statistics show that SMEs comprise 99% of businesses and 88% of private-sector employment (Government of Korea, 2011); in South Africa, 55% of private sector employment, and 22% of GDP (Kauffmann, 2005, and cited in Kim, 2011). In the US, SMEs constitute 99.7% of all businesses, generate 46% of private, non-farm GDP, and smaller SMEs employ 34.9% of all private sector workers (US Census Bureau, 2007).

There are varying definitions of SMEs: OECD/UNIDO (2004) note that SMEs are defined in the literature most commonly by reference to employment, due to the simplicity of the measure and the ease of collection of data (the

OECD and US generally use a measure of under 500 employees, the EU 250). Many systems use a broader definition in practice, e.g. in the EU, where SMEs are those with fewer than 250 employees, provided that their turnover and assets are below certain limits (EU, 2008), although EUROSTAT statistics are presented by reference to employee numbers only (EU, 2014). A similar approach is employed in the standards used by the US Small Business Association (SBA) to classify SMEs (though the SBA is not concerned with public procurement). Hence the figures in the preceding paragraph are not directly comparable, even before accounting for the different level of development in the countries and regions concerned, though a general conclusion that most businesses are “SMEs” can be drawn.

It is also clear that SMEs’ share of the public procurement market is below their proportion of total enterprises: in the EU, for example, SMEs secured 35%-35% of contracts by value in 2006 and 2007, and 42% in 2008 (EU, 2009); and between 53% and 78% of contracts by volume (EU 2008). This is not a recent trend: Bovis (1998) argued that market access is also limited for SMEs. The situation is similar elsewhere: the US SBA estimates that 21.89% of contracts were awarded to SMEs in 2009 (SBC, 2010), whereas in Canada since 2006-2007, over 43% of the total value of contracts on average was awarded to SMEs (Government of Canada, 2014).

Within the overall numbers and using a more flexible approach to what is an SME, the EU (in a report on SME access to public procurement) notes that SMEs’ access to public procurement varies from one Member States to another, but that overall they are awarded 18% lower contracts than their overall economic share calculated by turnover (EU, 2009). Behind these aggregated data, however, the position varies as between micro, small and medium-sized enterprises: “medium-sized enterprises do not seem to be unduly under-represented in public procurement”, but “the relative significance of micro and small enterprises lags considerably behind their actual role in the real economy”: the percentage lags are 2% (medium-sized, ie with up to 249 employees), 5% (small, ie with 10-49 employees) and 11% (micro, ie with up to 9 employees) (EU, 2009, European Commission, 2013).

Economic (and other) justifications for SME policies

These overall conclusions of under-performance are taken as evidence of market failure on a scale that justifies intervention. Estimates of the value of the total public procurement market vary, but according to the OECD “governments in OECD member countries spend on average 12% of their GDP on public procurement (excluding procurement by state-owned utilities)”, (OECD, 2011). Variations are considered to reflect the different size of the state, its role in the economy and the existence of high-value infrastructure and similar projects and range from 15% of GDP (the Netherlands, the Czech Republic and Iceland) to under 7% (Mexico, Chile and Switzerland) (ibid, 2008 figures). The figures consequently appear to justify intervention on a significant scale: Storey (2006, also cited in Freeman, 2013) estimates that the annual total financial support for SMEs in the UK is equivalent to £7.9 billion per annum - more than is spent on the police force or universities.

A separate area of rationale for SME support policies arises from cited economic benefits of SMEs over enterprises in general, such as that SMEs add value and promote innovation (Carter et al, 1999, Erridge et al, 1998, and Hoffman et al, 1998, as cited in Zheng et al, 2006); that SMEs are more adaptable and responsive to the needs of purchasers (Zheng et al) and support the creation of new supply markets, and respond to supply market dominance and fragmentation (Caldwell et al, 2004); that there are benefits to local economies from local sourcing (Walter, 2005, NERA, 2005 (and cited in Zheng et al, 2006)). At the micro-economic level, SME support can contribute to individual business sustainability (Zheng et al, 2006).

The economic rationale is linked closely to social motivations (McQuade and Johnson, 2003, Ram et al, 2002, cited in Zheng et al, 2006), including public relations and reputational value for enterprises contracting with local SMEs, and minority-support policies that lie at the heart of the US SBA and South African Black Economic Empowerment policies. Perhaps as a consequence, the policy goals behind SME policies are frequently stated in very broad and political terms (as the quotations in the introductory paragraph to this paper indicate).

Indeed, a recent report into SME access to public procurement in the EU concludes a statistical overview saying that “it is important to highlight that SMEs’ share of the value contracted for contract below €300,000 in fact slightly exceeds the corresponding figures for real economy. However, this is more than offset by the huge disadvantage they (micro and small enterprises primarily) have in accessing larger contracts. Whilst one would not expect the largest contracts to be won by SMEs, they could eventually win more lower-value contracts to have their ‘fair share’ of public procurement overall,” (EU, 2009). Gibbs (2000), in a paper entitled “SME policies, academic research, and the growth of ignorance, mythical concepts, myths, assumptions, rituals and confusion”, highlights that along with the substantial growth in SME research and publications there has been a parallel growth of ignorance, and that “mythical concepts” and ‘myths’ are used as a basis for key areas of policy development.

Data on SME policies

This lack of clear policy goals is, unsurprisingly, reflected in the data available on SME policies themselves. This situation was already identified over a decade ago; when considering whether bank lending to SMEs was insufficient, the UK's Bank of England sought to "bring facts into debates typified by anecdote, assertion and assumption," (Bank of England, 2004, cited in Freeman, 2013). Freeman adds that "a close examination of the academic, regulatory and commercial literature regarding SMEs and their role in the economy remains riddled with poor thinking and muddled conclusions, problems compounded by a plethora of issues relating to the availability and quality of relevant data". Zheng et al (2006), Karjalainen et al (2008) and Dalberg (2011) have all noted the relatively limited extent of empirical data.

Zheng et al et al, citing the SBS and other sources from the UK, notes that many policies are presented in descriptive terms rather than by reference to measurable objectives or goals. A later example can be found from the European Commission, which says that SMEs policies are mainly concentrated in five priority areas, covering: "the promotion of entrepreneurship and skills; the improvement of SMEs' access to markets; cutting red tape; the improvement of SMEs' growth potential, and strengthening dialogue and consultation with SME stakeholders" (EU, 2014).

While these objectives may be desirable policy objectives, achievements are effectively immeasurable without targets or benchmarks. The literature reveals few targets, though notable exceptions are found in the US, which has a policy goal of 23% awards by value to SMEs (SBA, 2010), and the UK (25% by 2015, UK Government, 2014).

A first issue, therefore, is to identify what we can learn about the use of SME policies that may be of use to policy-makers. Much literature on SMEs participation in public procurement tends to review SMEs as a group. That is, the data are aggregated data, rather than broken down by market sector, SME type or size, nature of the public purchaser, or referring to differing business goals, owners' backgrounds, levels of available technologies, skills and experiences, regions in which SMEs operate. In addition, there is a significant focus on the social aspects of SME purchasing (from minorities, etc, which are key elements of policies in the US and South Africa) (Zheng et al et al, 2006). Research at this aggregate level (Curran, 2000) gives little insight into what may motivate individual procuring entities and buyers to purchase from SMEs, and what factors influence their individual decisions (Zheng et al et al, 2006); decisions of procuring entities may be influenced by variable characteristics, such as spend portfolios, priorities, cultures and stakeholder requirements (Caldwell et al, 2004).

However, as Storey (2008) notes, the situation is gradually improving. For example, a recent EU Report provides a comprehensive set of data at the regional level; it contains an analysis of SME under-performance in public procurement contracts, which is broken down by country, type of government awarding body, contract size and whether the contract was for goods, services or construction, and by procurement method. The overall trend reflects the unsurprising proposition that the larger, more complex contracts are rarely won by micro and small enterprises (EU, 2009). Nonetheless, although the report starts with a chapter breaking down SMEs by industry sector, the analysis of under-performance in procurement is not broken down this way; in addition, the surveys of suppliers and procuring entities do not appear to have enquired into the different award proportions per sector, though they do identify a limited number of obstacles that have differing impact on micro, small and medium-sized enterprises (and many that all sizes of enterprises report as obstacles). In addition, the EU notes that data for different periods are not fully comparable (EU, 2009, a finding repeated in many other studies).

Indeed, in 2000, Curran had already reported on data difficulties and obstacles to the quantitative evaluation of policies: he cited quantitative methodologies that do not adequately account for net positive outcomes ("additionality"), as deadweight (ie outcomes that would have occurred without the policies concerned) and displacement (firms outside the policy cease to trade, have lower sales or employment, or have higher costs) should be accounted for. A lack of matched control samples as a result of the heterogeneity of SMEs was indicated by Storey (1999); difficulties of selection bias and low or biased response rates are evident. These factors also mean that deadweight is the most difficult element to evaluate – precisely the factor that policy evaluation should address if it is to be meaningful. Although qualitative alternatives have been employed to seek to improve this situation, they are essentially add-ons to quantitative research. Curran's overall conclusion that "there will always be a high level of uncertainty in estimating outcomes and impacts of [SME] policies" would not seem to have changed significantly. Indeed, a general policy of deregulation may have perverse consequences in that some SMEs now slip below the reporting obligations that allow statistical evidence to be gathered (Freeman, 2013).

Need for SME policies: market failures and SME support

The World Bank and IFC consider that the theoretical justification for SME support lies in “market and institutional failures that bias the size distribution of firms, rather than on any inherent economic benefits provide by small firms” (WB/IFC, 2000). Adapting Storey’s 2008 analysis of forms of market failure relevant to SME policies to the public procurement context, there are several types of failure that may justify market intervention. However, while market failure has long been noted as a necessary precondition for government intervention, it is not a sufficient one: intervention is justified only where the results will improve welfare (Storey, 2008). This issue will be considered below, after a description of the failures themselves and common policies applied to mitigate them.

The first group of market failures arise, adapting Storey (1999), as SME owners do not realise the benefits of participating in the public procurement market, and do not fully appreciate the benefits to their business of taking steps such as workforce or management training and promotion activities, that would allow them better access to this market. This is indicative of inadequate information (EU, 2009, ADB, 2012, Smith et al, 2001). The EU has also recognized that poor information about procurement opportunities can close markets to SMEs, and that inadequate information on procurement regulations and requirements as a major impediment to SME participation in procurement (Mishory, 2013). Similar findings are reported in Karjalainen et al, 2008, citing Fee et al, and ECEI, 2014. Indeed, Fee argues that inadequate access to information is the most significant barrier to SMEs’ performance generally. The EU, however, has found more recently that information about procurement opportunities is less of an issue than information on tenders themselves (ambiguous requirements, late information, and a lack of debriefing, for example (EU, 2009)). Lack of information about the procurement process itself, such as the mandatory legal requirements and associated procedures that all participants must follow, also presents obstacles to SMEs (EU, 2009).

A further limiting factor is the costs of participating in public procurement, which are noted as being 10-50% higher than for comparable projects in the private sector (Fee et al, 2002, cited in Karjalainen et al, 2008, Smith et al, 2001, UK Government consultation, 2013). These costs disproportionately affect SMEs, in part because many are fixed (ECEI, 2014, ADB, 2012). Indeed, a 2010 study found that the costs of regulation per employee are 36% higher for small than medium-sized and large firms in the USA (ADB, 2012). The costs themselves are derived from the disbursements required in the procurement process (including tender securities and performance bonds, inspection fees, registration and documents fees) and the time and resources involved in complying with rigorous and protracted procedural requirements, such as registration, production of detailed tender information (such as regarding minutiae of prices) and large volumes of documents (ADB, Karjalainen et al, 2008; Fee et al, 2002).

SMEs are also noted as suffering from tender preparation periods that are too short (ECEI, 2014), i.e. there is insufficient time to bid (EU, 2009). Bovis (1998) also cited the lack of language skills in technical areas of tendering as a further obstacle to SMEs (in Karjalainen et al, 2008), a finding also evident in the 2009 EU Report – SMEs do not have tender-writing specialists, and are less experienced in the task. This report also highlighted an over-emphasis on price in evaluation, disproportionate qualification and other criteria, together with the overall administrative burden. Although interaction with the procuring entity was noted to have improved over recent years, SMEs as a group considered further reforms in this area would be among the most pressing (EU, 2009).

After the selection process is complete, a winning supplier can expect to be confronted with complex contract management procedures and dispute resolution processes (ADB, 2012), and the costs and cash-flow implications of funding the projects concerned until payment (the payment period in the public sector is significantly longer than in the private sector) (ADB, 2012, Intrum Justicia, 2013).

Other issues relate to the manner in which the procuring entities manage contracts and SME participation. Here, an observed tendency is towards larger contract sizes and contract aggregation through framework agreements and similar tools (EU, 2014). For example, the value threshold above which the statistics indicate that SMEs underperform is in the range of €300,000 to €1m (EU, 2009). While noting that the median size varies among member States, a recent report states that the median contract size above thresholds should be accessible for SMEs, but that this median has increased recently from about €330,000 to €928,000 (EU, 2009). Even by 2003, the US equivalent of framework agreements accounted for nearly 30% of federal public procurement; the value of one type of framework agreement alone rose from \$4bn in 1992 to \$32.5bn in 2004 (Gordon et al). The literature on economy and efficiency in procurement routinely notes an increasing use of framework agreements, purchasing consortia and centralised purchasing agencies to aggregate purchases to enhance value for money. Bundling is also claimed to be administratively efficient (Clark and Moutray, 2004, ADB), though more recent studies are indicating that there are trade-offs in terms of meeting the needs of certain procurers, and where framework agreements used as the purchasing tool are sub-optimally set up and used (Nicholas, 2011). The pressures of financial austerity and shrinking procurement budgets is, for example, part of the reason for an ever-greater use of framework agreements in this context. SME surveys report a significant impact through bundling (EU, 2009, ADB, 2012), and aggregation has been considered to be “bad news for SMEs” (Smith et al, 2001). The “bad news” arises in two ways: bundling

or aggregation at the geographical level or through grouping types of purchases excludes SMEs that do not cover all necessary areas or ranges (Bovis, 1998; EU, 2009), and through larger orders that exclude SMEs who do not have the requisite capacity or capital (Morand, 2003, EU, 2009, Zheng et al, 2006).

SMEs surveyed also highlight risk aversion on the part of procurement officials as a significant barrier to participation (EU, 2009). Zheng et al cites studies pointing to issues with professionalism in procuring entities, trust between SMEs and procuring entities, and a lack of technical expertise in applying socio-economic objectives because of a lack of understanding of their implications and impact on purchases themselves (citing Ruth et al, 2002, Dollinger et al, 1991, Drabkin and Thai, 2003). These issues increase apparent risks of SME contracting. Procurement officials also have fiduciary duties as regards public moneys (ECEI 2014), which may translate into stringent financial and experience requirements that disfavour SMEs (ADB, 2012). This may also be a paradoxical result of measures to enhance transparency and accountability, as individual procurement officials seek to avoid censure for sub-optimal outcomes. At the institutional level, some compliance requirements on suppliers may have little to do with performance risk in a public procurement contract, but are designed to avoid political risk (contracting with “undesirable” suppliers with convictions for tax evasion, for example). In terms of the demand side, where innovation could be encouraged, procurement officials are cited to be reluctant to retreating from the tried-and-tested, “safe” solutions, specifications and suppliers (Georghiou et al, 2013), leading to a perception that the “nobody ever got fired for choosing IBM” rationale remains a real barrier (Smith et al, 2001).

Types of interventions to support SMEs

Storey (2008) sets out an analytical basis for distinguishing the types of intervention that may mitigate these obstacles and may be used to pursue the overall goals. A key distinction in policy can be observed: measures may seek to lower barriers or to offer support. Many governments pursue a mixture of both measures. The goal of such mitigating policies arguably should be to encourage participation (and hence the potential for competition in the public procurement market concerned (UNCITRAL Guide, 2012)).

To start with the “barrier” side, measures in the public procurement sphere may seek to reduce excessive regulations and/or to mitigate their impact. Extrapolating from the World Bank’s Doing Business surveys (citing the 2006 study), Storey (2008) categorises the policy options: first, policy-makers can seek to lower the impediments to business creation or small-firm expansion (broadly speaking, the approach of the USA, Canada and perhaps New Zealand). Secondly, policies can seek to provide direct assistance to compensate for the burdens or impediments (broadly speaking, the situation in the EU, which has relatively high impediments to starting a business in particular). Storey also notes that the situation in developing countries is often characterised by both high impediments and low direct assistance, an interesting finding given the many statements about the importance of the SME sector in those countries. Drawing on Lundstrom and Stevenson (2005), Storey concludes that there is considerable diversity in approaches to reduction of administrative burdens.

The legal framework for public procurement will include provisions on eligibility and qualification, descriptions of contract terms and specifications, and evaluation criteria, each of which have the potential to fall disproportionately on SMEs. In recognition of this general proposition, the 2014 EU Directives on public procurement introduce new measures to counter the burdens involved: first, self-declarations in matters of qualification are being introduced, with the declared aim of primarily benefitting SMEs. Secondly, the evidence of financial capacity of the supplier that can be required is to be limited as a general rule: for example, that for turnover requirements may not exceed a maximum of twice the estimated value of the contract (EU, 2014).

Other programmes seek to eliminate unnecessary qualification requirements: for example, the UNCITRAL Model Law on Public Procurement (which includes procedurally simpler methods for smaller-value procurement) provides for tender securities, but the Guide to Enactment that accompanies Model Law discourages imposing tender securities routinely, on the basis that the formalities and expenses concerned may discourage the participation of suppliers. It adds, “the procuring entity should consider all the implications of requiring tender securities (positive and negative), on a case-by-case basis, prior to deciding whether or not to require them”, and suggests that guidance and regulations should provide examples to assist whether a tender security could be excessive safeguard and where it would be justified, by reference to contract value, performance risk and so on (UNCITRAL Guide, 2012). Other policies may encourage international standards, testing and other requirements to be applied in a more user-friendly way, and to use functional, output-based rather than technical, input-based specifications, and less price-dominated evaluation criteria (EU, 2009); all these measures have been cited as pro-SMEs because their benefits will accrue proportionately more to SMEs. At a more practical level, rules designed to ensure objectivity, clarity and transparency in specifications can be supported by tools to improve and standardise documents and terminology. The EU requires the use of its Common Procurement Vocabulary (CPV, adopted by Regulation (EC) No. 213/2008), to standardise specifications and other elements of descriptions of what is to be procured. The UN

operates a similar scheme – the United Nations Standard Products and Services Code (“UNSPSC”). These tools are designed to establish “a shared and common understanding of a product domain” (Leukel and Maniatopoulos, 2005), and so address the information asymmetry of SMEs. Other measures include addressing possible SME weaknesses in terms of technical and financial capacity, by allowing joint bidders to fulfil requirements, improving dialogue between procuring entities and suppliers, engaging in post-submission qualification, and so on (EU, 2009). However, many procuring entities indicate that their time and resources, and a lack of concrete SME policies, do not allow for the full benefit of these types of scheme to be realised (EU, 2009). A further constraint may be risk aversion, considered further below.

A wide range of economy-wide administrative requirements may be incorporated into the public procurement sphere by reference. These include the need for licences, and compliance with health and safety, employment, environmental and other requirements. Requirements such as outmoded or unnecessary regulations; technical requirements that limit entry unnecessarily or serve as disguised tools for excluding competing suppliers (i.e. regulations that are non-discriminatory on the surface but are subtly discriminatory in their substantive requirements) and poorly designed regulations that are desirable in principle but unnecessarily intrusive, have long been recognised as detrimental to participation in markets and hence competition (WTO, 1998, in Anderson et al, 2011). The European Commission has established a high level expert group to consider reductions of specific disproportionate regulatory burdens on business (thereby covering SMEs as well). However the EU approach only focuses on so called “regulatory burdens” which are costs imposed by information obligations created by EU legislation (e.g. reporting and monitoring). As of today no EU-wide model for measuring compliance costs has been established (EC, 2007). The 2009 EU Report noted that SMEs frequently do not comply with necessary requirements, some of which are technical or relate to health and safety, and some relate to sustainability, equality and diversity policies (EU, 2009). To this can be added the displacement time spent in complying with rules (time spent with tax officials, for example (World Bank, 2014).

A related area of concern involves integrity measures in the procurement system that can have the unintended effects of limiting market participation. For example, expansive civil and criminal strictures against fraud in public procurement markets may create asymmetries between public and private contracting (Anderson et al, 2011).

Other measures designed to reduce the information asymmetry include the improvement of transparency in public procurement. UNCITRAL discusses the need to implement transparency requirements in a way that allows meaningful access in the prevailing circumstances; this may be particularly relevant in the context of developing countries as well as micro-enterprises in all systems, which may have lower technical resources than other SMEs (UNCITRAL Guide, 2012). The European Commission has been seeking to increase “access to information on procurement opportunities” and the “transparency of public procurement requirements,” in its three revisions to the Public Procurement Directives over the last 15 years (EU, 2014).

Many commentators have noted that improving regulations does not generally involve significant social cost (e.g., World Bank, 2014). However, as the legal framework is generally permissive rather than prescriptive, permitting less onerous requirements alone will not achieve the desired policy objective: meaningful guidance along the lines suggested by UNCITRAL and other measures to reduce risk aversion will be necessary for successful implementation. In addition, it is important not to equate better regulation with less regulation: the World Bank’s Doing Business indicators are predicated on the notion that economic activity requires good rules and regulations that are efficient, accessible to all who need to use them and simple to implement” (World Bank, 2014). Hence some indicators give a higher score for more regulation (eg transparency measures) and others for simplified regulations (such as a one-stop shop for business start-up formalities) (ibid).

Measures aimed at better regulation are unlikely to be recorded within the approximately £8bn assessed to be the annual cost of SME policies in the UK (Freeman). While no studies have been found directly addressing the costs of improving regulation, there will be costs in terms of designing and bringing in new regulations, but it is at least arguable that the benefits of better regulation will have a positive contribution to overall welfare. However, and as Storey has argued, the concept of market failure (here, regulation discriminating against SMEs in fact) does not guide the appropriate scale or envisaged length of intervention (Storey, 1999). A relevant consideration here is the cost of “regulation churn”, that is the costs of introducing and complying with new regulations, which should be evaluated when new policies are proposed; once the desired policy goal is achieved, the policies should cease. Freeman cites a Bank of England finding regarding lending to SMEs, though recent news items indicate that the issue continues to attract much political attention. The more obvious costs include the expenses directly incurred in changing systems and monitoring; indirect (opportunity) costs may arise where resources are diverted from, say, putting together good offers to the public sector to learning the new regulations will be harder to identify and measure.

Moving to the support side, Piga (cited in ADB) records that SMEs consider the unbundling of large contracts as critical to increasing their access to public procurement. While in theory the use of procurement procedures that allow for partial offers coupled with appropriate selection of lot sizes might theoretically enhance SME opportunities (UNCITRAL Guide, 2012), there is little evidence of this in practice. However, the 2014 EU Public Procurement Directives encourage contracts whose value exceeds €500,000 to be split into smaller lots, to be more SME-friendly, and require procuring entities to explain why they opt out of structuring a contract into lots in this way (EC, 2014). Interestingly, the EU Final Report did not identify the use of smaller lots as one of the more helpful tools that could be introduced (EU, 2009). UNCITRAL, too, has provisions in many procurement methods (including framework agreements) that allow suppliers to compete for part only of a procurement contract, and permits the use of multi-supplier framework agreements, both of which techniques can facilitate SME access (UNCITRAL Model Law, 2011, UNCITRAL Guide, 2012, EU 2009). The Korean online purchasing system (KONEPS) includes a Multiple Award Scheme for SMEs, with simplified processes for purchases of high-volume, repeated products (ADB, 2012).

Nonetheless, the general trend towards aggregation may mean that procuring entities will not take advantage of any available power to allow for partial offers or unbundle contracts. In addition, key procurement officials and oversight entities need to focus on the highest-value contracts and those at greatest risk and not those in which SMEs may be interested; indeed, the extent of business with SMEs may not even be measured (Smith et al, 2001), so SME exclusion is unlikely to be acted upon. No macro-economic empirical studies into the long-term effects of aggregation on SMEs and competition generally in public procurement were identified; though some commentators consider the opportunity costs of excluding suppliers from the market, and the potential for oligopolies or even monopolies to arise if the market concentrates as a result of aggregated purchasing by dominant purchasers (Graells, 2011, Albano, 2010). UNCITRAL encourages public procurement agencies to coordinate with competition agencies and share data for this purpose (UNCITRAL Guide, 2012).

Technical assistance and outreach to SMEs can address the second of the “information gaps” above. Within the EU, there are several schemes at the national level: France has a programme entitled “Practical guide for SMEs” and an association called “PactePME”; the UK has training courses offered through “Supply London”, local council website, face-to-face meetings, and tender resource packs for example (EU, 2009). Part of the USA’s Small Business Administration programme is to sponsor and participate in conferences and training designed to enhance SME participation in public procurement (ADB, 2012); in South Korea, the “SME Excellent Government Supply Products” award programme is designed to increase SME product visibility, and to include SME products in the KONEPS database (ADB, 2012). Other measures with similar aims include enhanced information distribution networks, the use of e-procurement systems and e-catalogues, targeted training and outreach. While many studies cite the rise in e-procurement tools and techniques as benefitting SMEs through enhanced transparency and efficiency (EU, 2009, for example), others indicate a lesser effect particularly on micro-enterprises and those in developing countries (an example given is South Africa (Zheng et al, 2006)). Zheng et al also cites earlier studies identifying limited use of the e-marketplace by SMEs beyond email and Internet for information-gathering and communications; a recent EU report also indicates some limits to the observed benefits of e-technologies, though with an indication that the position is improving and the drive towards full e-procurement should continue (EU, 2009).

Programmes to mitigate the impact of lengthy delay in payment under public procurement contracts on SMEs include direct financing measures. For example, in South Korea, the Public Procurement Service Authority (PPS) provides advance payments for goods contracts, and an SME network loan programme (ADB, 2012). In addition, the KONEPS system is designed to pay accepted invoices in four hours (Public Procurement Service, Government of Korea, 2014).

A further set of measures seek to go beyond barrier removal and support measures. These range from sub-contracting programmes to price-preferences and set-asides. These measures are directly aimed at SMEs, and to that extent are restrictions on competition. An initial consideration, therefore, is whether they are legally permitted. Many public procurement systems are regulated on the basis that the system should afford equality of treatment to all enterprises, so that “size cannot be a criterion in comparisons of tenders” (Karjalainen et al, 2008) or, indeed, in any part of the design of and selection in the procurement procedure. Examples at the international level include the EU Procurement Directives, which set out an express principle of equal treatment (in the 15th recital to the 2004 Directives, for example); and one of the WTO GPA’s two “cornerstone principles” is non-discrimination. The World Bank Procurement Guidelines set out a general consideration that the Bank will give all eligible bidders from developed and developing countries the same information and equal opportunity to compete in Bank-financed procurement (January 2011 version). Although these “international” procurement texts are aimed at preventing discrimination at overseas suppliers and apply over certain thresholds, to limited sectors of the economy and to limited groups of nationals, the extent to which affected governments can apply price preferences or similar

measures to support national SMEs is limited. A different approach is found in UNCITRAL, which is a template for national procurement systems rather than an international agreement or regulation of a donor programme. UNCITRAL's Model Law includes the objective of "fair, equal and equitable treatment", but permits the use of price preferences and set-asides, subject to compliance with international constraints and rigorous legal justification and transparency safeguards (UNCITRAL Model Law, 2011, articles 9-11 and Guide, 2012).

Where such direct assistance programmes are permitted, the advantages cited are that they support SMEs directly through creating and sustaining demand, and provide quick and visible benefits to SMEs. Some systems – such as in the US and South Africa, which base their SME policies on targeted assistance for economic and social reasons – set targets for awards to SMEs using a flexible combination of price preferences and set-asides, (and in the case of the US), require procuring entities to justify deviations from the policies concerned (ADB, 2012). This process has high administrative costs, arising from the use of classes and sub-classes of programmes, for which there are strict eligibility requirements, and the extent of justification for deviations. In the EU, where such policies at the national level would not be permitted, quasi-quotas including "community benefit clauses" to require the employment of local trainees, unemployed persons or other community building benefit can be applied in limited circumstances (EU, 2009).

Monitoring and evaluating SME policies

Storey (2008) identified a series of steps to assess SME policies, under a "COTE" framework, that involves policy clarity and coherence ("C"), specified objectives ("O"), measureable targets ("T"), and evaluation ("E"). However, he indicates that the "massively diverse" SMEs policies are not evaluated in practice at least partly for political reasons: partly because the "C", "O" and "T" elements are lacking; also because governments do not want SME policies to be evaluated (Storey, 2008; also Nightingale and Coad, 2011). Some issues relating to "O" and "T" have been canvassed above; some thoughts on "C" and "E" follow.

As regards "C", coherence, The UK Audit Commission referred to SMEs policies as "a patchwork quilt of complexity and idiosyncrasy" (Audit Commission, 1989; echoed by Storey (1994). SME policies should be simple and consistent, but in practice there is a bewildering array of them, at all levels of government, the effect of which is to impose rigorous qualification standards (and hence exclude many SMEs) (Storey, 2008) More generally, SME policies are said to have been implemented piecemeal and poorly (Storey, 1998), a finding subsequently echoed by Georgiou et al (2013).

At a more detailed level, some of the literature surveyed distinguishes between new SMEs and established SMEs when assessing the impact that administrative requirements may impose on new firms as compared with established ones. The effects of reducing more stringent financial and experience requirements – such as reducing the number of years' of required annual returns, tax compliance and previous contracts – may support financially less robust new SMEs proportionately more than established SMEs, as will reducing the costs of supplying tender securities. On the other hand, measures reducing the disproportionate tendering procedures and costs will benefit established as well as new SMEs. Policy-makers should be encouraged to decide whether they wish to target either or both groups; nothing in the literature surveyed indicates that policy-makers are heading down this path.

It may be considered that supporting all SMEs is the appropriate policy goal, given their aggregate contribution to economic performance. However, it is trite but true to say that policies cannot target 99% of the market. If they do, SMEs policies are merely pro-growth policies clothed in politically encouraging language (Freeman, 2013). Back in 2000, Curran identified some of the issues that inadequately targeted SME policies may raise, arising from a key finding: the low level of take-up of SME policies – many outreach initiatives rarely exceeding a 10% take-up, and often much less. They indicate insufficient targeting. Three reasons were noted: first, there was a perception that the support provider did not understand the business at issue. This perception was not clearly rooted in the nature and quality of the programmes, which were often carefully designed with appropriate professional input. Curran suggested that the obstinacy of the SME-owner and fear of losing personal autonomy may have been a partial cause; the SME owner's strong commitment to autonomy may also explain documented lack of growth ambitions. A second reason given was the "top-down" nature of the contents of outreach and training policies, much of which was distilled from large management practice and standard academic works. A third reason stemmed from administrative convenience: governments favoured (and continue to favour) standardised approaches that are easy to cost, administer and monitor. In this regard, Curran suggests that even where the case for national measures is difficult to justify, local, better-targeted programmes may be more productive. Gibbs (2000) discusses the definitive work of Bennett and McCoshan (1993) supporting bottom-up development and local ownership as indicators of success in SME programmes, but notes an absence of such an approach at the time. The outreach programmes in EU countries described above may be indications that this lesson is finally taking hold.

More generally, SME policies in public procurement are not pursued in isolation. “Socio-economic policies” as summarised in the UNCITRAL Guide to Enactment include SME policies, community participation in procurement, strategically placed contracts, sustainable development environmental policies, and it is noted that they “may be aimed at a specific sector or general development, environmental improvements, enhancement of the position of disadvantaged groups and economic factors” (Guide, 2012), echoing a point also made by Erridge (2004). Zheng et al notes that there is limited knowledge of how to apply such policies systematically in purchasing decisions (citing Maignan, et al, 2002), and that there will inevitably be tensions among the policy objectives including as between regulatory, commercial and socio-economic goals (Erridge 2004).

A pertinent example can be seen in the context of contract aggregation as described above. Since value for money in procurement – often considered the primary goal of procurement systems – may indicate aggregation and SME policies may indicate disaggregation, a review of the implementation and interaction of the policies at a detailed level is warranted. In a “Study to identify options to ensure that the Government’s ICT and SME policies are mutually reinforcing” (Government of Australia, 2013), the detailed consideration showed that the policies themselves were suitably aligned, but that there were problems in their implementation, such as a failure to take advantage of the ability to cap liability under ICT contracts that would facilitate SME participation. This example may be instructive, and policy-makers may also need to consider risk aversion particularly where efficiency and individual performance are included as goals of the public procurement systems concerned.

As regards “E”, evaluation, the literature on SME policies in procurement indicate that surveys of suppliers and procuring entities are noted as generally effective at identifying market failures and the obstacles to SMEs, as the above analysis makes clear. However, in the context of public procurement and incentives to innovation, the policy solutions do not address these barriers adequately Georghiou, Edler, Uyarra and Yeow, 2013, a finding that would be of significant concern if relevant to all SME policies. Hence more enquiries of stakeholders on the impact of SME policies is also indicated.

The long shopping-list of possible policies to support SMEs set out above have been well ventilated in the literature, but there appears to be little evidence on the economic efficacy or otherwise of them (at both the aggregate and detailed levels), beyond small increases in some measures of contract awards to SMEs (EU, 2009, for example). Indeed, Smith and Hobbs (2001) asserted that only a limited number of SMEs were able and willing to sell to the public sector in the UK; a Small Business Service (SBS) survey in 2006 found only 7% of UK SMEs were interesting in collaborating with the public sector (in Karjalainen et al); an earlier survey by the same grouping in 2004 had placed the figures at 14% (Zheng et al, 2006). Whether this fall is simply a data anomaly or the beginning of a trend and, if so, why, would merit examination.

Better or de-regulation may reduce the administrative burden on SMEs, such as through relaxation of reporting requirements, reducing compliance with regulatory requirements implied into public procurement procedures noted above, and other deregulation measures (EC, 2007). However, even deregulation can involve unintended costs. An ad hoc example from Austria may illustrate the problem: when postal services were deregulated, installing new post boxes was required. The costs of so doing were completely unknown at the time, though a model has now been designed. As direct intervention policies have the potential for even more costs than deregulation and other support measures, they should perhaps receive primary attention, but the administrative costs should not be ignored.

An initial mitigating step would be to enhance the collection of relevant data. As noted above, a primary objective in the procurement context is to enhance participation in procurement opportunities. From this perspective, data on awards are only a proxy for identifying participation. Although the SBS survey in 2006 highlighted pre-qualification and tendering processes as the most significant disincentives to participation, all empirical studies identified for this paper since that point continue to focus on award of public procurement contracts as the key determinant of whether or not the regulatory simplification measures noted above are working. (It appears that this is to some extent a forced measure, because of the data that are available.) A recent EU report recommends, for example, that an SME-marker (identifying whether a supplier is a micro, small or medium-sized enterprise) should be included in EU contract notices (EU, 2009), so as to improve the information base. It is suggested that this information should be collected from all participants downloading or otherwise requesting tender documents. That information could be analysed against the nature and number of suppliers in the relevant market, by reference to the typology applied in competition policy to determine markets.

Assessing the level of contract awards, however, may be a key indicator of broader SME policies pursued using public procurement as a vehicle, a strategic use of public procurement that has become more accepted, reflecting an increasing awareness of the wider impact of public procurement decisions on “supply markets, local economies and society” has been noted (Zheng et al, citing Walker et al, 2005). The World Bank has found, however, that while a large SME sector is characteristic of successful economies, the data do not indicate that SMEs have a causal impact

on growth (World Bank, 2004). Indeed, the link between SMEs and GDP growth may be a truism: given the high numbers of SMEs in economies at all levels of development, any per capita GDP growth must be to some extent attributable to SMEs.

An example of the difficulties of identifying causation the use of SME policies to encourage job creation and/or economic growth through developing an “enterprise culture” and innovation. Here, too, there are some Gibbsonian myths and policy confusions (initially identified in Curran, 2000), conflating SMEs, innovation and enterprise. Wong, Ho and Autio (2005) (among many others) note that SMEs create a substantial number, and perhaps the majority, of new jobs, citing studies in USA, Sweden and Canada. (It should be noted that Wong et al do not consider SMEs *per se*: their focus is on SMEs as a vehicle for entrepreneurship.) Statements on the issue are often made at the political level, without empirical justification and in some cases relying on sources that may have an interest in promoting SMEs (Curran, 2000). In ADB, 2012, for example, it is asserted that “according to the SME Finance Forum [no reference given], [SMEs] are crucial for growth and job creation, accounting for nearly 86% of employment opportunities in developing countries.” ADB continue that it is now well-established that SMEs play an important role in job creation and are positively associated with GDP per capita growth, citing Beck et al (2004).

Wong et al recall the well-established links between technological innovation and economic growth, but note that the recent focus on this link (rather than the earlier Schumpeterian tradition of the “entrepreneur as innovator”) does not provide any direct test of the creation of new firms and innovation. They draw on a suggestion in the literature surveyed that entrepreneurship contributes to economic growth by “introducing innovations, creating change, creating competition and enhancing rivalry”. They also consider that the notion of entrepreneurship includes both new entrants to the market-place and “innovative and imitative entries” into new markets from established firms. They conclude that it is fast-growing new firms – and not new firms in general – that account for most of the job creation in SMEs in advanced countries. As they note, “truly significant contributions are made by the fast-growing ‘gazelle’ firms (Birch et al, 1997)”, rather than new firms in general.

Freeman also comments on the misleading extent of apparent entrepreneurial activity in SMEs (Freeman, 2013), drawing on Nightingale and Coad’s summary of data flaws (Nightingale and Coad, 2011). They note that conventional datasets often miss whole areas of SME activity and over-represent successful SMEs (only those that survive long enough to be included); unrepresentative samples and skewed statistics (most entrepreneurs perform poorly, but the stellar performance of a few bring up the average to a point where the ‘average’ is meaningless); regressions to the mean may lead to misleading analysis (citing the example of a high growth SME that grows large as a result; should it subsequently shrink, it will be classified as a fast-shrinking large firm). In addition, and as noted earlier in this paper, data are often not comparable and “conceptual slides”, such as between net and gross figures, and definitions vary so significantly that there is no consensus on policy goals, what to measure and findings. Nightingale and Coad (2011) remind us that “while most (but not all) new firms are small, most small firms are old”; and of Storey’s 1994 finding; “firms with less than 20 workers [are] responsible for 54% of gross job gains, which sounds remarkable until [we note] that they were also responsible for 54% of gross job losses”.

In other words, not all new-business entrepreneurs create employment; new businesses may be started by what would be otherwise unemployed individuals, and thereby guarantee the owners’ employment but do not generate growth. (These latter entrepreneurs – termed “refugees” – are more likely to be found in “lower-income nations with less-developed social security systems”, in times of a decline in the business cycle, according to data from the OECD 1974-1994 cited by Wong). Storey (2008) and Freeman (2013) make a similar point about SMEs displacing earlier businesses.

Nightingale and Coad in their paper “Muppets and Gazelles” therefore suggest that the single category “entrepreneurial firms” be broken up along a continuum from the large number of economically marginal, undersized, poor performance enterprises (“muppets”) to the small number of high performance “gazelles” that drive most positive impact on the economy. This, they say, would allow a more realistic evaluation of the impact of entrepreneurs by avoiding a composition fallacy that assigns the benefits of entrepreneurship to the average firm (Nightingale and Coad, 2011). A recent OECD publication on ‘Innovative SMEs and Entrepreneurship for Job Creation and Growth’ provides data and suggestions towards this end (OECD 2010). Suggestions in some recent literature that SME policies should be harnessed to drive innovation, drawing on findings that demand and new requirements drive innovations rather than in-firm innovations (Edler et al, 2007, Georghiou et al, 2013), should perhaps be analysed through this prism.

More generally, there appears to be a dearth of data on the costs of preference policies and set-asides; these may be among the most difficult to measure, especially the “deadweight” and “displacement” elements noted by Curran (2000), along with the long-term costs of restrictions in the market that such policies may involve (higher prices,

lower quality, innovation). Curran postulates that SMEs receive more subsidies and benefits than they merit: by analogy with “zombie firms” that recent bank lending may be keeping alive under policies designed to address recent recessions, there may be an argument that SME policies are maintaining “zombie SMEs”. Curran also states that it seems to be universally accepted that more small enterprise is beneficial for the economy, but academics are demonstrating scepticism (Curran, 1993, Storey, 1994 and 1998, Gibb, 1998, all as cited in Curran, 2000).

Conclusions

It can be concluded that the time for a wholesale review of SME policies is ripe. Whether this will take place is, however, questionable. Indeed, it has been asserted that SMEs policies are “an intensely political issue” (Freeman, 2013), and a convenient proxy for pro-growth policies, and vote-winners to boot (Storey, 1998), indicating that the political goals will dominate the economic motivations. Indeed, many commentators allude to the fact that pro-SME policies have become an unchallengeable leitmotif (Freeman, 2013); the “value of entrepreneurs has become such a part of the cultural zeitgeist that to ask for evidence, or even question the robustness of that evidence has become the height of political correctness” (Nightingale and Coad, 2011). Nightingale and Coad’s paper opens with a citation: *“He who makes ‘the desert bloom’ is often a very colourful person; a study of him in consequence is likely to turn into a romantic product ... Cold-blooded appraisals of the role of the entrepreneur in economic development are rare: glorification is usual (G. H. Evans (1949)).”* It is to be hoped that a cold-blooded appraisal will be undertaken for SME policies in public procurement as well as generally: public procurement systems are required to be transparent, objective, to demonstrate integrity and provide value for money. There is no reason that SME policies applied in public procurement should be exempted from these requirements.

References

- [1] G. Albano, A. Ballarin and M. Sparro. (2010): Framework agreements and repeated purchases: the basic economics and a case study on the acquisition of IT services, paper presented to the International Public Procurement Conference, Seoul, August 26-28 2010, available at <http://www.ippa.org/IPPC4/Proceedings/04EconomicsofProcurement/Paper4-1.pdf>
- [2] R. Anderson, W. Kovacic and A. Müller. (2011): Ensuring integrity and competition in public procurement markets: a dual challenge for good governance, chapter prepared for The WTO Regime on Government Procurement Challenge and Reform, S. Arrowsmith and R. Anderson, Eds, 2011. Chapter available at <http://www.oecd.org/dataoecd/12/1/44456320.pdf>.
- [3] Bank of England. (2004): Finance for small firms: an eleventh report, available at <http://www.bankofengland.co.uk/publications/Documents/financeforsmallfirms/fin4sm11.pdf>.
- [4] T. Beck A. Demeriguc-Kunt, R. Levine (2005): SMEs, Growth and Poverty: Cross-Country Evidence, *Journal of Economic Growth*, 199-229.
- [5] C. Bovis. (1998): The regulation of public procurement as a key element of European Economic Law, *European Law Journal*, Volume 4, Issue 2, June 1998, Pages: 220–242, available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-0386.00050/abstract>.
- [6] N.D. Caldwell, H.L. Walker, C.M. Harland, L.A. Knight and J. Zheng et al, (2004): Promoting Competitive Markets: The Role of Public Procurement. In: *Challenges in Public Procurement: an International Perspective*, (Thai K.V. et al. eds.), pp 315-334. Florida, USA: PrAcademics Press
- [7] Clark, Major III and Chad Moutray. (2004): “The Future of Small Businesses in the U.S. Federal Marketplace.” *Journal of Procurement Policy*. Volume 4
- [8] Communication From the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions(2008): Think Small First, A “Small Business Act” for Europe, June 25, 2008 COM(2008) 394 final, SEC.
- [9] J. Curran. (2000): What is Small Business Policy in the UK for? Evaluation and Assessing Small Business Policies, *International Small Business Journal*, 18.36
- [10] Dalberg. (2011): Report on Support to SMEs in Developing Countries Through Financial Intermediaries, available at http://eudevdays.eu/sites/default/files/dalberg_sme-briefing-paper.pdf.
- [11] M.J. Dollinger, Enz, C.A. and Daily, C.M. (1991): Purchasing from Minority Small Businesses. *International Journal of Purchasing and Materials Management*, Spring, pp. 9-14
- [12] D. Drabkin, and K.V. Thai. (2003): U.S. Federal Government Procurement: Structure, Process and current issues, a paper presented at the Comparative Public Procurement Cases Workshop, International Research Study of Public Procurement, Budapest, Hungary, April 10-12
- [13] EC/Enterprise and Industry, European Commission. (undated, approx 2006): The new SME definition User guide and model declaration, available at http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf.
- [14] EC/Enterprise and Industry publications. (Undated, accessed 7/2/2014): The new SME definition, User guide and model declaration, available at http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf.
- [15] European Commission. (2014): revision of Public procurement Directives – Frequently Asked Questions, MEMO/14/20, available at http://europa.eu/rapid/press-release_MEMO-14-20_en.htm?locale=FR –.

- [16] J. Edler and L. Georghiou. (2007): Public procurement and innovation—Resurrecting the demand side, available at http://dimetic.dime-eu.org/dimetic_files/EdlerGeorghiou2007.pdf.
- [17] J. Edler and L. Georghiou. (2007): Public procurement and innovation – resurrecting the demand side, available at www.sciencedirect.com
- [18] European Commission. (2003): Recommendation concerning the definition of micro, small and medium-sized enterprises, OJ 20.5.2003 L 124, p. 36 (see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:EN:PDF>) ("EC, 2003")
- [19] European Commission. 2006: Models to reduce the disproportionate regulatory burden on SMEs, and 2007: Report of the Expert Group, both available at <http://ec.europa.eu/enterprise/policies/sme/business-environment/administrative-burdens/> ("EC, 2007")
- [20] European Union. (2007): Enterprises by size class - overview of SMEs in the EU - Issue number 31/2008, available at http://epp.eurostat.ec.europa.eu/portal/page/portal/european_business/special_sbs_topics/small_medium_sized_enterprises_SMEs. ("EU 2008")
- [21] European Union. (2009): Evaluation of SMEs' Access to Public Procurement Markets in the EU, Final Report (2009 Update), available at http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf. ("EU 2009")
- [22] European Union. (accessed on 8 February 2014): Small and medium-sized enterprises (SMEs), available at http://epp.eurostat.ec.europa.eu/portal/page/portal/european_business/special_sbs_topics/small_medium_sized_enterprises_SMEs. ("EU, 2014")
- [23] European Union Directives on Public Procurement. (2014): To be available at <http://www.europarl.europa.eu/plenary/en/texts-adopted.html>.
- [24] R. Fee, A. Erridge, S. Hennigan. (2002): SMEs and government purchasing in Northern Ireland: problems and opportunities, *European Business Review*, Vol. 14 Iss: 5, pp.326 – 334
- [25] A. Freeman. (2013): Challenging myths about the funding of small businesses...", *Finance for growth*, Demos Finance, available at http://www.demos.co.uk/files/DF_-_Finance_for_Growth_-_web.pdf?137821.
- [26] L. Georghiou, J. Edler, E. Uyarra and J. Yeow. (2013): Policy instruments for public procurement of innovation: choice, design and assessment, *Technological Forecasting & Social Change*, available at www.sciencedirect.com
- [27] A. Gibb. (2000): SME policy, academic research and the growth of ignorance, mythical concepts, myths, assumptions, rituals and confusions, *International Small Business Journal* 18(3), 13-35
- [28] D. Gordon and J. Kang. (2009): Task-Order Contracting in the U.S. Federal System: The current System and Its historical context, Chapter 5 in: Arrowsmith, S., ed. *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement*. Eagan, West. ("Gordon et al")
- [29] Government of Australia, Department of Finance and Deregulation and the Department of Innovation, Industry, Science and Research. (2009): Study to identify options to ensure that the Government's ICT and SME policies are mutually reinforcing, available at <http://www.finance.gov.au/files/2013/02/SME-Study-2009.rtf>
- [30] Government of Korea. (2011): Statistics, available at <http://eng.smba.go.kr>.
- [31] Government of Canada. (2014): Public Works and Government Services Canada, about us, www.pwgsc.gc.ca
- [32] Government of Korea, Public Procurement Service. (accessed 9/2/2014): Available at <http://www.pps.go.kr>, summarized in English by K. Seo, at <http://www.epractice.eu/files/KANG%20PPS%27s%20e-Procurement%20Support%20for%20SMEs.pdf>

- [33] Intrum Justicia. 2013: European Payment Index, available through <http://www.intrum.com/Press-and-publications/European-Payment-Index/>.
- [34] K. Karjalainen and K. Kemppainen. (2008): The involvement of small- and medium-sized enterprises in public procurement: Impact of resource perceptions, electronic systems and enterprise size, *Journal of Purchasing and Supply*
- [35] J. de Kok, P. Vroonhof, W. Verhoeven, N. Timmermans, T. Kwaak, J. Snijders and F. Westhof. (2011): Do SMEs create more and better jobs? available at http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/do-smes-create-more-and-better-jobs_en.pdf.
- [36] C. Kauffmann. (2005): Policy Insights No.7: Financing SMEs in Africa', OECD Development Centre, available at www.oecd.org/dev/aec/.
- [37] Y. Kim. (2011): SMEs in Africa: Challenges and the role of Government for the future, , available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=906:smes-in-africa-challenges-and-the-role-of-government-for-the-future&catid=58:asia-dimension-discussion-papers&Itemid=264
- [38] J. Leukel and G. Maniatopoulos. (2005): A Comparative Analysis of Product Classification in Public vs. Private e-Procurement, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.76.9727&rep=rep1&type=pdf>
- [39] A. Lundstrom and L. Stevenson. (2005): Entrepreneurship Policy: Theory and Practice, *International Studies in Entrepreneurship*, Vol.9.
- [40] A. McQuade, P. Johnson. (2003): Mapping the terrain: understandings of corporate social responsibilities, Paper presented at the British Academy of Management Annual Conference, Harrogate, UK
- [41] Management, Volume 14, Issue 4. (December 2008): Pages 230–240, available at <http://www.sciencedirect.com/science/article/pii/S1478409208000642>.
- [42] E. Mishory. (2013): Leveling Asymmetry: The Information-Leveling Model of Transparency in Government Procurement, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365092.
- [43] P.H. Morand. (2003): "SMEs and public procurement policy", *Review of Economic Design* 8, 301–318
- [44] NERA Economic Consulting. (2005): A Study of the Benefits of Public Sector Procurement from Small Businesses, NERA Economic Consulting, available at http://www.nera.com/67_5054.htm.
- [45] C. Nicholas. (2012): A Critical Evaluation of the Revised UNCITRAL Model Law Provisions Regulating Framework Agreements," *Public Procurement Law Review* 2, (2012).
- [46] P. Nightingale and A. Coad (2011): Muppets and Gazelles: Rooting Out Ideological and Methodological Biases in Entrepreneurship Research, University of Sussex, available at http://www.finnov-fp7.eu/sites/default/files/FINNOV_DP8.5.pdf
- [47] OECD. (1997): Small businesses, job creation and growth: facts, obstacles and best practices, available at <http://www.oecd.org/cfe/smes/2090740.pdf>.
- [48] OECD/UNIDO. (2004): Effective policies for small business. A guide for the policy review process and strategic plans for micro, small and medium enterprise development, available at http://www.unido.org/fileadmin/media/documents/pdf/Business_Environment/15hvhso.pdf.
- [49] OECD. (2010): Issues Paper 1: Innovative SMEs and Entrepreneurship for Job Creation and Growth, at the 'Bologna+10' High-level meeting on lessons from the global crisis and the way forward to job creation and growth, Paris, 17-18 November 2010, available at <http://www.oecd.org/cfe/smes/46404350.pdf>
- [50] OECD. (2011): Government at a Glance, available at http://www.oecd-ilibrary.org/sites/gov_glance-2011-en/09/01/index.html?contentType=/ns/StatisticalPublication,/ns/Chapter&itemId=/content/chapter/gov_glance-2011-46-en&containerItemId=/content/serial/22214399&accessItemIds=&mimeType=text/html; summarized at <http://www.oecd.org/newsroom/1845927.pdf>. ("OECD, 2011")

- [51] G. Piga. (October 2011): "Procurement and Preferences," ADB Research
- [52] M. Ram, D. Smallbone, and B Linnerker. (2002): Assessing the Potential of Supplier Diversity Initiatives as a means of Promoting Diversification among Ethnic Minority Businesses in the UK. Centre for Enterprise and Economic Development Research (CEEDR), Middlesex University, Final Report, pp. 1-70
- [53] A. Sanchez Graells. (2011): Public procurement and the EU competition rules, Hart Publishing.
- [54] SME Development: Government Procurement and Inclusive Growth.(2012): Asian Development Bank ("ADB, 2012")
- [55] P. Smith and A. Hobbs, Shreeveport Management Consultancy for the Small Business Service. (2001): SMEs and public sector procurement, available at <http://www.dti.gov.uk/files/file38305.pdf>.
- [56] D. Storey. (1994): Understanding the Small Business Sector, Routledge.
- [57] D. Storey. (1999): Six Steps to Heaven: Evaluating the Impact of Public Policies to support Small Businesses in Developed Economies, in D.L. Sexton and H. Landstrom (eds.), "Handbook of Entrepreneurship", Blackwells, Oxford, pp. 176-194, available at http://www2.warwick.ac.uk/fac/soc/wbs/research/ei/research/working_papers/wp59-six_steps.pdf.
- [58] D. Storey. (2006): Evaluating SME policies and programmes: technical and political dimensions, in The Oxford Handbook of Entrepreneurship, Oxford: Oxford University Press.
- [59] D. Storey. (2008): Entrepreneurship and SME Policy, Warwick Business School, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDEQFjAA&url=http%3A%2F%2Fwww.world-entrepreneurship-forum.com%2Fcontent%2Fdownload%2F1698%2F39646%2Fversion%2F1%2Ffile%2FStorey_Entrepreneurship%2520and%2520SME%2520Policy.pdf&ei=oyu6UuHAGa3b7Aa8rIC4Cg&usq=AFOjCNGYGsZEsBRNzemvPBRLUFmASTcDZw&sig2=mM0wXiyIW1385JeLXXBNSA&bvm=bv.61190604.d.ZGU.
- [60] Supply Management. (2011): South Africa SMEs dismiss public procurement opportunities, available at <http://www.supplymanagement.com/news/2011>.
- [61] UK Government, Small Business Service. (2004): Annual Small Business Survey, available at <http://www.berr.gov.uk/files/file38250.pdf>.
- [62] UK Government consultation. (2013): "Making public sector procurement more accessible to SMEs", available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243685/SME_consultation_-_publication_version_-_18september.pdf and response document, Analysis of Responses to the Consultation on Making Public Sector Procurement More Accessible to Small and Medium Sized Enterprises, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264101/LYCons_response3final.pdf
- [63] UNCITRAL. (2011): Model Law on Public Procurement, available at http://uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.
- [64] UNCITRAL. (2012): Guide to Enactment of the Model Law on Public Procurement, available at http://uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.
- [65] US Government Census Bureau. (2007): Statistics about Business Size (including Small Business), available at <http://www.census.gov/econ/smallbus.html>.
- [66] US Government, Small Business and Entrepreneurship Council. (2009): Small Business Facts and data, available at <http://www.sbecouncil.org/about-us/facts-and-data/> ("SBC, 2010")
- [67] US Small Business Administration. (2010): Small Business Procurement Scorecard Shows Progress toward Meeting 23 Percent Goal for Small Business Contracting, available at <http://www.sba.gov/news>.

- [68] G. Walker. (2005): Fostering the development of innovative SMEs, available at http://www.recep.ru/files/documents/Walter_Innovative_SMEs_en.pdf.
- [69] P. Wong, Y. Ho, E. Autio. (2005): Entrepreneurship, Innovation and Economic Growth: Evidence from GEM data, Small Business Economics 24: 335–350, available at [http://business2.fiu.edu/1660397/www/Ent%20and%20Eco%20Development/Wong_Ho_Autio\(2005\).pdf](http://business2.fiu.edu/1660397/www/Ent%20and%20Eco%20Development/Wong_Ho_Autio(2005).pdf)
- [70] World Bank and IFC, K. Hallberg. (2000): A market-oriented strategy for SMEs, Discussion paper 40. available at <http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-4727-6>.
- [71] World Bank. (2011): Procurement Guidelines, available at <http://go.worldbank.org/RPHUY0RFI0>
- [72] World Bank. (accessed 10/2/2014): Private Sector Data. Available at <http://data.worldbank.org/about/world-development-indicators-data/private-sector>.
- [73] WTO. (1998): Report of the Working Group on the Interaction between Trade and Competition Policy, WT/WGTC/2.
- [74] J. Zheng , H. Walker and C. Harland.(2006): The Role of SMEs in public procurement: a Review of Literature and Research Agenda, available at <http://www.ipsera.com/assets/documents/57.pdf>.

Is Public Procurement an effective development policy tool?

David Salazar¹ and Maria Eugenia Roca²

¹ Inter-American Development Bank*,
Rincon 640,
Montevideo, Uruguay
e-mail: davidsa@iadb.org

² Inter-American Development Bank*,
1300 New York Ave. NW
Washington, DC 20577
E-mail: mariaero@iadb.org

ABSTRACT

Many developing countries have already set institutions, regulatory frameworks, and a fixed budget assignment to establish public procurement agencies. Most of these agencies are playing a role next to the core in the public administration, facilitating the implementation of government's projects in many different ways. Nevertheless, there is not much evidence of the direct contribution of public procurement (and the institutions behind it) to the long term development goals of those countries. This article suggest that there is a considerable space that policy makers should consider when managing procurement, by using it as an intervention tool, to promote economic development and other specific public policy goals.

This article intends to provide elements on resolving a question that is relevant both for public procurement institutions and public policy makers: is public procurement an effective development policy tool? While in large and developed economies, many argue that the role of public procurement in development policies contributes to promote innovation, hence contributing to growth and development; in small economies and developing countries, there is not so clear how government purchases can provide incentives for innovation to the local industry. Indeed, many public policy makers from small economies have been pursuing different goals through public procurement, not necessarily related to promoting productivity or innovation.

After setting the knowledge framework, we will explore the role of public procurement to analyze the impact on the economies' growth, and provide some elements to better understand the effects and the role of the public procurement into the economies' development. The conclusion is that public procurement brings important tools to policy makers for promoting education, innovation, productivity, competitiveness, and investment in knowledge capital. Furthermore, public procurement may have a powerful role in wealth distribution and in other specific public policy objectives.

Keywords: economic development, public policy, public procurement.

* The opinions expressed in this paper are those of the authors and do not necessarily reflect the views of the Inter-American Development Bank, its Board of Directors, or the countries they represent. Authors are exclusively and individually responsables for all the content in this paper.

I. INTRODUCTION

The economies' growth is essential for the improvement of the quality and the life standard of people. There is a solid consensus on that productivity; technological change and education positively affect economies' growth. In that sense, many argue that government policies should seek to establish a set of institutions that generate the correct incentives for investment and innovation. [1]

The role of public procurement as a key contributor to a set of effective government institutions is now a fact with strong evidences among both big and small economies. There is at least two points of view with well documented arguments supporting this approach: i) public procurement giving incentives for innovation and promotion of new technologies; and, ii) promoting better efficiency *per se* and contributing to public sector productivity (many variables may influence and are taken into account on the efficiency, for example equitability, competitiveness, transparency and so on).

Nonetheless, these approaches have little correspondence with developing economies. The first argument may be difficult to support as the innovation and new technologies are none of the development leads of the emerging economies. Similarly, the second argument have been difficult to prove in development countries as there have been little time from the reforms, not to mention the analytical complexity of this approach.

Ishmael [2] provides a consistent theoretical framework for the small economies' governments to conceptualize their procurement in a way that is complementary to the countries' development goals. The key factor in that approach is that the government assumes an entrepreneurial role in industries (at least that of strategic importance).

By using technology changes incentives, governments may use procurement as an effective tool to induce innovation in local industries, hence generating long term foundations for economic growth.

Section 2 describes the framework for economic development. Section 3 analyses public procurement role; and Section 4 ends with the conclusions.

II. ECONOMIC DEVELOPMENT

"It's widely agreed that the productivity growth of the industrialized economies is mainly an ongoing intellectual achievement, a sustained flow of new ideas."
[3]

All recent literature views on economic growth and development agree on the fact that economic efficiency and productivity have always played a key role on the development of an economy. Both endogenous and exogenous growth models use technology to determine how other variables influence the total income of an economy.

After Barro [4] and Romer [5], several economic development papers have been written on endogenous economic growth, incorporating public expenditures as a determinant variable for GDP per capita growth (see for example Alleyne, Lewis-Bynoe and Moore [6]; Quang Dao [7]).

Aside from methodological discussions (simultaneity problem), such studies have shown, for several cases and for different economies, that the government expenditure influences the rate of economic growth.

Government expenditure had been tested both as an aggregate variable and as a specific sector (eg. health, education) to prove its influence in the GDP. On that basis, we found that it have been well explained how government expenditure affects development, and naturally our purpose here is not to argue on that sense, nor to question any argument on that direction. We take this fact to incorporate government procurement on the determinants of development, as the relationship between government expenditure and government procurement is not difficult to understand. All government procurement implies expenses, and as such, it is also another way to influence the GDP.

What is essential on understanding the influence of government expenses (including government procurement) on economies development is their capacity to affect the levels of both human and physical capital. Indeed, development economics has consistently shown that long term and sustained growth of economies' income have an undoubtable relation with the levels of capital accumulation, where the human capital (knowledge) and technology are essential.

Regional economics have also provided several examples and case studies to show how public procurement influences the income levels (see for example [8]). Although those cases are well explained and may provide guidance for effective public policy formulations, their focus seems to be more concentrated on generating fiscal incentives to industries (e.g. tax cuts), so firms choose a region to invest further generating higher income for that region. On this basis, a discussion may be raised to question the effectiveness of such incentives (especially considering the associated costs) and may also lead to protective policies in detriment of free trade. To determine the influence in development, such policies should be analyzed case by case, especially taking into account the costs of implementation and its net effects in capital formation (again, especially human capital). Our approach rather looks for a contribution on how to incorporate public procurement into main stream development economics.

Another important consideration when discussing development, knowledge and innovation is income equality. In this regard, public procurement may also play a key role for implementation of redistributive policies. Goldin and Lawrence [9] have observed the relation between education levels and technological change. They say: "A nation's economy will grow more as technology advances, but the earnings of some may advance considerably more than the earnings of others. If workers have flexible skills and if the educational infrastructure expands sufficiently, then the supply of skills will increase as demand increases for them. Growth and the premium to skill will be balanced and the race between technology and education will not be won by either side and prosperity will be widely shared". While here our interest is not to further argue on the education and technology relationship, we use their findings in the sense that there is a relationship between technology progress and education choices of the population, and that such choices will have an impact on development. Also, they show us that for a policy that incentivizes innovation to be successful, a desirable target is to maintain the earnings equality, where we argue that public procurement can be a powerful tool. When designing an implementation mechanism for economic development, public procurement is an important tool, but is not alone, and one should consider it along with other variables to achieve higher levels of capital and attain a sustained development.

III. THE ROLE OF PUBLIC PROCUREMENT

Procurement means acquiring goods and contracting works or services (consultancies included) from outside suppliers. Savings, efficiency, equitability, transparency, competitiveness, and several other concerns are associated to public procurement [10].

It is not difficult to distinguish differences among private and public procurement. While the first is more concerned with strategic relations with suppliers, the last should reflect public concerns as well as efficiency and transparency. However, both are similar in many ways such as cost savings, quality and supply market analysis.

Governments are facing the consequences of the 2008 global financial crisis and they are undergoing difficulties in managing their economies to deliver more and improved services to the citizens, with limited resources. Public expenditure for purchases of works, goods and services is a key component of national income and well-being. Considering that public procurement accounts on average 13% of gross domestic product (GDP) across Organization for Economic Cooperation and Development (OECD) members [11], and that in Latin America public purchasing represents a lower value near 8% of the GDP, there is no doubt this is an important tool for the implementation of economic and social policies. Efficient public procurement remains underutilized as a policy tool by many governments to pursue other policy objectives.

OCDE [11] have reported that "countries are using public procurement more strategically". Many OECD countries are using innovative procurement tools to achieve economies of scale (94% use framework agreements, for example), restructuring their purchasing functions, adopting new technologies in the procurement process (97% use

a national e-procurement systems for calls for tenders). Furthermore, they concluded that many OECD countries use public procurement policies not only to foster value for money but also to pursue other policy objectives such as innovation, sustainable growth, small and medium enterprises (SMEs) and leveling the playing field to access business opportunities (disadvantaged groups and women-owned businesses).

Choi [12] developed a model to describe the whole aspect of the role of public procurement analyzing five categories: i) the national economic contribution, ii) the leadership in government officials, iii) social responsibilities, iv) eco-friendly activities, and v) industry innovation. His investigation concluded that public procurement is a powerful tool that can influence many areas and change government's behaviors making procurement more efficient and competitive.

Barro [4] makes it clear that for the purpose of his research, government expenses are all productive goods, such as telephone lines or roads connecting to factories. That puts a clear difference on what procurement can be in order to fit the model, and of course this have its implications on how policy makers use public procurement to achieve their countries development goals.

On the other hand, there have been a group of researchers that have demonstrated the positive effects of innovation on development. This is clear that for a policy maker who seeks economic development, innovation is one of the main variables she would need to look after. There are two ways to achieve higher levels of innovation: by demand pull and by supply push. [10]

However, there are more variables that need to be considered in order to achieve a comprehensive model, which further may be used to implement public policies and seek economic goals.

For the purposes of making clear our approach, we distinguish three ways where public procurement can be used to influence economies development, through technology improvement and innovation: i) specific sectorial programs (technology improvement); ii) improving efficiency of the public sector in general (technology improvement); iii) pulling innovation.

The first alternative, and maybe the most explored by governments, is to use public procurement to achieve discrete public policy goals, usually with programs that provide incentives to specific sectors (e.g. eligibility of local consultants depending on their nationality or place of living) or industries (e.g. SMEs) and civil society groups (usually minorities or vulnerable groups). These programs have shown great success on achieving policy goals, many of them unequivocally contributing to economies' development. However, it is to be noted that such incentives have costs, making important for the government to verify *a priori*, if the expected benefits from the proposed program are higher than the costs (which usually are overprices) [8]. The evidence suggests that using this alternative to promote economic development should be carefully and individually evaluated, as the costs and propensity to accept them may vary greatly among different countries and cultures.

A second way for public procurement to influence economic development is simply by making its job well done. Indeed, by definition, public procurement function inherits the costs savings goal, hence improving the overall public sector efficiency. At least two different ways of institutional arrangements are in place in most countries: centralized agencies that both regulate and procure, and those that only puts in place regulatory framework and provide shared administrative resources to governments' offices [13]. The two ways of organization indubitably can promote better efficiency in the public sector given they cross cut all government sectors. Of course, the degree of contribution to economic development will depend on the success of achieving efficiency and continuously improve administrative and clerical tasks.

The third approach, in which we argue there is an important opportunity to promote economic development, is by using public procurement to pull innovation. It should be say, first, that most developing countries may lack the lead in innovation as usually defined in terms of cutting edge developments and new ideas. Using Lucas [3] argument, public procurement can effectively promote new knowledge by demand pulling, making thousands (and

maybe millions) of small improvements, solving logistics issues, designing better purchase methods, standardizing clerical duties, and so on.

There are several studies that analyze in detail the relationship between public procurement and innovation policies (see for example Uyarra and Flanagan [14]). Although most of them have shown the importance and relevance of designing aligned policies to achieve goals in both directions, (and also, of course, relevant ways for purchasing innovation), it is often difficult to deduct a meaningful policy guidance that unambiguously implement incentives for innovation through public procurement, without a tradeoff into another goal.

The important point to be considered by policy makers and public procurement agencies, is that innovation can be achieved in many different ways, directly or indirectly through a government's purchase action, and that the size of the effect is expected to be high, as the volumes of public purchases and contracts are of high importance for local industries, especially for developing countries.

Among the principles of private sector procurement is the building of a strategic relationship with suppliers and to get to know their cost structure. By doing so, the buyer is more likely to achieve successful negotiations as well as to build a network of trust with their core suppliers. What would be the parallel of this principle in public procurement? As public procurement have a multi-objective policy, aiming social, economic, sectorial, and other different goals, it's hard to determine a principle comparable to the behavior of the private sector. The effect of public procurement reforms on the private sector suppliers is still to be analyzed empirically, especially for development economies. There, we believe, can be set a parallel with the private sector's procurer behavior of building a strategic relationship with suppliers. Transparency, equitability, competitiveness, and other principles of public procurement may appear to be opposite to anything similar to a strategic relationship with suppliers. We found that it is possible for the government to take actions to approach suppliers without losing value on any of those principles. Those actions are mainly related to get to know the cost structure, the level of technology used by the firms, the bottle necks they are facing, and the level of competitiveness (or collusion) that rules the market. We believe that in developing countries, the big concerns with improving their transparency and competitiveness may have put aside the relevance of that strategic market knowledge. Now, what can the government do with such information? Specifically, what can be done in terms of influencing the economy development? It should be stressed that a result for innovation pull is desirable as long as it co-exist with several other public policy goals, such as transparency, competitiveness, equality, just to name a few. How to achieve this? i.e. how is it possible to design mechanisms that pull innovation and at the same time complies with all other procurement requirement, especially those where results are already implemented and expected?

We believe the answer is to use the government strategic position as a purchaser. Government is indeed a big procurer of thousands of different types of goods and services, with geographical needs across all the country's territory. That makes the government relevant for every firm and industry, and because of its volume, the potential effects of any intervention are relevant, including any small gains on efficiency, improved processes or innovation.

Buying with efficiency and effectiveness

Governments must manage several variables in achieving efficiency, transparency, and at the same time promoting social and economic development objectives. Can both efficiency, transparency and development objectives be had at the same time?

There are many ways and methods of obtaining this, but first of all, public procurement officials have to understand cost structure, cost behavior and the supply market to maximize the opportunity to achieve simultaneously those goals (negotiation vs. open competition, fixed priced vs. cost-plus methods, price only vs. quality-weighted tenders, central purchases vs. local purchases, cost of purchase or life cycle cost). No one size fits all, but much is now known on what procurement criteria form the best fit for a specific market situation [15].

While most of these tools are designed to enhance participation and competition, other tools can do so over time and in a structurally way. A coordinated approach between public procurement and antitrust regulatory authorities

- at transactional level promoting preferences for small and medium companies, local or women employment in tendering and, at a structural level, in regulation over procurement markets- if optimally implemented, generate welfare gains in addition to fiscal space for governments. Thus, public procurement can take a leading role by including social criteria in public procurement procedures.

For the environmental point of view, public procurement can stimulate demand through mandating application of new “green” standards in public purchases. Introducing a life-cycle costing approach to evaluating offers would improve the net green effect of public purchases by raising incentives for firms to provide products with better environmental qualities, such as recycling capacity of material and ease of disposal.

Focusing on using the scale of public procurement to promote innovation also has the potential to regenerate local economies in urban and rural areas through a targeted “multiplier” effect on local demand.

Furthermore, since public procurement is a big purchaser, industry should pay attention to this client. The scale of the public procurement market can encourage the development of new, innovative products by generating sustained demand to ensure that a sufficient number of public purchases cover the costs for innovation (i.e. defense programs, transport sector, information and communication technologies). Therefore, it can be said that public technology procurement is a demand-side instrument to innovate a new technology of industry. Again, although empirical data are not available as yet, this effect is also valid for small economies, where innovation may not be at the top of the technology frontier, but may bring small improvements to the production chain and logistics, or enhance the way the final customers assign utility to the goods or services.

A great advantage of public procurement in innovation policy is that government specifies a desired output and leaves the creativity of private businesses to achieve the result with the most effective and efficient technologies. An example can be that governments started to use the public private partnerships (PPP), a form of agreement where the cooperation between public and private sector resolve public procurement needs. Procurement-based innovation policies can target the results of research and development activity from the final user’s perspective, rather than through an external evaluation of technical achievements.

Finally, even beyond stimulate innovation, achieve efficient, transparency and at the same time promote development objectives, public procurement is in a position to set forward the dominant standard for commonly used products and processes. Not less important, the governments to pursue a heterogeneous array of socially relevant objectives have to understand which manner is the most appropriate to implement a certain policy or action.

IV. CONCLUSION

Public procurement has been one of the main institutional changes in governments of development economies, in the last decade. This paper aimed to point out opportunities for policy makers to use the potential of public procurement into the economic development.

By looking at the main variables of development economics, namely technology improvement, and innovation, we explored one of the main ways to influence economies development through public procurement. Although at this stage data and evidence are limited, and successful cases are still an ongoing work, this approach sets the inception principles for achieving higher economic development through policies that uses public procurement as an important tool of implementation.

The rationale comes from the influence that public procurement may have on the level of innovation and technologies that by its turn, will improve productivity and will have a positive impact on development. Particularly for innovation, we note that in development economies, the approach for contributions of public procurement to innovation is such that may bring small changes, but would be replicated (or concatenated) so many times, so that a relevant improvement is achieved.

V. REFERENCES

- [1] P. Ferreira, R. Fragelli. (2014): Diferentes Visões do Crescimento. Valor Econômico [Online]. Available at <http://www.valor.com.br/colunistas/Pedro%20Ferreira%20e%20Renato%20Fragelli%20> [Retrieved January 23th, 2014] Ferreira and Fragelli, 2014).
- [2] B. A. Ishmael. (2013): Government Procurement and Innovation: the creation of an environment for competitiveness in small developing countries. International Public Procurement Conference 2012. Available at <http://www.ippa.org/IPPC5/Proceedings/Part11/PAPER11-3.pdf> [Retrieved July 1st, 2013]
- [3] R. E. Lucas. (2008): Ideas and Growth. National Bureau of Economic Research, working paper 14133.
- [4] R. Barro. (1990): Government spending in a simple model of endogenous growth. Journal of Political Economy 98, S103–S125.
- [5] P. Romer. (1990): Endogenous technological change. Journal of Political Economy 98, S71–S102.
- [6] K. Alleyne, D. Lewis-Bynoe, W. Moore. (2004): An assessment of the growth-enhancing size of government in the Caribbean. Applied Econometrics and International Development 4, 77–94.
- [7] M. Q. Dao. (2012): Government expenditure and growth in developing countries. Progress in Development Studies 2012 12:77.
- [8] C. C. de Sousa Júnior. (2008): Utilização do poder de compra do estado de minas gerais como instrumento de desenvolvimento regional e para a promoção de políticas públicas locais redistributivas. CEDEPLAR. Available at http://web.cedeplar.ufmg.br/cedeplar/site/seminarios/seminario_diamantina/2008/D08A145.pdf [Retrieved May 2nd, 2011]
- [9] C. Goldin, L. Katz. (2007): The race between education and technology: the evolution of U.S. educational wage differentials, 1890 to 2005. National Bureau of Economic Research, working paper 12984, March 2007.
- [10] Centro de Estudios en Economía Sistémica. (2009): Innovación y Desarrollo Económico: Revisión teórica, análisis empírico y modelo dinámico. ECSIM. Available at <http://www.ecsim.org/Vista/Publicaciones.aspx> [Retrieved December 2nd, 2013]
- [11] OECD (2013): Government at a Glance. Available at <http://www.oecdbookshop.org/display.asp?K=5K48763TPQ8V&LANG=EN>. [retrieved January 14th, 2014]
- [12] J. W. Choi. (2010): A Study of the Role of Public Procurement: Can Public Procurement Make Society Better?. International Public Procurement Conference 2010. Available at http://www.ippa.org/ippc4_proceedings13.html [Retrieved July 1st, 2013]
- [13] G.L. Albano, M. Sparro. (2010): Flexible Strategies for Centralized Public Procurement. Review of Economics and Institutions, 1 (2), Article 4. doi: 10.5202/rei.v1i2.4. Available at <http://www.rei.unipg.it/rei/article/view/17> [Retrieved January 31st, 2011]
- [14] E. Uyarrá, K. Flanagan. (2009): Understanding the innovation impacts of public procurement. Manchester Business School Working Paper No. 574. Available at <http://www.mbs.ac.uk/research/workingpapers/> [Retrieved January 29th, 2012]
- [15] N. Dimitri, G. Piga, and G. Spagnolo. (2006): Handbook of Procurement. Cambridge University Press.

CARICOM: SMALL MARKET–BIG MONEY

Amalgamating the Procurement Market to Transform Small Size into an Economic Advantage

Sharlene Shillingford-McKlmon¹ and Shirley Gayle-Sinclair²

¹Inter-American Development Bank,
1300 New York Avenue,
Washington DC, USA
E-mail: sharlenes@iadb.org

²Inter-American Development Bank,
17 Alexandra St
St. Clair, Trinidad and Tobago
E-mail: shirleyg@iadb.org¹

Abstract

Public Procurement is an important part of many trade agreements. The countries of the Caribbean have been participants in and signatories to many trade and integration agreements over the past decades. Most significant, is the Treaty of Chaguaramas (1979) which established the Caribbean Community (CARICOM). Article 239 of the Revised Treaty of Chaguaramas (2001), which established the CARICOM Single Market and Economy (CSME), mandated the member states to elaborate a Regional Protocol for Public Procurement. Implementation of this mandate has been slow. Public procurement in the Caribbean countries has been regarded as small and insignificant. Indeed, the countries themselves appear to have espoused this view undervaluing the bargaining power to be gained from the strength of their procurement market and focusing instead on advocating for concessions such as special and differential treatment.

This paper will show that while the Caribbean countries are small in geographic size, the procurement market, hitherto undervalued and unrecognized, is substantial in monetary terms. The potential of this is yet to be harnessed and could have a significant and positive impact on economic development in the Caribbean. There are benefits to be derived from the implementation of the mandate for a single procurement market and an unharnessed strength in the CARICOM Single Market and Economy for trade negotiating power, for efficiency gains and for economic gains. As the reality sets in, that there is no reversal of free trade, sooner or later, Caribbean countries will have to face the fact that all they have is CARICOM. They may be ready for the eventuality if they position themselves now to access gains from more efficient and effective government spending.

¹ The information and opinions presented in this publication are entirely those of the authors, and no endorsement by the Inter-American Development Bank, its Board of Executive Directors, or the countries they represent is expressed or implied.

I. INTRODUCTION

Economic Profile of the Region

Trade is recognized as a catalyst for economic development. It follows therefore that public procurement as vehicle to facilitate trade, can be a major driver for national development. The small economies of The Caribbean Community (CARICOM) face several challenges in achieving economic integration and economic development. These include geographic location and spread, physical and population size, import dependency as well as dependency on tourism and few export markets, among other issues. CARICOM is comprised of fifteen countries of the Caribbean, being mostly island states. The countries are far from homogenous and reflect many differences in population and physical size and levels of economic development. **Table 1** shows the GDP, size and population of the Region.

GDP Per Capita varies greatly with the Bahamas, Trinidad and Tobago and Barbados at the top end and Belize, Guyana and Haiti at the bottom end. Geographically the region comprises small islands as well as large continental territories. Guyana, Suriname, Belize and Jamaica are the largest territories. Guyana at 214,000 sq. km is the largest. The combined size of the other 14 countries is 247,282 sq. km. Essentially almost every single CARICOM country can fit within Guyana. Haiti has the largest population of almost ten million while Montserrat has the smallest population of just over nine thousand, for a total population of **17.387** million.

Table 1. Economic and Geographic profile of CARICOM

Name of State	GDP US\$ Billions	GDP per capita US\$ Thousands	Physical size (sq km)	Population
Antigua/Barbuda (A&B)	1.22	13,428.64	442	88,000
Bahamas (BAH)	8.373	22,832.91	13,940	352,000
Barbados (BAR)	4.262	16,151.70	431	278,000
Belize (BEL)	1.637	4,535.50	22,966	343,000
Dominica (DOM)	0.495	7,022.04	754	71,000
Grenada (GND)	0.811	7,496.46	344	105,000
Guyana (GUY)	3.02	3,596.43	214,970	775,000
Haiti (HA)	8.287	758.849	27,750	10,413,000
Jamaica (JA)	14.389	5,540.67	10,991	2,752,000
Montserrat* (MON)	0.04378	8,500	102	5,189
St. Kitts & Nevis (SKN)	0.767	12,803.52	261	57,000
St. Lucia (SLU)	1.377	7,276.09	616	168,000
St. Vincent & Grenadines (SVG)	0.742	6,489.25	389	110,000
Suriname (SUR)	5.009	8,685.81	163,270	546,000
Trinidad & Tobago (TT)	27.13	19,018.21	5,128	1,329,000
TOTAL	77.519			17,387,000

Source IMF WEO 2013

*Figures for Montserrat from CIA World Fact book - GDP figures are 2006

Fig.1 depicts the market size in relation to population. Haiti clearly has the largest population. While it has a comparatively low GDP to the other countries, its public procurement would be very large owing both to the size of the population and to the development and structural needs.

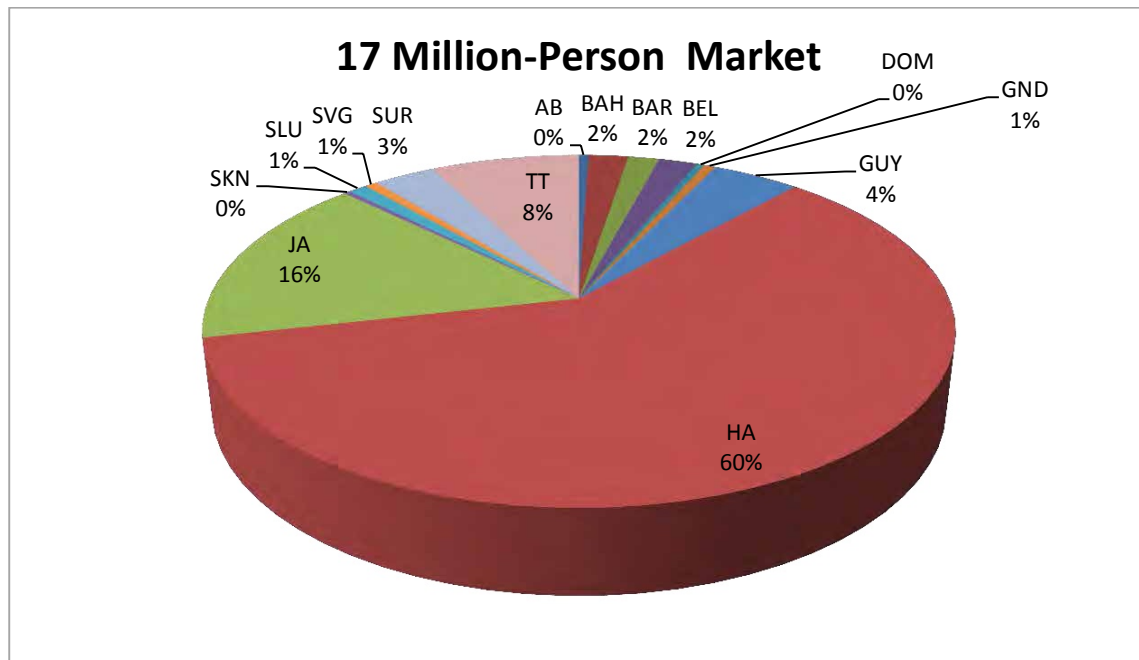


Figure 1: Market distribution based on population

With the transition from agro-economies and the protection including special and differential treatment which characterized the non-reciprocal trade agreements of the past, services has emerged as the dominant sector across the region contributing the most to GDP. The recent recession in the United States and Europe had severe repercussions in the region further devastating economies that were in many cases already under stress. Several of the countries saw a decline in economic activity resulting from sharp decreases in tourism income and remittances, as well as escalation in the cost of food and other imports. Many of the countries are highly indebted, reflecting debt -to- GDP ratios in excess of 80 %, with two, Jamaica and Grenada in excess of 100%, thereby limiting governments' ability to fund much needed public services. As a region, the Caribbean has had a negative annual balance of payments for the past 20 years.

The Caribbean Community (CARICOM) Single Market and Economy (CSME)

The CARICOM Single Market and Economy (CSME) was introduced in 2001 with the Revised Treaty of Chaguramas. It was intended to serve as a platform to better position the small vulnerable countries of the Region to meet the challenges and better exploit the opportunities of the changing regional, hemispheric and global environment and to achieve the Region's objectives. Some of its expected benefits are: accelerated, coordinated and sustained economic development and convergence; expansion of trade and economic relations with third states; and enhanced levels of international competitiveness. The single economic space is intended to bring with it optimal allocation and utilization of the Region's resources; access for national producers to the entire CARICOM market in the first instance and then to market opportunities further afield and; increased opportunities for CARICOM nationals for investment, production, provision of services and for employment in a new CARICOM environment. The CSME is to be governed by two key principles: non-discrimination on grounds of nationality only; and most favored nation (MFN) treatment which prohibits treating a third country (or a third State) better than another CARICOM Member State.¹

The integration process within CARICOM accelerated seven years ago when, twelve of its fifteen Member States declared themselves CSME compliant. Thus far, all of the Member States have taken legislative actions which are sufficient to establish and make the Single Market a functional entity. However, full implementation of the legal

provisions is still outstanding. Today, the CSME remains mostly legally established but not fully operational. It should be recognized that the CARICOM Single Market was never intended to be implemented in a single undertaking. Article 239 of the Revised Treaty of Chaguaramas addresses the Built-in Agenda which includes contingent rights, government procurement, e-commerce, free zones and similar jurisdiction and free circulation.

II. PUBLIC PROCUREMENT WITHIN A SINGLE MARKET AND ECONOMY

Background:

The Regional Regime for Public Procurement Within CARICOM:

The authority for developing a protocol on Government Procurement is Article 239 of the 2001 Revised Treaty of Chaguaramas establishing the Caribbean Community (CARICOM). Article 239 mandates that CARICOM Member States elaborate a regime for government procurement within the Single Market (CSME). This was to be achieved through the negotiation of obligations and rights to be contained within the Procurement Protocol which is to be integrated into the Revised CARICOM Treaty.

The first stage for building a regime for public procurement consistent with the CSME began in 2001. With the support of Canada and the IDB, between 2001 and 2005, fifteen (15) Country Procurement Assessment Reports (CPARS) and fifteen (15) procurement statistical reports were produced. The reports found that procurement expenditure for central government was spread out among 500 plus central procuring entities with goods being the highest contributor to total government procurement. Based on data from the IMF World Economic Outlook, at the 15% of the 2005 GDP, the region would have spent US\$ 7.7 Billion on public procurement.

At the end of the period of research and review, while acknowledging that some progress had been made in Jamaica to tackle procurement reform and while Guyana had introduced a dedicated procurement Act, author Hagop Angaladian in his work “Public Procurement in the CARICOM – A Comparative Assessment 2005” concluded that “competitive public procurement in all remaining CARICOM States are obsolete and shallow ... and the result is dysfunctional procurement regimes which translate into **segregated pockets of procurement practices and not national systems**”. Very little has changed since 2005. Essentially, with the absence of dedicated legislation governing public procurement, and with the heavy reliance on outdated Financial Administration and Audit Acts, the provisions do not entail a strategic vision and fail the key tests of economy, efficiency, reliability, fairness, competitiveness, transparency and accountability.

The research that was conducted and the above-mentioned reports that were produced between 2001 and 2005 contributed to the development of the first draft Framework Regional Integration Policy on Public Procurement (FRIP) in 2006. The policy went through six (6) iterations before it was approved seven (7) years later in May 2011 by the Council for Trade and Economic Development at its 32nd Meeting in Georgetown, Guyana. During those seven years between the first presentation of the policy and its approval, multiple simultaneous national reform initiatives began, all of which are ongoing and which will require imminent convergence if regional harmonization is to be strategically tackled, and successfully and effectively achieved.

Current State of Public Procurement

Over the past decade several of the countries with the support of international development partners such as the IDB, Canada, the World Bank and the EU have engaged in some aspect of modernization or reform of their procurement system. Much of this work has been focused on first generation reforms including developing new legislation to regulate procurement. Countries such as Jamaica and Guyana have undergone varying levels of reform with Jamaica leading in the breadth and depth of the reform, including the establishment of a comprehensive institutional framework, but lacking in a primary procurement law. Guyana, in 2003 passed a Procurement Act, however, some of its key institutional bodies, including the Public Procurement Commission and the Bid Protest Committee are yet to be established. Both Trinidad and Barbados are at the early stages of reform with both attempting to develop procurement acts. Haiti has had procurement legislation for several years however, the IDB financed operations are challenged by low institutional capacity, lack of trained personnel and disproportionate level of procurement activity due to the reconstruction following the earthquake of 2010. Within the Eastern Caribbean group (OECs) the support of the World Bank has led to several drafts of a harmonized public procurement model Act for implementation in the 6 OECs territories. Only in two countries, Antigua and Barbuda² in 2011 and Dominica³ in 2013 had their Parliaments successfully approve dedicated public procurement legislation. In the case of Dominica however, the Act is not yet in force.⁴ Beyond the steps of legal reform, very little advancement has been made in transforming and modernizing public procurement. The current state reflects procurement systems that are outdated and structurally out of alignment with current demands, continuing to treat public procurement as an afterthought rather than a strategic function where planning is key. Public procurement management is weak and processes are inefficient and do not achieve value for money objectives. Human resource

capacity is lacking due to a deficit in trained and competent professionals. **Table 2** provides a panoramic view of the systems in the Caribbean.

In short, procurement reform has been slow, sometimes incomplete, and in some countries not attempted. The countries face significant challenges due to the **lack of** (i) well-functioning administrative systems and processes; (ii) legislative and regulatory framework and guidelines; (iii) distinctive leadership at the national level with a strategic vision of public procurement and what it can achieve; (iv) Project Implementation Units (PIUs) that absorb the better public officers, who then rarely return to public service.

Strengthening initiatives have been proposed in the Strategic Plans which accompany the Methodology for Assessing Procurement Systems (MAPS), Public Expenditure and Financial Accountability (PEFA) and other public financial management diagnostics. However, implementation of the proposed interventions has been slow and in some cases not at all administered. The reasons for this vary and include the lack of political will for the changes, absence of funds, weak interest on the civil society side or a combination of all.

Consequently, we find that there are countries which have undergone comprehensive legislative reform and which, despite the new legal framework have failed to deliver even moderate improvement of knowledge, capacity and quality in the procurement processes and procurement function and have achieved little progress toward international standards. Conversely, there are countries which have not established dedicated procurement legislation but have worked on the development of administrative norms and the establishment of institutional bodies to support the procurement processes, however those institutions alone have failed to yield efficient, strategic, well planned and effective cost saving procurement. This is in large part due to the fact that the governments of the region have not committed to investing resources in procurement reform. The reform process has been largely donor- driven and funded. This trend has been described by Andrews, Pritchett and Woolcock (2012) as "isomorphic mimicry" where there is a "tendency to introduce reforms that enhance an entity's external legitimacy and support, even when they do not demonstrably improve performance." The authors further note that an outcome of this is the formation of "capability traps: a dynamic in which governments constantly adopt reforms to ensure ongoing flows of external financing and legitimacy yet never actually improve." When donor prompting relents and funding dries up, reforms come to a virtual standstill.

In effect, as a region, the countries of the Caribbean have not been able to gain, much less maximize on the benefits of, planning, strategizing, and organizing effective public spending. The state of the capability of Public Procurement Systems is very low and with severe deficiencies in the corresponding condition of human capital. **Table 2**, attempts to capture at a glance the state of procurement in each of the CARICOM countries. Essentially, the matrix shows the strength of some 20 indicators (also found in MAPS diagnostics) in each of the national systems. The scoring is based on a 0-5 measurement basis, the **Shillingford-Gayle Scale (SGS)**, as follows:

- **0-** It does not exist ;
- **1-** It exists in draft form; It is not yet implemented and/or it does not impact on the operations of the system. ;
- **2-** It may exist but it is weak ;
- **3-** It exists. Its use is not mandatory hence occasional. It cannot always be found. It does not always work. It needs updating.
- **4-** It exists; It is used. It functions though not exactly as it should. It needs strengthening to do a better job. It is on the right track;
- **5-** It exists. It has the qualities of and functions according to good international practices.

In essence ten (10) countries rank in the range 0 to 1 indicating that for 10 countries while there are some arrangements in place, they are rudimentary, do not constitute procurement "systems" and that there is no positive impact on operations. Three (3) countries are ranked in the 1 to 2 range meaning that whatever "system" exists is weak and does not always work. One system, ranked at 4 is on the right track.

On examination of the average among the 15 countries, within the context of the four MAPS pillars, the "Legislative and Regulatory Framework" at a score of 1.8 is weak. The "Institutional Framework and Management Capacity" at a score of 0.6 does not exist or does not impact on operations. The "Procurement Operations and Market Practices" at a score of 2.1 is weak and; "Integrity and Transparency" at a score of 1 does not exist or does not impact on positively on operations within the system.

Table 2

CARIBBEAN PUBLIC PROCUREMENT MATRIX

Shillingford-Gayle Scale: It does not exist **0**; It exists in draft form; It is not yet implemented and or it does not impact on the operations of the system. **1**; It may exist but it is weak **2**; It exists. Its use is not mandatory hence occasional. It cannot always be found. It needs updating. **3**. It exists; It is used. It functions though not exactly as it should. It needs strengthening to do a better job. It is on the right track. **4**. It exists. It has the qualities of and functions according to good international practices. **5**

INDICATOR	COUNTRY														Indicator Average
	AB	BAH	BAR	BEL	DOM	GND	GUY	HA	JA	SKN	SLU	SVG	SUR	TT	
Start of Reform	2008	2011	2010	2011	2008	2008	2000	1999	1998	2008	2008	2008	2011	2012	
Legislative and regulatory Framework	4	1	1	0	1	1	4	4	4	1	1	1	1	1	1.8
Complaints Mechanism	0	0	2	0	0	0	0	2	4	0	0	0	0	0	.6
Standard Bidding Documents	0	0	0	0	0	0	4	3	5	0	0	0	1	0	1
Regulations and guidelines	0	0	0	0	0	0	5	5	5	0	0	0	1	1	1
User guide or Manual	0	0	0	1	0	0	4	3	4	0	0	0	1	1	1
Institutional Framework and management Capacity	0	0	0	0	0	0	2	2	5	0	0	0	0	0	.6
Normative or regulatory Body	0	0	0	0	0	0	1	3	4	0	0	0	1	1	.7
Central or accessible system providing procurement information	0	0	0	0	0	0	2	2	3	0	0	0	1	1	
Electronic Information System	0	0	0	0	0	0	2	2	4	0	0	0	1	1	.7
Capacity Building Program	0	0	0	0	0	0	0	0	4	0	0	0	1	1	.4
Procurement Operations and Market Practices	2	2	2	2	2	2	2	2	4	2	2	2	2	2	2.1
Training of Government and Private Sector	0	0	0	0	0	0	0	0	3	0	0	0	1	1	.4
Tools and Technology	1	1	1	1	1	1	1	1	3	1	1	1	1	1	1
Records Safekeeping	1	1	1	1	1	1	1	1	5	1	1	1	1	1	1.3
Integrity and Transparency of the Public Procurement System	1	1	1	1	1	1	1	1	5	1	1	1	1	1	1
Audit and Control systems	1	1	1	2	1	1	1	1	5	1	1	1	1	1	1
Appeals Mechanisms	0	0	0	0	0	0	2	2	5	0	0	0	0	0	.6
Access to Information	0	0	0	1	0	0	1	1	4	0	0	0	0	1	.5
Anti-Corruption Bodies	0	0	0	0	0	0	0	0	5	0	0	0	0	3	.5
Code of Ethics	0	0	0	4	0	0	0	2	5	0	0	0	0	2	1
Public is engaged and interested in the integrity of the system	1	1	1	1	1	1	3	1	5	0	0	0	3	4	1.5
Country Average	0.5	0.4	0.4	0.7	0.4	0.4	1.7	1.8	4	0.3	0.3	0.3	0.9	1.1	

Size of the Public Procurement Market

While the accepted estimate for public procurement in OECD countries is 15% of GDP, some developing countries cite up to 35% of GDP is spent in public procurement. In the Caribbean public procurement is likely between the 20%-30% range. This is because the private sector is not very strong and so the government is the greatest economic driver. In addition there are annual spikes in public spending following the annual hurricane season. For the purpose of this paper, 20% of GDP is used as the estimate of public procurement in the Caribbean. **Table 3** below shows public procurement in the Caribbean at 15, 20 and 30% of GDP.

Table 3- Procurement as a Percentage of GDP (US\$ '000)

Country	GDP	15%	20%	30%
Antigua and Barbuda	1.22	0.183	0.244	0.366
The Bahamas	8.373	1.25595	1.6746	2.5119
Barbados	4.262	0.6393	0.8524	1.2786
Belize	1.637	0.24555	0.3274	0.4911
Dominica	0.495	0.07425	0.099	0.1485
Grenada	0.811	0.12165	0.1622	0.2433
Guyana	3.02	0.453	0.604	0.906
Haiti	8.287	1.24305	1.6574	2.4861
Jamaica	14.389	2.15835	2.8778	4.3167
Montserrat	0.04378	0.006567	0.008756	0.013134
St. Kitts and Nevis	0.767	0.11505	0.1534	0.2301
St. Lucia	1.377	0.20655	0.2754	0.4131
St. Vincent and the Grenadines	0.742	0.1113	0.1484	0.2226
Suriname	5.009	0.75135	1.0018	1.5027
Trinidad and Tobago	27.13	4.0695	5.426	8.139
Total	77.519	11.62785	15.5038	23.2557

International Monetary Fund, World Economic Outlook Database, October 2013

*Figures for Montserrat from CIA World Factbook - GDP figures are 2006

Calculated at 20% of GDP, the estimated annual public procurement spend in the Caribbean is 15 Billion USD. Because the economies are small and the government plays the leading role in stimulation of the economies, the national spending practices and the efficiency of the spending is of utmost importance. Governments procure a diverse range of goods and services to both enable direct delivery of public services and as inputs to other productive processes. In the Caribbean, the weight of the Government as the chief spender is even stronger because of state ownership in various sectors such as telecommunications, health, utilities, and hospitality/tourism. With relatively weak procurement systems in the Caribbean and with only donor funds going through rigorous procurement oversight and procedures, the amount of money at risk is about 8-12 billion USD per annum.

Fig.2 below shows the distribution of the US\$15 billion by country.

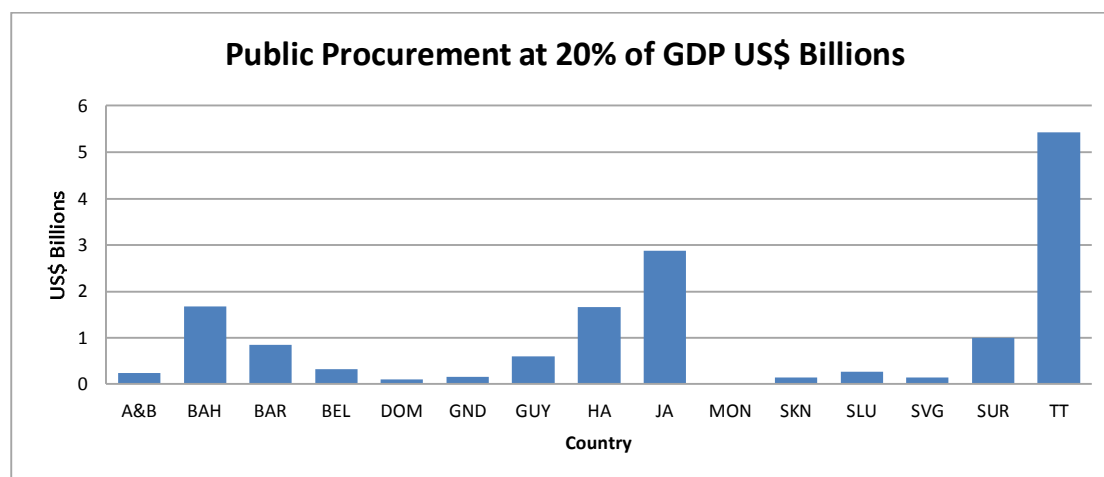


Figure 2: Public Procurement in CARICOM at 20% of GDP

International Development Partners in the Region

As mentioned earlier, several international development partners (IDPs) have given support to various related aspects of public financial management (PFM) reform over the past decade. Beyond the conduct of fiduciary diagnostics the IDPs have not substantially coordinated their interventions in the Caribbean Region and have been working largely in isolation. **Fig. 3** shows the various national and international players who have been working in the region. The effect of this failure to coordinate has resulted in multiple overlapping interventions as well as several isolated projects some of which have failed to achieve the intended results. The interventions have further failed to leverage the benefits of cross collaboration and economies of scale that would result from a more strategic and coordinated approach. Therefore even the IDPs have failed to obtain optimal results from the use of their funds. Currently, the IDB and the World Bank provide funding through loans and technical cooperation grants and the EU has provided regional funding through the European Development Fund. The IDB is the major financier of development projects in the region.

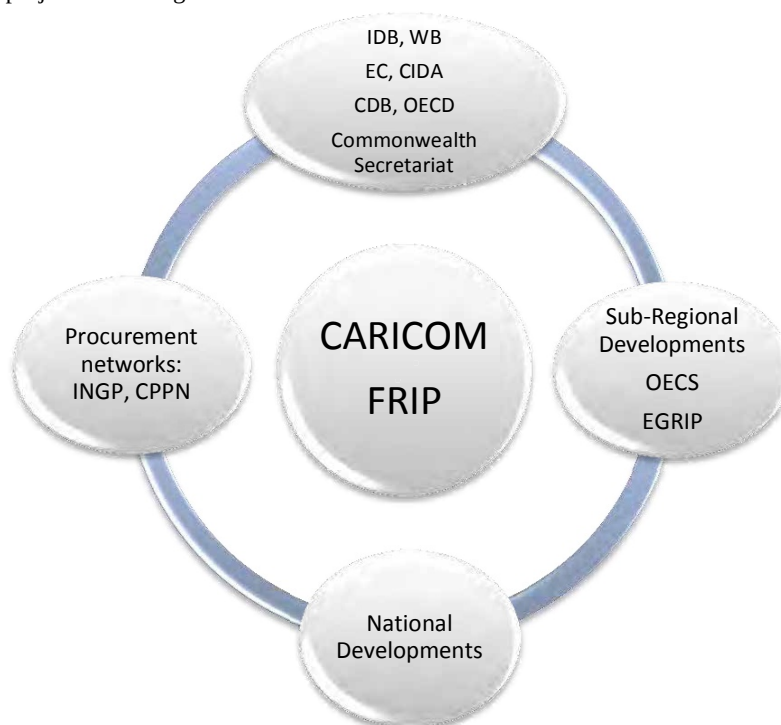


Figure 3: Players in the Region

III. CHALLENGES

Public procurement within CARICOM is an unrecognized, under-valued, and unused potential driver for economic growth and development.

High Debt

In general, the region currently faces significant economic challenges. Economic growth is low, foreign debt is high with some countries facing serious balance of payments challenges. Managing public spending has become a delicate act involving significant cuts, juggling budget allocation. Those national challenges affect the national economies and in a holistic manner, affect the entire region. Even the IDPs have been affected through the reduction in donor-financed operations and loans and the negative impact on project implementation. Reducing national debt to open up fiscal space and enable adequate provision of public goods and services is critical. **Fig. 4** below depicts the debt to GDP ratio across the region. Nine countries surpass 60%. Six surpass 80% and two 100%. It should also be noted that for Haiti, the figures shown reflect the fact that part of its debt has been forgiven.

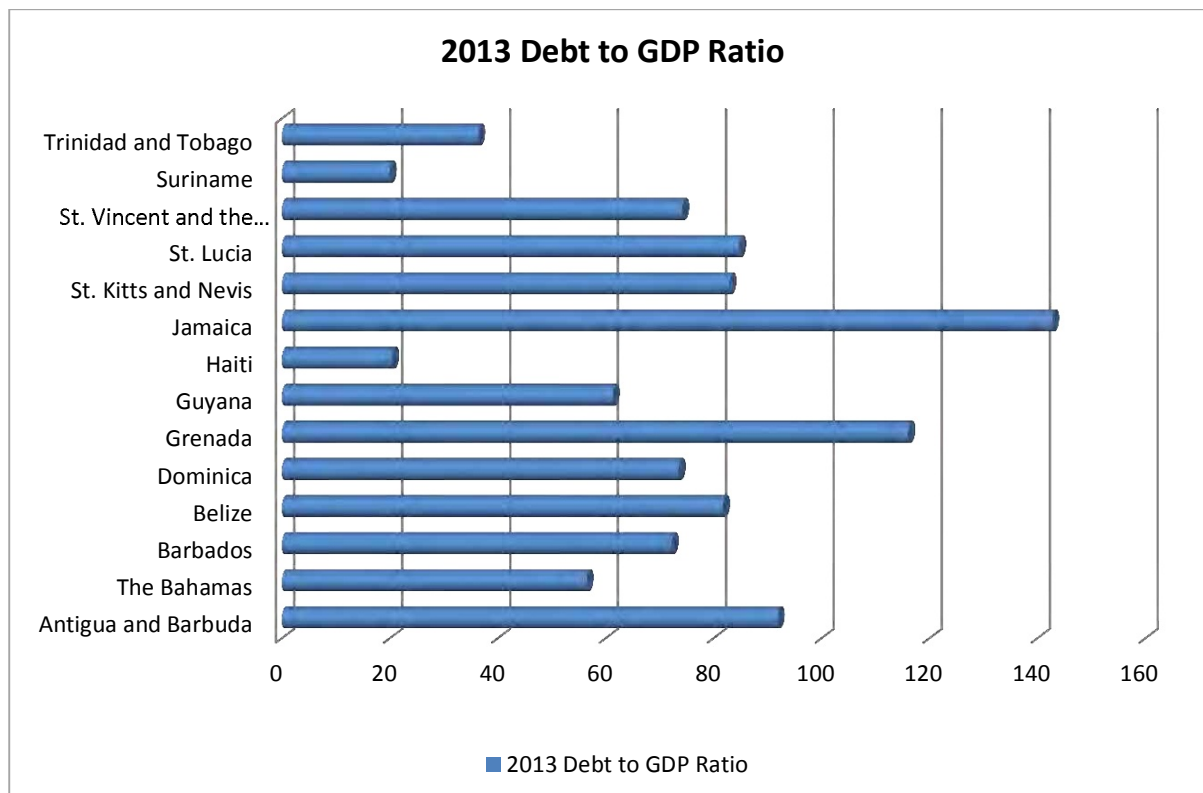


Figure 4: 2013 Debt to GDP Ratio.

International Monetary Fund, World Economic Outlook Database, 2013. General Government Gross Debt as Percent of GDP⁵

While it is recognized that public procurement in the region faces a major challenge of limited financial resources, there are several other issues that stymie effective procurement.

The need to maximize benefits to the economy through improved procurement

Procurement expenditure within CARICOM is composed of activities funded by international donor agencies and those funded with internal resources, being either the national budget or, the earnings of state-owned enterprises (SOE) who in some cases are self-financing and in others, receive transfers from central government. In an environment of tightening fiscal constraints, the capacity of the governments of the region to finance the delivery of public goods and services such as health, education and infrastructure is becoming more limited. Funding from international lending agencies and donors therefore plays a major part in public procurement. As several CARICOM countries have risen to 'middle income' classification status based on GDP per capita, they have graduated from receiving grants from some donor agencies. This combined with their high debt burden, see **Fig. 4** above, which has served to limit their capacity to borrow from international lending agencies, has severely constrained resources available to procure goods and services to support social and economic development. The need for public expenditure and more specifically, procurement expenditure to be leaner, deliver better value, and be managed by way of more efficient business processes, is becoming more urgent, if not critical.

Underdeveloped Country Systems

Within CARICOM, while work is ongoing to develop systems in Jamaica and Barbados, there are no electronic systems in use. In Jamaica however, there is quarterly reporting on contracts awarded through the National Contracts Commission (NCC) portal, but very limited advertising. Jamaica is the only country where framework agreements are used, although it is limited. Very few use standard bidding documents beyond donor funded international competitive bidding (ICB) and there are manuals in use in only two countries - Jamaica and Guyana. Practices continue to vary by procuring entity. In short, beyond the developments in Jamaica over the past 15 years, there are insufficient laws, policies, manuals and tools to consider the existence of true "national systems" elsewhere in CARICOM.

The countries of CARICOM like many other countries, have been challenged with having to employ a different set of procurement policies for each IDP with which they work. This has frequently caused much confusion among the various policies to be implemented and a strain on human resources. In response to a cry from developing countries, through the Paris Declaration on Aid Effectiveness, donors agreed and have been working to harmonize policies. They have advanced fairly well with Standard Bidding Documents (SBD), prohibited practices and some e-procurement. In addition, donors, recipient countries and International Financial Institutions (IFIs) agreed to work together to improve and strengthen country systems for use in donor funded operations. The use of national procurement systems would be validated for systems or portions of systems that display similarity to internationally accepted practices. After 15 years of reform, Jamaica is the only CARICOM country where a sub-system (price comparison) has been approved for use in operations funded by just one of the IDPs, the IDB.

Weak Human Resource Capacity

With the increasing focus of IDPs on countries' procurement frameworks and capacity, there has been some effort in a few countries to train procurement staff and build the technical capacity to support procurement. However, there remains a long way to go to ensure that a professional cadre is developed in each country and across the region. Only one country Jamaica, has a sustained and coordinated procurement training program, which is continuous and mandatory. In others, courses are delivered on an *ad hoc* basis and mostly by donors to their Project Implementation Units (PIU) staff teams. The human resource deficit presents a major obstacle to successful procurement planning and management and should not be underestimated. IDPs continue to express concern with the slow pace of execution of development projects around the region as procurement is a key driver of project execution. The evidence has shown that project execution is suffering from the dearth of trained and competent procurement professionals. Executing Agencies face severe difficulty in filling procurement positions in PIUs. The deficit leads to many compromises with the result that positions are often filled with under-skilled persons who lack the knowledge-base and competencies to perform effectively and to use their discretion and professional judgement when needed.

Limited Supplier Base

The market for procurement in the Caribbean is further challenged by a limited supplier base at the national level. Small geographic size, few areas of comparative advantage, limited diversification, limited consumer base and purchasing power are all contributing factors. The small supplier base constrains procurement in many ways. Firstly, the range of available goods and services is narrow. It limits competition and gives rise to monopolies and other forms of market dominance. Procuring entities feel compelled to contract the sole supplier of a particular good. It is the easiest and most natural thing to do. Suppliers are not pressed to distinguish by quality service, and in many cases do not treat their clients as valued business partners, failing to meet agreed contractual obligations. With little or no competition, pricing is distorted and goods and services cost more, these are some of the factors that often contribute to not obtaining best value for money

Lack of procurement planning and specialized management of procurement processes.

Procurement planning, a critical element of the procurement cycle, is lacking. Procurement is carried out in an *ad hoc* manner, creating urgencies that further reduce the scope for proper planning and encourage the practice of direct contracting. A review of the governing documentation for procurement across the countries will show that only a small minority show any recognition of procurement planning as a distinct activity in the process. Additionally, procurement processes have to interact with inefficient structures that act as stressors which cause undue delay. A recent IDB study (2013)⁶ validated observations that systemic weaknesses in the public administration are a major contributor to slow procurement execution. Institutional structures that act as part of the mainstream process as well as those that are peripheral to it are inefficient and poorly organized to support the process. Ultimately, there is a lack of coordination and synergy among the various entities involved the procurement process.

Inadequate use of modern procurement tools.

Procurement in the region largely continues to take place without making use of more recent tools and techniques that would allow for transparency and optimal efficiency. As alluded to above in many of the smaller states, direct contracting is common as well as shopping based on familiarity with suppliers. This seems acceptable to practitioners given the small supplier base and the perceived reliability involved in procuring from a supplier who is known. The downside is that some suppliers are always assured of business while some are excluded. The use of more modern methods such as framework agreements and electronic tendering would increase transparency, efficiency, provide for more competition on more equitable terms and reduce the process costs.

IV. OPPORTUNITIES

It's a much bigger market than assumed!

Small geographic size has often been postulated as a limitation for the countries of CARICOM. Indeed, size and the fact that most of them are islands bear connection to some of the challenges recognized in public procurement. Chief among these are, limited human resources and market size. Small size means a smaller population, which in turn means a smaller manpower base. Without concerted and deliberate intervention, the professional demographics of the countries would present constraints for not only the procurement discipline but for many other areas of professional practice in both private and public management. Market size means a limited supplier base.

Small size however, does not indicate small value. The countries of the region require similar goods and services as any of their larger counterparts in the rest of the developing world. The scale of certain physical services such as road construction, will vary proportionately with size however, it is arguable that the demand for intellectual services is similarly high. As previously shown, the CARICOM procurement market is estimated at US\$15 Billion. This is a substantial sum by any measure. This market represents numerous opportunities for business and professionals alike. The regional procurement market has been fertile ground for firms from across the world in all categories of procurement: works, goods and services. But what opportunities does the market present for the region itself?

In a paper discussing the importance of size to economic growth in the Caribbean, IDB economist Ruprah (2013) compares economic growth in the Caribbean to that of other small economies with similar characteristics that could be described as causing a negative impact on economic growth and development. He addresses diseconomies of scale, high indivisible fixed costs and vulnerability. By way of the comparison with other small economies, he concludes that "size is not a binding constraint for economic growth," and that "countries can escape from size related disadvantages." He however points out that since achieving the high economic growth that followed the transition of its economic model from agriculture to services, the Caribbean Region has not been able to overcome the challenges which feed the growth gap. Ruprah sums up that "policymakers and analysts should focus on the Caribbean's specific problems that could account for the growth gap; **size cannot be the reason.**" To illustrate the discussion on size, the case of the Eastern Caribbean States (OECS) Pharmaceutical Procurement Service (PPS) is poignant.

Benefits of Regional Pooled Procurement -OECS PPS

The Eastern Caribbean States (OECS) is a grouping of nine (9)⁷ countries located in the eastern Caribbean. With a combined population of 550,000, this small group has been able to turn around an alliance originally forged to address a significant market disadvantage into an "excellent cost-benefit model of economic and functional cooperation"⁸ now hailed as an international best practice.

With funding from USAID, the Pharmaceutical Procurement Service (PPS)⁹ was established in 1986 and became self-sufficient in 1989. Though annual cost savings are approximately 30%, the OECS PPS website reports that during the 2001/2002 tender cycle the 20 most popular drugs were purchased for 44% lower than the individual country prices.

Factors of success in this model include, the strong political will and financial backing of the governments, the formation of a public sector monopsony and the purchase of products exclusively through annual framework agreements. Purchasing of pharmaceuticals in the Eastern Caribbean has been transformed with a centralized restricted tendering process where suppliers from a pool of 75 are pre-qualified to assess quality standards and technical competence.

In 2009 regional purchases peaked at US\$21 million, with a portfolio of 700 products. Going forward, this sub-region of the Caribbean Community (CARICOM) has already moved toward pooled procurement of medical supplies, contraceptives and x-ray consumables¹⁰.

In the Eastern Caribbean PPS model we see the total package of an efficient and effective public procurement system. There have been clear and unquestionable economic benefits, with economies of scale being achieved and delivering an average annual savings of 30%. Under the PPS model there has been a move from the traditional purchase- and- store approach to pharmaceutical procurement, eliminating the risk and high cost associated with storage. Instead, the onus has been placed on suppliers to deliver according to the terms of the framework agreements and specific purchase orders. Apart from the savings on up-front purchase price significant savings have been realized due to the reduction in storage. The other non-economic and cyclically enabling benefits include transparent and rational procurement (ICB), enhanced quality assurance; regional cooperation and integration;

harmonized formulary manuals and standard treatment guidelines (STGs); coordinated training and sharing of information.¹¹

The disadvantage of diseconomies of scale led the OECS group to pooled procurement. In this case, and based on what was being purchased, pooled procurement naturally led to the application of international good practices such as ICB. The resulting cost savings, transparency, improved planning, and enhanced service and product quality, has transformed the initial disadvantage into an undisputable advantage bringing international recognition.

After twenty -eight (28) years of successful operation the OECS PPS stands as a model of pooled procurement that should be emulated and replicated within the Caribbean and for goods beyond pharmaceutical and medical products. With a common examination curriculum, the opportunity exists for pooled procurement of other supplies including school books. Potential also exists in commodities, agricultural inputs and insurance among other areas the depth of which needs to be properly explored. The PPS has been showcased in Africa and other parts of the world as a best practice model. Does size matter? It does, but it is not a deterrent to growth. Speaking on competitiveness and innovation, IDB Principal Technical Leader, Competitiveness and Innovation Division, Juan Carlos Navarro, noted (in a presentation entitled “Competitiveness and innovation in the Caribbean”, February 2014) that size may be seen as a weakness as the Caribbean is below its counterparts in innovation however, size may not matter significantly anymore due to globalization. It is arguable therefore, that the region stands to better face the opportunities and challenges of globalization as a united region.

Financial Terms- When it all comes down to the Money

As previously noted, at 20% of GDP, public procurement within CARICOM is US\$15 billion annually. What does the US\$15 Billion compare to? It compares to the GDP of Senegal, Georgia, Mozambique and Papua New Guinea. It is 57 % of the amount spent (\$26B) by the World Bank in 168 countries in 2013¹² (Christopher Brown, Chief Procurement Officer, 19 February 2014- Procurement Delivering Development Outcomes). It is larger than the value of projects approved by the IDB in 2012. The IDB 2012 annual report states that as the leading source of multilateral credit for the countries of Latin America and the Caribbean, it approved 169 projects totalling US\$11.4 billion in 2012. The IDB has stationed a procurement specialist in each of its 26 borrowing member countries because US\$11.4 billion is significant enough to care about how it is spent and also to provide assistance and support in the strengthening of country systems. How about US\$15 billion within CARICOM?

A procurement spend of US\$15 Billion in CARICOM is exactly the same sum of money that the Corruption Eradication Commission in a 2011 study, found to be at risk owing to “misuse due to corrupt and inept procurement practices” in Indonesia. The Millennium Challenge Corporation (MCC) of the US agreed a \$600 Million compact with Indonesia. **US\$50 million** of this amount is dedicated to the Procurement Modernization Project of Indonesia¹³. What therefore, is the level of investment that the Caribbean would warrant and who is prepared to make this investment?

Under current market operations within CARICOM, that US\$15 billion is imprisoned and along with it, is the potential market access which would have allowed for growth of SMEs. Development of the CSME remains significantly constrained due to the continued segmentation of the regional market for goods, services and works. **Fig. 5** below shows the segmentation of the public procurement market.

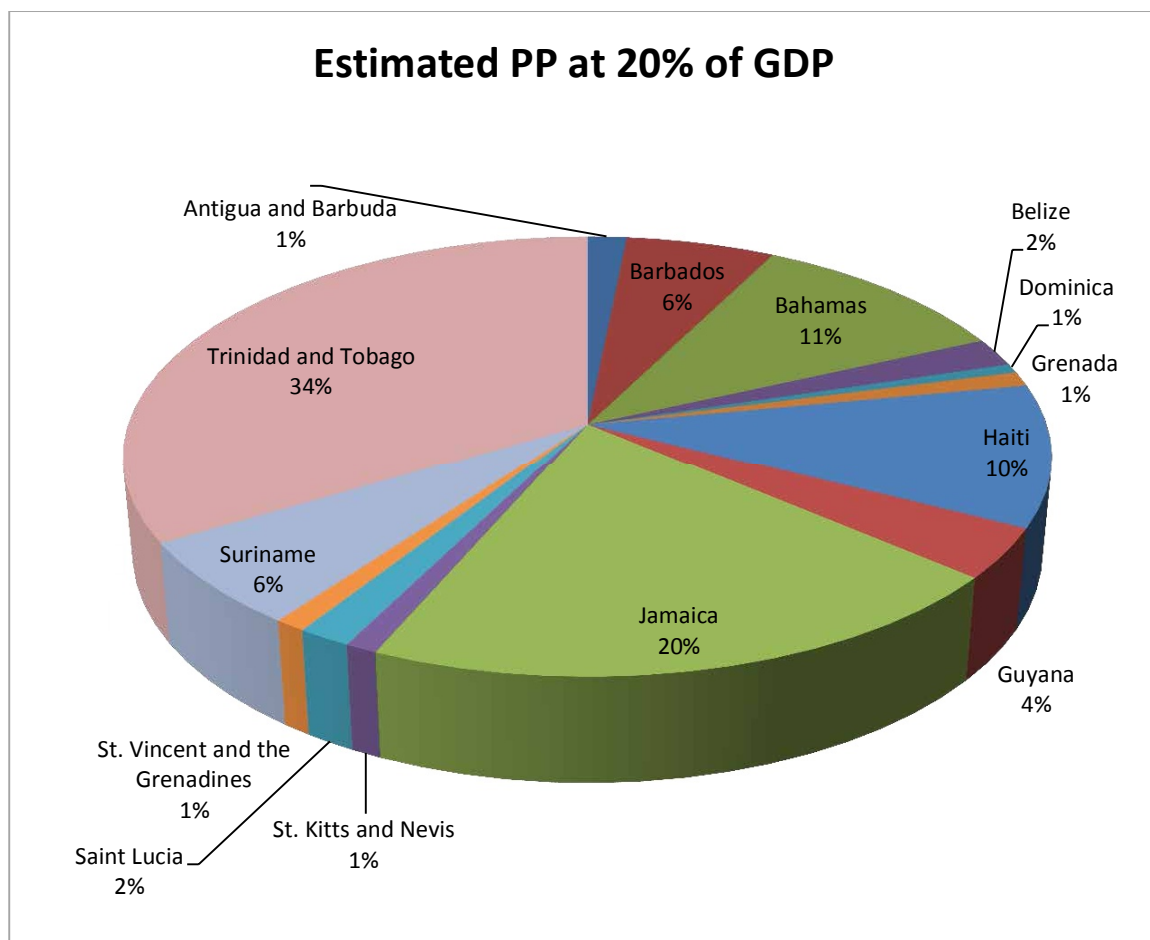


Figure 5: Showing Segmented Market

It is possible that by applying internationally accepted best practices to public procurement, CARICOM members could save between 20% to 25% of the total procurement, which is equivalent to about US\$3.75 billion annually. How could this US\$3.75 billion impact on the five year regional average negative balance of payments of US-\$1.5234 billion? See Appendix A **Table 2**. In addition by implementing a program of strategic and pooled procurement the CARICOM region stands to save at least 30% on goods and services. The OECS PPS model is proof of this. What therefore, could be the cause of the reluctance of Caribbean Community national governments to do what could likely lead to gains both to the governments and the citizens of the Caribbean Community? **Table 4** below illustrates the panoramic economic profile of the region and demonstrates potential savings in public procurement, per country.

Table 4: Panoramic Economic Profile

Country	Size Sq. KM	Population	GDP US\$ Billions	GDP Per Capita	Dominant Economic Activity	Debt to GDP ⁴ Ratio 2012 US\$ Billions	Balance of Payments ⁵ US\$ Billions	Strength of PPP System on 0-5 Range	Public Procurement @20% of GDP US\$ Billions	Potential Savings in PP 25% US\$ Billions	2012-2013 Transparen- cy Information al Corruption Perception Index
A&B	442	88,000	1.22	13,428.64	Tourism/Services	89.137	-0.15	0.5	0.244	0.0588	--
BAR	13,940	352,000	4.262	22,832.91	Tourism/Services/Sugar	51.176	-1.135	0.4	0.852	0.2245	15
BAH	431	278,000	8.373	16,151.70	Tourism/Services	85.91	-0.255	0.4	1.674	0.4022	22
BEL	22,966	343,000	1.637	4,535.50	Agriculture /Eco- Tourism	77.696	-0.04	0.7	0.327	0.0777	--
DOM	754	71,000	0.495	7,022.04	Agriculture /Eco- Tourism	74.809	-0.067	0.4	0.099	0.0249	41
GND	344	105,000	0.811	7,496.46	Agriculture/Tourism	109.477	-0.181	0.4	0.162	0.0395	--
HA	27,750	10,413,000	8.287	758.849	Manufacturing/textiles/ small scale agriculture	15.446	-0.368	1.8	1.657	0.3951	165
GUY	214,970	775,000	3.02	3,596.43	Minerals/ Agriculture Sugar/ Seafood gold/timber	65.288	-0.316	1.7	0.604	0.1394	133
JA	10,991	2,752,000	14.389	5,540.67	Agriculture/Rum/Touris m Textiles	146.142	-1.817	4	2.877	0.76245	83
MON	102	5,189	0.0438	8,500		--	NA	NA	0.009	0.002189	NA
SKN	261	57,000	0.767	12,803.52	Tourism/Services/Sugar	89.297	-0.099	0.3	0.153	0.0367	--
SLU	616	168,000	1.377	7,276.09	Tourism/Agriculture/Sm all Scale Manufacturing	70.88	-0.234	0.3	0.275	0.061	22
SVG	389	110,000	0.742	6,489.25	Tourism/Services/agricu lture	70.076	-0.198	0.3	0.148	0.0356	36
SUR	163,270	546,000	5.009	8,685.81	Mining/alumina, gold, oil/timber	21.964	0.304	0.9	1.002	.2369	88
TT	5,128	1,329,000	27.13	19,018.21	Oil and Gas/ Cement/ Manufacturing	38.746	3.07	1.1	5.426	1.26385	80

Operationalize the Regional Regime to Overcome Challenges

The CARICOM Framework Regional Integration Policy on Public Procurement (FRIP) was approved by the Counsel for Trade and Economic Development (COTED) on 20th May 2011. This is a significant development within the CSME. The CARICOM Regional Procurement Policy is intended to facilitate the establishment of an open and competitive regional government procurement market pursuant to Article 239 of the Revised Treaty of Chaguaramas. The Policy was first developed in draft in 2006 and was reviewed of numerous occasions by various bodies of the Community. With the policy approved, the Region has commenced work on the legal protocol on public procurement which would amend the Treaty of Chaguaramas and enable national implementation. Some of the critical next steps and binding commitments of the CARICOM public procurement regime include, *inter alia* :

1. Community Model Law
2. Capacity Building and Training
3. Electronic Procurement Regional Information system
4. Professionalization of Public Procurement Staff
5. Permanent joint Council on public procurement
6. Joint Bidding facility
7. Development of Standard Bidding Documents
8. Supplier registry
9. Catalogue of Goods
10. Development of Infrastructure for procurement administration
11. Permanent Committee on Public Procurement
12. e-enabling Legislation.

Since 2006, when the first draft FRIP was prepared, nine (9) CARICOM countries have commenced the process of modernizing national procurement systems with projects ranging from US\$5 million loans to grants and technical cooperation of as little as US\$30,000. Through these multiple simultaneous interventions, tax payer dollars are being spent to support multiple national initiatives that may be only partially implemented but which might affect implementation of the regional obligations if the systems are not compatible and or interoperable.

The twelve pillars of the CARICOM procurement regime outlined above point to the foundation necessary for the transformation of public procurement in the region. Within these pillars lie the opportunities for efficient procurement development. A key example is the Electronic Procurement Regional Information System. This contemplates the establishment of a regional e-procurement platform that would enable, *inter alia*, the publicizing of procurement opportunities across the region, facilitating ease of access to this information. It would enable ease of tendering from any member state and offer open and transparent administration of procurement processes. A common electronic procurement system for the entire region. Because of the failure of CARICOM to advance on these elements, a few states have begun to pursue e- procurement development independently. If this continues, fifteen states will singly go through the process of developing specifications and issuing calls for tenders to acquire e-procurement systems. The result will be a motley set of systems built on different platforms and sold by different providers at varying costs. With estimated average cost of approximately US\$ 500,000 for an e-tendering system with limited functionality (excluding hardware), one thing is certain, the individual pursuit will cost each country far more than contributing to the purchase of a single system to serve the region.

Currently, there is a severe lack of systematic and reliable procurement statistics. There is no central repository for complete procurement statistics in any of the countries and procurement data is not being captured in a structured way. The application of electronic systems in the region will also support the collection of data and allow for the generation of statistics that are not only key to strategic procurement development but to economic planning in general. A related concern is the lack of a unified codification system for goods and services. A classification system will be necessary to underpin e-procurement however, for the region to gain collectively from a coordinated approach to procurement development, a common procurement language must be spoken. In this regard, a unified codification system will be required across the region in order to ensure market synergy and importantly market access.

Capacity Building, Training and Professionalization are also key pillars. It has already been noted that there is a shortage of trained procurement personnel. It is noteworthy however, that the distribution of personnel is not even across the states. Some states have more resources than others. A real opportunity is presented to address the human resource deficit through the channels of the CSME. One of the primary tenets of the CSME is the free movement of labour (skilled persons). If the interventions for training and professional development could be coordinated region-wide so that a professional cadre is developed, implementation of free movement of persons would allow member states to tap into the pool of personnel, regardless of the nationality.

The CSME through the Joint Bidding Facility offers the opportunity for business enterprises of all sizes and MSME's in particular to expand their expertise, resource base and market through joint ventures and other forms of collaborative tendering. Ultimately an expanded market base would allow these enterprises and their respective sectors to grow. The narrow supplier base of some states would be significantly expanded thereby allowing for stronger competition and better prices. It becomes apparent how procurement could fuel economic growth and development in the region.

A Regional Regime as a platform for International Trade Negotiations

Public Procurement is increasingly recognized for its important potential contribution to trade and for more than a decade, it has featured prominently on the agenda of both multilateral and regional trade initiatives. When in early 2001 the regional effort to collect data and diagnose the strength of the public procurement systems in the Caribbean began, it was intended to develop the FRIP and be ready to face the EU in negotiation of the Economic Partnership Agreement (EPA) which was to be the successor to the Cotonou Convention wherein the trading relationship between Europe and the Caribbean had been defined for a decade following the end of the Lomé Conventions¹⁶.

Indeed, that regional policy in its goal to harmonize public procurement law and operations in the Caribbean was also intended to prepare the Caribbean for negotiation under the Free Trade Area of the Americas (FTAA) and for bilateral negotiations with Canada and the US. The region failed to develop a common approach on public procurement and therefore the opportunity to be truly prepared with endogenous policies for negotiations of the public procurement chapter of the EPA with the EU was missed. Nevertheless at the end of 2007 CARIFORUM and the EC initialled the EPA which came into effect in the Spring of 2008. Negotiations with Canada for an agreement to replace CARIBCAN¹⁷ are ongoing, while negotiations of government procurement under the FTAA have stalled. Despite there being a precedent set in the provisions of the public procurement chapter of the EPA, CARICOM should continue its efforts to complete the regional regime for public procurement in order to engage other trade negotiations with a common approach on public procurement.

Enhancing the participation of Small Business

There is an argument put forward that the thresholds for market access and transparency in the region should be high in order to allow for national policy space to protect micro, small and medium enterprises (MSMEs) etc. With a very limited number of small business laws and policies in operation, and with the national market share not transparently nor evenly distributed, few small businesses are in reality protected. The firms participating are usually larger and in a better position to access what is required to participate and meet the criteria in a public tender process including: access to credit, bank guarantees, years of business experience, reputation, business and supplier registration, and updated payment of taxes. This is where government policy would need to intervene to balance the scales in support of small business. The limited participation of the small business sector, which is regarded as a key engine of growth and employment, in the national market further compounds the problem of limited supplier base. It further perpetuates high and rising costs of goods and services to consumers. The ones left to carry the brunt of the financial cost of protectionism are the consumers.

If ultimately, already struggling consumers pay the high price of protection and small business being bound to their small share of already limited national markets do not realize their growth potential, who wins? What continues to hold the regional public procurement market hostage when as it stands now, many businesses and consumers do not win?

Agree on Thresholds and Open the Market!

Among the challenges facing the region is the lack of agreement on regional transparency threshold. Theoretically, within a *single* market such as the CSME, the threshold for both transparency and market access should be zero (0). Because the CSME is not fully implemented and consequently does not yet function as a single market, measures should be put in place to ensure that there is enough visibility of each national market at the regional level. As a matter of priority, transparency thresholds should be established to ensure that suppliers from across the region can access information about procurements and by extension, the CSME public procurement market to bring to life some of the fundamental principles of the CARICOM FRIP including inter alia, transparency, market access, competition, fairness, efficiency and value for money. With little to none of the governments advertising national opportunities electronically, competition and market access remains low and the price of goods and services high.

Given the thresholds agreed in the EPA with the EU, of Special Drawing Rights (SDRs) 150,000 for goods and services and 6.5 million for works, CARICOM needs to establish thresholds that promote rather than restrict competition and which are low enough to allow access but high enough to be consistent with internationally negotiated commitment. Thresholds of no greater than US\$50,000 for goods and services and US\$500,000 for

works should be considered as transparency thresholds. This should in no way be a barrier to regional access to tenders not regionally advertised and which are below these thresholds.

V. RECOMMENDATIONS

Awakening Civil Society through Transparency

The passage of Access- to- Information Legislation in some countries has served to increase civil society scrutiny of government actions. In Jamaica for example, various individuals and groups including the media, have used this avenue to request information on specific procurements, taking the matter further to force inquiry by regulatory bodies. Similar legislation is also present in Trinidad and Tobago. This kind of involvement and scrutiny by citizens is as important as regulatory oversight in maintaining accountability. Notwithstanding, as the biggest of all stakeholders, CARICOM's civil society is for the most part, silent. Getting the populations engaged in demanding transparency and accountability regarding public spending is a key to taking the reform process to an entirely different level. Until citizens understand that national debt is a taxpayer burden passing from one generation to another and that every cent spent must be properly accounted for, public procurement will happen in a space that is not subject to transparency, efficiency, fairness and accountability. Two key questions must be brought to the fore of a civil society conversation with governments: "Where is the money to come from"? and, "What was done with the money?"

With the goal of genuine implementation, it must be recognized that integration of the Caribbean Community is only partly a political process. To a greater extent, it is a people process. The body politic has been marginalised in the process largely due to the fact that binding Community obligations agreed through Ministerial Counsel meetings are not public and online. Civil society therefore relies on the press releases and communiques that do not give the complete picture of the Ministerial deliberations. It is therefore almost impossible for civil society to hold national leadership accountable to its Community obligations. The Community should work to ensure the bringing online of government throughout the region.

Supporting the Creation of a Regional Regime

Notwithstanding the efforts to build the CSME and to harmonize public procurement systems, there has been an approach that seems to favour singular and national initiatives. Often Caribbean countries are treated as second tier because (a) the national markets are "small", (b) nationally public procurement is considered to be "small", (c) loans are small and (d) risks, while they are considered medium to high, the value on which there is risk, is considered to be "small". At US\$15 billion, with a legally binding mandate for a harmonized regional public procurement system, the time has come to acknowledge the real value and potential impact of public procurement within CARICOM, not as national entities, but as a region. IDPs ought to consider investing in the region to support the development of both national and regional procurement systems that, despite concerns of small value, would serve to reduce the gaps with international practices. Operating on the premise that the portfolio and risk is small and not worthy of serious investment would serve only to widen the gap. The future of the Caribbean countries, like their past is linked to their regional interrelationships, regional initiatives and regional identity in a manner which is very profound and symbiotic. The model of the OECS PPS, the most vulnerable group within CARICOM, has convincingly demonstrated the potential impact of regional economic initiatives earnestly and strategically implemented. As yet, no other solution has been proffered to the lingering ailments of the Caribbean either in fact or in theory that can rival the potential of an implemented CARICOM single market and economy and its institutions. A more coordinated and harmonized approach from the IDP community could bolster the ongoing efforts of the Community and give life to the sub-structures mandated in the CSME and the Framework Regional Integration Policy on Public Procurement (FRIP). Even as IDPs continue to work on national projects with the CARICOM members, the regional obligations and mandates to which these countries are legally bound should be at the fore of discussions, given due consideration and remain in full sight.

"Do not send to ask for whom the bell tolls":

There are some critical aspects of the economy and of development that are outside the full realm of government control and over which government has little or no immediate influence such as tourism and foreign direct investment. However, there are other aspects such as public spending where the political authority has immediate and full direction. It is in the latter that the opportunities lay to turnaround the trajectory of public procurement in the CARICOM Region. In an economic environment where every dollar counts, there are US\$15 billion reasons to take advantage of the opportunities that lay within an open regional public procurement market. And if there are any doubts about the impact of US\$15 billion, there are 17 million human reasons that will weigh in when special concessions and aid for trade are exhausted and the reality of the economic situation sets in. The region should

acknowledge and value public procurement as a potential driver for economic growth and bring a **concerted regional political will** and commitment to enable and develop the regional procurement regime.

When treated each as separate and distinct entities, the countries of CARICOM are more susceptible to the limitations of being small and vulnerable with several characterized as economically sub-optimal. However, if the region were to implement the single market and economy as envisaged in the Revised CARICOM Treaty, its market size would expand, with the free movement of goods, services and skills, it could potentially balance human and natural resource needs as well as market needs and further possibly withstand if not repel constant external shocks. This position is supported by a belief that the tools and the resources needed by the region are already within the region, requiring only reallocation and realignment. There are countries with vast unutilized agricultural land and others with alkaline soil. There are some with great and some with little agricultural produce. There are some with high rates of unemployment and some territories where their nationals choose not to take up certain types of employment. Giving the CSME a chance could bring balance to these challenges.

With the small size of national markets, limited natural resources, high imports and low and narrow exports and domestic outputs, the countries of CARICOM are clearly small and vulnerable. However, despite half a century of using these characteristics to argue for special and differential treatment, without lasting success, the region has the opportunity to not be defined by these limitations but by its true potential that collectively can be harnessed from making strategic economic and procurement decisions. National governments of the Caribbean Community are one decision away from realizing their potential. Holding on to a model of protection is unrealistic and unnecessary.

Partially following the "problem driven iterative adaptation" discussed by Andrews, Pritchett and Woolcock (2012) and the call by Ruprah (2013) for an examination of the real challenges to growth, **Table 5** below attempts to capture the direct and indirect procurement related factors where opportunities of enhancement rest.

Table 5: Problem driven approach to procurement related challenges facing the region.

#	Problem	Impact	Opportunity	Priority	Indicator	Authority and Influence
1	Domestic Market Size	diseconomies of scale; Limited competition High prices	Amalgamate the market	1	CSME operational; Lower prices	Political directorates; Private Sector
2	Limited Transparency Obligations	Limited Publicity and advertisement; Limited market access Narrowly informed civil society	Establish regional transparency thresholds to facilitate opening of the now segmented US\$15 Billion Public Procurement Market Establish regional public procurement notice board Reclassify procurement from an administrative function to a strategic function. Consolidate and pool procurement of certain goods/services through a central fully capacitated entity.	1	Thresholds established; Regional Public procurement notice board operational; National opportunities published on regional public procurement notice board	Political directorates
3	Lack of Strategic Procurement	Procurement is fragmented and has been subsumed under Finance and Administration or Audit Acts. Policies developed to address finance and administration concerns; High costs of the majority of goods and services.	Pool Procurement in Pharmaceuticals and other feasible areas	1	Procurement repositioned as a strategic area of public financial management	Civil service; Political directorates; Private Sector.
4	High cost of goods including pharmaceuticals and school text books	Shrinking budgets due to fiscal constraints; Low quality products provided to consumers; Inadequate supply of goods		1	Use of framework agreements	Civil service/Political directorates;
6	Low number of bidders	Unequal access Few contractors control the bulk of the market	Develop harmonized electronic procurement system; Advertise all opportunities above US\$50,000 Regionally	1	e-tendering modalities in use Increase in number of bidders per call	Political directorates; Private Sector.
7	Weak Human resources capacity	Inadequate supply of trained persons to manage procurement; Frontline workers provide low level service to private sector; Inefficient spending	Professionalize Procurement Train personnel in public procurement, project and contract management, by sector	1	Structured and contextually relevant training /certification program rolled out and maintained across the region	civil service/Political directorates;

#	Problem	Impact	Opportunity	Priority	Indicator	Authority and Influence
			Partner with a regional institution such as the UWI to develop a sustainable training program (diploma, certificate, degree) in public procurement UWI to partner with national universities and colleges to provide diploma training.			
8	High Cost of Electronic systems.	Multiple donor funded national initiatives; Failure to maximize scarce resources	Pool national and donor resources to develop regional or interoperable harmonize national systems	1	Integrated e-procurement and financial management systems in place	Political directorate; IDP Community; CARICOM Secretariat leadership
9	Small businesses participating minimally in procurement No incentives for small businesses	Concern that Small Businesses may lose market share and not survive competition; Small business sector not benefiting from government support. Unable to make sustained contribution to economic development	Develop small business laws and policies to legally support small business, Establish a carve out for vulnerable groups, local content, community procurement and women in business, and use them. Establish Joint Bidding Facility	2	Small business procurement policies developed and backed up by legislative provisions. Small businesses taking up procurement opportunities.	Political directorate; Private Sector
10	Lack of donor coordination for more than diagnostics	Multiple simultaneous initiatives, some of which do not take into account legally binding regional mandates; Strain on already limited human capacity	Engage with donors as a region on cross-cutting, common issues, Recognize and support regional obligations for a single harmonized procurement system.	1	More shared or joint donor funded projects; Harmonized regional public procurement policy implemented with IDP encouragement and support	International Development Partners; CARICOM Secretariat leadership
11	Limited to no involvement of Civil Society	Limited accountability to citizens; Limited demand for transparency of process and award; Lack of commitment to shared responsibility for development	Bring civil society into the fold of discussion and accountability regarding national and regional development and management; Conduct country by country awareness campaigns	2	Civil society increasingly and actively engaged with demanding transparency and accountability; Countries willingly and easily providing access to information	Political directorate; IDP Community; CARICOM Secretariat leadership

#	Problem	Impact	Opportunity	Priority	Indicator	Authority and Influence
12	Lack of Institutional capacity	Institutional framework inadequate to meet current procurement demands	Institution strengthening both at the national and regional level through benchmarking within and outside the region	1	Key institutions established resources and operational at national first then regional level	National governments; CARICOM Secretariat leadership
13	Lack of Collection of Statistical Data	Absence of key economic and planning information decisions not based on empirical evidence; Lack of Business Intelligence	Implement harmonized e-procurement system region-wide; Implement other electronic PFM tools that collect data	1	Integrated e-procurement and financial management systems in place; Statistical data easily generated; Planning based on data analysis	Political directorate; IDP Community; CARICOM Secretariat leadership
14	Absence of a unified codification system	Barrier to market access and regional coordinated procurement	Agree and implement common codification system	1	Codification system in use across CARICOM	CARICOM Secretariat leadership

Appendix A

Table 1: General Government Gross Debt as Percent of GDP¹⁸

Country	2009	2010	2011	2012	2013
Antigua and Barbuda	102.46	90.782	92.869	89.15	91.908
The Bahamas	38.13	45.458	48.375	51.856	56.5
Barbados	63.926	72.622	75.327	72.634	72.262
Belize	84.385	84.41	82.251	78.106	81.782
Dominica	64.195	69.879	70.665	72.164	73.576
Grenada	97.671	104.29	109.041	112.567	116.109
Guyana	64.814	65.299	65.162	60.333	61.349
Haiti	28.157	17.743	12.205	15.446	20.442
Jamaica	139.395	140.759	141.498	146.591	142.758
St. Kitts and Nevis	148.491	163.863	153.58	89.297	82.962
St. Lucia	61.34	66.039	71.053	78.372	84.761
St. Vincent and the Grenadines	64.624	66.235	67.828	70.175	74.23
Suriname	15.552	18.478	20.386	20.464	19.996
Trinidad and Tobago	30.591	35.503	33.438	39.723	36.402
Total	1003.731	1041.36	1043.678	996.878	1015.037

International Monetary Fund, World Economic Outlook Database, April 2013

Table 2: Current Accounts balance¹⁹ in US\$ Billions 2009-2013

Country	2009	2010	2011	2012	2013
Antigua and Barbuda	-0.234	-0.167	-0.122	-0.15	-0.162
The Bahamas	-0.809	-0.813	-1.09	-1.135	-1.148
Barbados	-0.247	-0.35	-0.375	-0.255	-0.284
Belize	-0.076	-0.039	-0.016	-0.04	-0.051
Dominica	-0.102	-0.077	-0.061	-0.067	-0.071
Grenada	-0.182	-0.185	-0.182	-0.181	-0.192
Guyana	-0.183	-0.217	-0.344	-0.368	-0.426
Haiti	-0.226	-0.821	-0.339	-0.316	-0.479
Jamaica	-1.333	-1.172	-1.869	-1.817	-1.593
St. Kitts and Nevis	-0.189	-0.151	-0.112	-0.099	-0.122
St. Lucia	-0.137	-0.203	-0.244	-0.234	-0.234
St. Vincent and the Grenadines	-0.197	-0.208	-0.199	-0.198	-0.196
Suriname	-0.024	0.28	0.251	0.304	0.206
Trinidad and Tobago	1.633	4.172	2.623	3.07	2.957
TOTAL	-2.306	0.049	-2.079	-1.486	-1.795

International Monetary Fund, World Economic Outlook Database, April 2013

References

1. International Monetary Fund. World Economic Report 2013. www.imf.org
2. The World Factbook, Central Intelligence Agency (CIA). <https://www.cia.gov/library/publications/the-world-factbook/>
3. Caribbean Community (CARICOM) (2001) Revised Treaty of Chaguramas.
4. Caribbean Community (CARICOM) Secretariat. www.caricom.org
5. Caribbean Community (CARICOM) (2001-2005) Country Procurement Assessment Reports
6. Angaladian, Hagop. (2005) Government Procurement Frameworks in the Caribbean Community: Towards a Regional Best Practice Regime for the CARICOM Single Market and Economy. *Public Procurement in the CARICOM- A Comparative Assessment*.
7. Angaladian, Hagop. (2005) Government Procurement Frameworks in the Caribbean Community: Towards a Regional Best Practice Regime for the CARICOM Single Market and Economy. Component II. *Collection and Analysis of Government Procurement Statistics*.
8. Caribbean Community (CARICOM) Framework Regional Integration Policy on Public Procurement (FRIP) 2011.
9. Andrews, Matt. (2013) The Limits of Institutional Reform in Development- Changing Rules for Realistic Solutions. Cambridge University Press.
10. Andrews, Matt; Pritchett, Lant; Woolcock, Michael. (2012) Escaping Capability Traps through Problem – Driven Iterative Adaptation. HSK Faculty Research Working paper Series. RWP12-036.
11. Roca, Maria Eugenia et al (2013) Adquisiciones y eficiencia operativa: análisis de la ejecución de proyectos financiados por el BID. Inter-American Development Bank IDB-TN-613.
12. Ruprah, Inderjit. (2013) Does Size Matter? Yes, If you are Caribbean! Inter-American Development Bank Policy Brief. IDB-PB-201.
13. Organisation of Eastern Caribbean States (OECS). www.oecs.org
14. Inter-American Development Bank. www.iadb.org
15. Brown, Christopher, “Best Practice Procurement in a Development Environment” World Bank February 2014. <http://www.worldbank.org/en/events/2014/02/04/procurement-delivering-development-outcomes>
16. Navarro, Carlos, Presentation “Competitiveness and Innovation in the Caribbean”. February 2014. www.iadb.org
17. CARIFORUM-EC Economic Partnership Agreement. (2008) Chapter #3. Public Procurement
18. Bernal, Richard. Publications on Economic Development in the Caribbean. www.richard.bernal.net/publications
19. Bishop, Matthew; Girvan, Norman, et al;(2011) Caribbean Regional Integration UWI, Institute of International Relations.
20. Woolcock, Stephen. (2008) Public Procurement and Economic Partnership Agreements: Assessing the potential impact on ACP procurement policies. London School of Economics; Commonwealth Secretariat.

END NOTES

¹ See Articles 8 and 9 of the Revised Treaty.

² The Procurement and Contract Administration Act, 2011

³ Public Procurement and Contract Administration Act, 2012.

⁴ Section 1 (2) of the Act states that “the Act shall come into force on such day as the Minister of Finance may, by Order published in the Gazette” while subsection (3) “provides the limitation of the Minister’s discretionary privilege to January 21, 2015”.

⁵ IMF WEO. General government gross debt consists of all liabilities that require payment or payments of interest and/or principal by the debtor to the creditor at a date or dates in the future. This includes debt liabilities in the form of SDRs, currency and deposits, debt securities, loans, insurance, pensions and standardized guarantee schemes, and other accounts payable.

⁶ Adquisiciones y eficiencia operativa: análisis de la ejecución de proyectos financiados por el BID

⁷ Anguilla, Antigua and Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines

⁸ www.oecs.org

⁹ Originally established as the Eastern Caribbean Drug Service with USAID grant of US\$3.5 million and counterpart funding of US\$0.7 million.

¹⁰ The OECS PPS is also currently exploring pooled procurement of dental and laboratory supplies.

¹¹ www.oecs.org

¹² Obtained from WB presentation “Best Practice Procurement in a Development Environment?” by Christopher Brown, Chief Procurement Officer, WB, February 2014.

¹³ Millennium Challenge Corporation, USA, Fact Sheet- MCC and Indonesia: Investing in Innovation for Sustainable Economic Growth. November 2011. www.mcc.gov

¹⁴ IMF WEO. General government gross debt consists of all liabilities that require payment or payments of interest and/or principal by the debtor to the creditor at a date or dates in the future. This includes debt liabilities in the form of SDRs, currency and deposits, debt securities, loans, insurance, pensions and standardized guarantee schemes, and other accounts payable.

¹⁵ **Current account balance (U.S. dollars)**

Current account is all transactions other than those in financial and capital items. The major classifications are goods and services, income and current transfers. The focus of the BOP is on transactions (between an economy and the rest of the world) in goods, services, and income.

¹⁶ The Lome and Cotonou Conventions were successive non-reciprocal ACP-EU conventions.

¹⁷ CARIBCAN granted unilateral duty-free access to eligible goods from beneficiary countries in the English speaking Caribbean up to 2013.

¹⁸ IMF WEO. General government gross debt consists of all liabilities that require payment or payments of interest and/or principal by the debtor to the creditor at a date or dates in the future. This includes debt liabilities in the form of SDRs, currency and deposits, debt securities, loans, insurance, pensions and standardized guarantee schemes, and other accounts payable.

¹⁹ **Current account balance (U.S. dollars)**

Current account is all transactions other than those in financial and capital items. The major classifications are goods and services, income and current transfers. The focus of the BOP is on transactions (between an economy and the rest of the world) in goods, services, and income.

Contract Management Innovation in Public Procurement: Costa Rica's Experience

Ileana Palaco¹, Alicia Avendaño² and Waldemar Nuñez³

¹ Technical Secretariat for eGovernment,
Edificio Interbolsa, Sabana,
San José, Costa Rica
E-mail: ipalaco@gmail.com

² Technical Secretariat for eGovernment,
Edificio Interbolsa, Sabana,
San José, Costa Rica
E-mail: avendano.alicia@gmail.com

³ Instituto Costarricense de Electricidad & Fidelitas University,
Proveeduría ICE, Sabana,
San José, Costa Rica
E-mail: Wnunez@ice.go.cr

The Traditional Model

Costa Rica is an upper middle-income developing country, located in Central America, it has a population of approximately 5 million inhabitants and its national GDP amounts 45.13 billion USD. Accounting for roughly 20% of the Costa Rican national GDP, government procurement plays a very important role in ensuring effective and transparent management of public resources. According to a poll held by the University of Costa Rica (UCR), public contracting has been identified as one of the government's activity with the highest perception of bribery risk ^[1]. This is a worldwide phenomenon. In a Public Expenditure and Financial Accountability Program Assessment ^[2] held in October 2010, the procurement model presented weaknesses due to its highly fragmented model, and lack of control facilitation or efficiency within the procedures. In this same assessment, Costa Rica's transparency in procurement ranked as low as D+. Transparency in government procurement, together with citizen's active involvement as government's expenditure auditors, constituted a critical need in Costa Rica.

In order to conduct a functional and practical analysis of the Costa Rican current public procurement model, the starting point of the case to be described in this paper, must be clear: The traditional procurement model in Costa Rica, governed by red-tape and paper, exhausted itself. The new innovated model, based on an online procurement service, must cover the whole cycle, from planning to contract management.

Starting Point & Scenario

According to World Bank's experts ^[3] who analyzed the country's public expenditure environment in 2009, Costa Rica's legal and institutional framework for procurement is based on best international practices. However, the country's procurement followed a fragmented model and had a series of deficiencies. The assessment stated that the public sector failed "to take full advantage of available procedures, practices and management tools". Some examples of how the model was failing to support Costa Rican efficient budget execution may be summarized through the existence of excessive amount of paperwork, bureaucracy and poorly integrated processes. These are some features that characterized this traditional model:

- No standardization of procurement documents and processes.
- Lack to enable price-referencing, benchmarking mechanisms or supply industry analysis, due to the use of different codifications (goods and services classification codes) and not-integrated supplier registration database
- Different procurement proceedings in each entity lack of international standards such as product codification, forms terms of reference, business documents and transactions as a result of fanciful interpretations or ignorance of the applicable regulations.
- Numerous regulations and procedure manuals, depending on each entity.
- Numerous investments and disintegrated use of IT platforms.
- Duplication of requirements and procedures for supplier registration through different institutions.

- Purchasing processes require multiple approvals and reviews at different levels (individuals and committees)
- Lack of process reengineering, standardization and simplification, due to excessive requirements that must be met depending the institution.

After analyzing the country's reality, Inter American Development Bank (IDB) and World Bank (WB)^[3] issued a series of recommendations, which pointed out that the country should focus on seeking greater efficiency and savings through procurement rather than on implementing the existing legislation. It stated that the country urged to implement mechanisms to enable advanced procurement instruments, already available in the legal framework (reverse auction, joint contracting agreements, denominated "convenios marco"). The assessment estimated potential savings (between 12.6 % and 17.6 %) and urged the Ministry of Finance to take certain measures to improve public procurement, such as: procurement consolidation, the definition of standards country-wide, the use of a single catalogue, registered supplier data base, and the use of framework contracts.

Another important assessment on the matter, carried out by the Organization of American States (OAS)^[4] had also repeatedly stated that among the major problem that affected the efforts made so far by the Costa Rican authorities was the fact that none of the initiatives could actually turn Costa Rica's procurement process into a 100% online traceable process. Public procurement efforts on the improvement of the national contracting scenario were focused on improving technical or specific procedures rather than tackling the need to create a more complete and comprehensive public procurement system.

A joint study by INCAE Business School and the Technical Secretariat for Digital Government (TSDG) in early 2008 showed more evidence about this reality^[5]. Based on data from the General Comptroller's Office (CGR), the study estimated that in 2007 a small group of 20 companies billed the Costa Rican government 40% of their purchases, which is approximately 8% of the national GDP. The study suggests that this concentration *"is mainly due to the barriers to participate in government's procurement processes representing system complexity and expensive it is for potential bidders."* Despite the progress and efforts made until 2009, the traditional model, followed by the Costa Rican procurement processes and based on paper-PDF-based procurement systems developed one by one within the public sector, fell short against the objectives of transparency, accountability, productivity and development promotion that the country required to accomplish.

National e-Procurement Platform: Mer-link

Up to 2010, many attempts to improve Costa Rica's procurement model were carried out without noticeable success, they were not perceived as an effective solution to an increasingly evident problem. The challenge to modernize through a single window process Costa Rica's procurement still remained.

As a result, the Technical Secretariat for Digital Government (TSDG), in partnership with the National Telecom Company (ICE), the Public Procurement Service (PPS) of the Republic of Korea adapted the Korean e-Procurement System, known as KONEPS into what is now a days called the Costa Rican National e-Procurement Platform, also known as Mer-link. This system began with the development and implementation of basic modules by July 2010, and in January 2011 its full scope was launched.

A team of 14 public institutions, including National Banks, Universities, Public Agencies and Local Governments; lead by the TSDG and ICE, through a strong standardization and BPR process was able to shift a paradigm throughout our country's public administration. The interoperability model followed on Mer-link's design lead the country to build a basis to connect our government's back-office. The fact that Mer-link system connected citizens, businesses and government; transformed paper and red-tape-based public services to online, multi channel and one-stop transparency-based services.

In spite of these institutions' efforts, by 2012, Costa Rica reported several platforms used for procurement purposes. In the same year, the General Comptroller's Office (CGR) requested the Governing Council a definition on the issue of public procurement. Consequently, CGR^[6] issued a report that pointed out that *"due to the large number of transactions generated by the public sector, it [was] necessary to consolidate efforts and automate the procurement process through a single channel. The channel must consolidate government goods and services transactions into a single IT e-procurement platform that integrates all the country's needs."*

Given these recommendations, the Office of the President delegated to a National Public Procurement Committee constituted by the Ministry of Finance, Science and Technology and TSDG's Director General, the integration of the National System of Public Procurement. The main objective of this committee was to implement Mer-link System as the national procurement service platform.

The Mer-link platform and these team's efforts in recruiting other autonomous agencies to use the platform and optimize its use are necessary precursors to this paper. The detail story in its growth and development may be found across the Internet

and through several international organization experts reports, most of them in Spanish. Mer-link has been operational for three years with an expanding list of agencies (now 68 government agencies of over 300) conducting procurement through this national single window platform.

As the National e-Procurement System, throughout its interoperability model, Mer-link allows exchanging information with more than 50 institutions countrywide, all bidding related information is integrated and publicly available. It has accomplished to bridge the gap between a dynamic set of detailed information on government procurement and the citizenry. Costa Ricans are able to freely access and understand details of government procurement and budget expenditure, all accomplished by this platform on its purpose to enhance transparency in government procurement. At present, the system is being implemented and is expected to cover more than 90% (by volume)^[7] of national public procurement by the first semester of 2014.

One of its biggest strengths is that it handles the entire procurement process, which includes supplier registration, bid notice, bidding, awarding, contracting, payment and the entire contract management process, which is why this project has become one of the most innovative government services within the national agenda. Once registered, suppliers are able to participate in all public tenders. The design contains the following main modules, which have been put into operation since 2010: Supplier Registration (User Management), Goods/Services Catalogue (based on UNSPSC), Bidding (procurement planning, online Tendering, e-Bond Management (Participation and Performance), online bid submission, e-assessment, analysis and evaluation and e-awarding), Dynamic Purchasing Modules (e-Auction, e-Shopping Mall, Framework Contracts), Contracting (Online Contract Issuance, e-Signature/ Digital Certification), Contract Management (Delivery, Inspection, e-Invoice, e-Payment, Supplier Evaluation).

In spite of such complete functionalities, one could think that many of the described features are already available in some of the worldwide known practices, why is it that Mer-link is acknowledged as an innovative solution to the national procurement dilemma? Upon the last stage of contract management, Mer-link has added a great value to the Costa Rican procurement cycle by including within its online service scope the entire Administrative and Disciplinary Sanctions procedure. Empowering citizens through real accountability, allowing them to follow-up on how the procurement process is executed, moreover how their taxes are being spent. At the same time, this innovative module enables online, real-time access to all procurement profiles, including detailed management process actions to key players, such as: Comptroller's Office, Legal departments, Audits and Judiciary Branch.

Mer-link's Scope

According to OECD ^[8], there is a general concern on *"the lack of attention dedicated to the risks of waste in the needs assessment as well as in the contract management"* in public procurement. In particular, OECD's mentioned documentation addressed the importance of accountability throughout the whole procurement cycle, including pre-bidding and post-bidding phases. In this regard, Costa Rica has made a remarkable effort including this cycle and more as Mer-link's system function scope.

According to the Costa Rican legal framework procurement processes are essentially divided into three stages, namely:

- **Planning:** In this initial phase the need to be satisfied is determined and the works, goods or services to be acquired for a certain purpose are identified. This initial stage ends with the accurate identification of the good or service required, the verification of budget availability and the procurement modality to use. This phase includes to have a potential supplier database and to have standardized coding of the good or service to be purchased.
- **Selection:** this phase is where the entity must seek the best proposal (price, quality, experience- for example). It can be done through several mechanisms such as direct contract, abbreviated or competitive open tendering, dynamic contracting, reverse auction or shopping mall-which is a figure known as "convenio marco" [In English: framework agreement]. Direct contracting mechanism is mainly used for frequently procured goods and commonly standard required features. This mechanism involves a shorter period tender contest, and high volume with low value, meaning lots of low unit value contracts. Tendering in its various forms (abbreviated, competitive, international) is an appropriate mechanism for the selection of goods of very specific characteristics, or the acquisition of higher value goods, which means this mechanism involves high economic impact. The selection process ends with the contract or purchase order issuing, in the case of direct contracting.
- **Execution / Contract Management:** During this phase the contractor delivers the goods or services and the recipient verifies its validity and proceeds with payment. It ends with the final reception of all goods or services. This phase is related to the after-service for goods or services purchased. It involves any post-delivery action (such as warranty compliance) or condition stipulated in the contract or purchase order. This phase ends on the last day of the warranty.



Figure 1. e-Tendering Cycle in Costa Rica.

This fact proved how challenging it was for an SME to actually be invited into a public tendering process.

Thanks to the extensive use of Digital Certification, based on the Public Key Infrastructure technology, Mer-link enabled a Single nation-wide Online Supplier Registration. This is a countrywide database, where the professional or company representative may sign in (and update information) and make sure to be invited to any potential business opportunity with the government. Through a digitally signed declaration and interoperability processes, company's data, such as legal status, capital, ownership, social security & tax payment status may be verified online in a real-time basis. Up to date, Mer-link accounts more than 7,000 potential suppliers. This massive online process has opened a very important door of opportunity for both procurement departments and potential interested supplier companies, especially SME's.

National Goods & Services Catalogue:

As the supplier registers the company in Mer-link, he/she must select from the online product catalogue the goods or services that his company is in capacity to provide to the government. This catalogue is based on United Nations Standard Products and Services Code (UNSPSC) classification. Once registered, the vendor will be notified (through e-mail and/or SMS) and to their inbox in Mer-link system officially noticed to participate every time there is a potential business opportunity with the government, according to the listed products and based on the related product classification.

Mer-link's organization holds an expert unit trained to ensure product correct classification and technical specifications. Every good or service is added and classified into Mer-link's Catalogue through this unit and all procurement procedures base their technical descriptions upon this catalogue. The principle behind the Catalogue's design is to standardize all products purchased by the government, ensuring quality in technical specifications as well as preventing bad technical interpretations and corruption practices. Another important principle is to establish a common language between private sector (vendors) and government procurement departments. The use of a unique catalogue has enhanced efficiency, reducing operation costs and processing time.

Some of the benefits that may be accountable to the use of the UNSPSC catalogue, is the enhancement of the logistics and supply chain management of public entities, reducing inventory levels through better management of information on available products. Additionally, it enables an accurate mechanism to compare prices of similar products and therefore speeding up the procurement selection and decision-making process. Thanks to the data collected and standardized within Mer-link's catalogue the country counts with detailed statistics and important business intelligence tools to feedback the national public procurement policy-making, and streamline organizations operation and general management strategy.

According to several vendor's opinion surveys, Mer-link's catalog facilitates sales functions, introduced online marketplace activities between private and public sectors, ensures the quality of product technical information, streamlines the introduction of new products to the public procurement market, facilitates the collection of sales data.

Within all of the stages, portrayed in Fig. 1, there are a number of key features to drive characteristics such as efficiency and productivity in the procurement process, through the use of technology. At the level of public procurement cycle in Costa Rica, the following image and related statements will provide a glimpse of Mer-link's model main features and how they constitute an innovative process.

1) Planning:

Single Vendor Registration also known as Register of Bidders:

Costa Rica's greatest weakness in terms of procurement before the implementation of Mer-link System was the fact the potential suppliers had to go to each government procurement department (300+institutions) and provide a series of requirements to be included and registered in the official supplier data base. In a study carried out by INCAE Business School ^[5], it was determined that the cost of these requirements amounted to USD \$2,000 per process.

Budget Management:

One of the general features of Mer-link's product classification is budget/expense code classification, this allows Mer-link to establish a seamless work flow between the procurement and the accounting process. Starting from the planning phase, Mer-link will interconnect with the institution's accounting or financial system confirming budget availability to start certain contracting procedure and follow on with the publication of the terms of reference.

Procurement Order/Request:

The Order Request is the final step of the planning phase. In the traditional model (paper-based) this used to be an e-mail or official letter from certain division within any public institution addressed to the procurement division director, officially requesting the need to buy any good or service.

This platform was designed to be used at the same time, by an institution such as big as ICE, whose organization accounts more than 45 working units and by a local government office or a public school's board, with very small and centralized organization. Depending on the institution the internal process could vary, and Mer-link's standard workflow should be able to fit one either working schemes. After Mer-link's modeling and standardization efforts, this phase was summed up into an electronic document, mainly a form, which is filled out by an assistant/analyst and approved and digitally signed by the division's chief or director. Depending on each institution's configuration Mer-link's flow will automatically submit this Order Request to the Procurement Department users to proceed accordingly. The mentioned form is currently the kick-off point of the current public e-procurement process and therefore of any procurement process e-record or transcript. The data filled in this e-form will feed later stages in the procurement cycle.

2) Selection:**e-Tendering, e-Bidding:**

Based on the data entered and submitted on the Procurement Order or Request, any user institution will be able to publish terms of reference (also known as RFP) and start a tendering process, for any contracting mechanism established on the Costa Rican procurement legal framework. Once the user published the terms of reference the system will generate a robust security mechanism based on PKI technology (using a unique encryption mechanism for each procurement process), with which, at the correct moment, the designated user will be able to open the chamber where electronic bids will be encrypted and stored. The system's functional design allows any bids to be signed at a personal, corporative level, and even at a joint bid or consortium level.

Depending on the goods or services, selected on the catalogue, Mer-link will shoot immediate notifications (through SMS or E-mail) to all potential vendors and the clock on the tendering procedure will start ticking. Any questions, remarks, complaints on the published RFP may be managed through the platform, making sure that physical visits or meetings between vendors and public officers are avoided.

In the same way as the previous phases, interested vendors may present their proposals. Companies will fill out a form responding to their compliance with all details and specs of the RFP. Through digitally signed e-documents, each vendor's bid will be encrypted, electronically submitted and locked up in a chamber, which will be available until the corresponding date and time selected to start the assessment and awarding phase. On the matching moment and with the key generated at the RFP publication phase the procurement officer in charge will be able to open the chamber and proceed with the assessment phase.

A key innovation aspect in this stage is that throughout Mer-link's portal publicity the Costa Rican Government has allowed the site's publicity to substitute the obligatory publication of public bidding proceedings in the local Gazette newspaper. This decision not only generates paper- and operation related efficiencies but also important savings in institution's printing expenses transferred to the National Gazette.

e-Bond or Collateral:

Another important value added to this online process is related to the Participation, Warranty & Performance Bond issuance. In the traditional paper-based model, companies had to visit an Insurance Company or a Bank, provide certain requirements and issue a paper-based bond, which they had to attach to their paper-bid. Nowadays, Mer-link has accomplished to connect nationally to all (15 institutions) Bond Issuing public and private entities, among which it may be mentioned; the National Insurance Institute, Costa Rican Bank, Scotiabank, Bansol, Promerica, Lafise. The interoperability has streamlined the warranty-related work flow not only for potential government supplier companies but also for public procurement departments which required a team (up to 5 resources) for bond management purposes. To this date, bonds

issued in relation with any procurement process in Mer-link are issued electronically by the corresponding entities and reflected automatically in the bidding process, once the bid is opened. The system will provide to the procurement departments the necessary tools to manage the warranty issuances, amounts, valid period, expiration and renewal dates.

Assessment/Evaluation and e-Contract:

Once the procurement analyst opens the bids, Mer-link will order them automatically according to the evaluation criterion previously defined by the public institution (on the RFP). For instance, if the evaluation criteria would be 100% based in the price, then Mer-link will display a table comparing all the received bids and will place the lowest price one in the first row and order the following ones according to the price.

The national e-procurement tool was designed in such a way that the institutions may select and define any kind of evaluation criteria or different variable combinations according to their specific needs (whether it is price, experience, quality certifications, cost effectiveness, energy efficiency, post-warranty). Mer-link will only provide important hints and efficiencies in the process however the procurement decision and responsibility will rely on public officer-users.

Following-up with the process, the officer in charge of the corresponding contracting process will check the received bids through the table generated automatically by Mer-link (ordered according to the established criterion). The officer may review that the procurement related conditions are covered and may forward the bids for an expert review. For example if the public institution is buying computers then the procurement analyst may review that the tenders eligibility. The procurement officer must confirm that tenders comply with basic conditions, such as stamps, participation warranty bond, to not have any debts regarding tax and social security payments. The procurement platform will issue a Bid Opening Minute where all acts related to this chamber opening and bid review proceeding will be recorded.

After the minute is issued, the procurement analyst in charge may forward the bids for technical review to a designated IT Department analyst who may check that the computers offered by the bidding companies comply with the requested specs. IT analyst will check and compare the proposals and provide his technical recommendation on the best option.

Once this internal workflow is completed, procurement analysts will be able to award and notify the best proposal. To make this selection official, procurement department may request to the selected vendor the payment of certain duties and online presentation of a performance bond, etc. And once the awarded company fulfills these steps, the public institution will issue an e-purchase order or e-contract (depending on the contract's amount and chosen mechanism). All approval levels within the workflow described in national legal framework to issue this contract (for example if the contract needs to be previously confirmed by the National Comptroller Department or by the highest level organ within an institution, such as Board of Directors or Procurement Commission) are all available features in this electronic tool. Given the fact there is no paper involved all these steps for internal or external approval are followed through using the system and e-signature features. The e-contract (or e-PO) will be issued by the institution and electronically submitted in an e-document to the selected vendor. This e-document will contain all legal responsibilities and rights between the parties and is as valid as a paper and manually signed one.

3) Contract Management/Execution:

e-Reception, e-Invoice, e-Payment:

From the moment the e-contract is signed by the parties and notified, the selected vendor should start working on the provision of the contracted goods or services. In this regard, Mer-link's e-procurement platform is being used in such way that the system connects with logistics and asset management systems, internal management systems allowing public entities to streamline their supply chain management. To follow-up with the previous example, the selected computer vendor will notify through Mer-link system the amount and characteristics of the computers to be delivered, according to the contract's specifications. Thanks to Mer-link's smart catalogue system and technical specifications tabs, the computers to be delivered may include important asset management features such as GTIN (Global Trade Item Number) identification or include inventory number plates. Once the vendor sent the information on the partial or total delivery of the products, warehousing public officers will be able to check with the system and crosscheck the correct delivery of goods according to agreed conditions. The warehousing staff will provide a partial reception, which will always be confirmed by technical report, which in this example will be issued by the IT department. The latter will be in charge of checking the conditions of the computers and finally approving in the system the correct delivery of the products. This process is similar on services and works, however due the nature of professional services and public works the partial and complete dispatch and reception confirmation is done through different kinds of supervision, however all variables are included in Mer-link's system functionality and therefore in the procurement record of every process.

Once the stakeholders confirm the reception, a final acceptance e-document will be issued and the vendor may proceed to request the payment. Although Costa Rican Tax System does not count yet with a general use of e-Invoice, as of 2014 e-

Invoice will be implemented for certain industrial and professional service sectors. At present, Mer-link's design includes the use of e-Invoice and also with a digitalized/scanned copy of the invoice that must be physically submitted to the institutions financial and accounting authorities. Once e-Invoice is 100% implemented, and the country issues the necessary regulation for its use, Mer-link has been already prepared for this step. Nowadays, the vendor will issue a payment request upon the Goods/Services Reception confirmation, and submit the original copy of the invoice to the institution. Once and also through a connection with Payment and Financial Systems, Mer-link is operated in such way that it will feed the accounting or financial system regarding that payment and through national inter-banking platform, known as SINPE, Mer-link will be able to issue the payment. This means, Mer-link system, through an inter-connection with SINPE, will deduct the money from the entity's account and deposit it in the one the vendor requested in a previous step. This process is most commonly used by local governments or small public entities who do not have a complex or online payment system to connect to and therefore for them Mer-link system has meant a big step not only to streamline procurement process but also for payment and accounting process. On the other hand, the connection between Mer-link and the accounting systems may work also the other way around, which means Mer-link will only feed the institution's accounting system that a payment must be made, with all the information the vendor has provided on the Payment request. Following this, the internal payment system will be in charge of transferring the related funds and report to Mer-link system that the payment was successfully made or not. Currently, big government institutions, such as ICE are using this latter procedure.

Contract Conclusion (Modification, Expansion):

The moment all contracted goods/services are delivered, paid and their warranty expires, the contract execution phase will be concluded. However, many contracts, especially in public works or complex objectives will undergo contract modifications, these changes may be caused and request by one party or by both parties. They may include scope expansions and therefore additional payments or just an extension on the agreed duration of the contract. All these changes on the original e-contract will undergo certain requirements, which are included in the Costa Rican legislation. In this regard, all contract modification's are included in Mer-link as an Appendix of the original e-Contract. This appendix is represented through the numeration series of the e-document, adding to any additional or expanded contracts, for example if the Original Contract Number is 123456789 the amended one will be No. 123456789-01.

e-Record:

As mentioned in previous sections, Mer-link's e-Record tracking feature is one of its most important characteristics, which highly account for public procurement transparency and accountability. In this regard, it is important to emphasize that the National e-Procurement platform keeps records in real time, of all actions related to the procurement procedures by using standard protocols to number and label each section of each phase of the procurement cycle. This enables that in any dispute or trial, lawyers or judges may always find and refer to certain information in the labeled sections or procedure stages. It is Mer-link's design pillars and part of its original vision to promote traceability and this can only be accomplished by handling one single record with all actions and related information and documents of each process.

Administrative Dispute, Penalty also known as Sanctions:

Although traditional procurement IT systems worldwide basically focus on supplier registration, catalogs, tendering, direct procurement, claims and endorsements which are also, they generally do not get involved in the issue of contract management and execution. Commonly known systems solely handle reception, final acceptance, supplier evaluation and payment.

In this regard, if all contract conditions were successfully and timely complied with, then the process will go directly to the vendor's performance evaluation and contract's closure. However, if any dispute regarding the contract's execution arises between the stakeholders then the dispute's processing - up from the coordination of a private hearing, internal resolution committee appointment and process resolution will be required. If this module was not integrated into the system's scope, then public institutions would have to be forced to open a parallel paper record to follow through the dispute resolution and penalty administrative process. This would highly prejudice the transparency level envisioned for the Costa Rican national procurement.

The fact that Mer-link handles all this process in a seamless way, enabling the corresponding authorities to handle every detail of the contract's process management in real time and process this complicated mechanism through an efficient IT tool has set an example towards real-time, 100% online, zero paper e-procurement process. This innovative module, which actually represents a subsystem within Mer-link's IT architecture has been successfully implemented into the tool's scope and is known in Spanish as "*Procedimiento Administrativo Sancionatorio*" or Sanctions/Penalty and Administrative Dispute Proceeding.

This added-value module includes in its scope all actions referred to dispute resolution and sanction or penalty application

towards a supplier or public officer who did not comply with public contracting regulations. The following are the specific features contained in the regulation (Public Administration Law and related ones) and therefore within Mer-link's functionalities:

- Absolute manifest nullity of a procurement procedure
- Prohibition or warning of a vendor or contractor
- Contract Resolution or termination
- Fine or penalty clause Application (towards the contractor who failed to comply with the contracting conditions and procurement regulations)
- Collection and Payment of Damage Costs to a contractor
- Performance, Participation, Compliance or Collateral bond execution

With this Contract Management module, public institutions in Costa Rica are able to handle the necessary administrative procedures electronically with a greater added value: the fact that whatever the final resolution of this process may be, the users will be able to affect in a smart and efficient way the procurement process. For example, Mer-link does not allow the contractor to request a reception or a payment of a contract that is undergoing an administrative dispute procedure and its final resolution was not issued. Additionally, this important sub-system within Mer-link's platform scope complies and follows all steps and procedural safeguards established by the applicable legislation, such as:

- **Administrative, Dispute Management Process Initiation:** The module allows the institution to develop the statements that constitute the preliminary report in which the alleged failure of the bidder / contractor is documented, detailing facts such as alleged damages caused to the institution, alleged unfulfilled standards, conditions or regulations and all related proof.
- **Appointment of the Dispute Resolution Organ:** Mer-link will provide special e-forms for the selection, recommendation and appointment of the team (whether is a group or individual) that will serve as referee in the process. This organ will be responsible for conducting a correct and efficient dispute resolution or sanction process. If any appointed party requires to be abstained from this process for any applicable reason (for example: conflict of interests), Mer-link's functionality will enable to select a new member for the organ.
- **Initial Act:** The system allows to hold the opening or imputation act where the bidder / contractor is individualized, and the alleged infringement is described in detail, the rights of the offeror / contractor detailing the / the ground (s) stated in law the alleged breach and proof thereof.
- **Bidder / Contractor Disclaimer/Evidence Presentation:** The module allows the contractor to carry out his defense, directly (personally) or through the appointment of a representative, who receives electronically the notice of the administrative procedure initiation, and invitation to present relevant disclaimers and evidences.
- **Final Act:** Once analyzed all related information by the appointed organ, the users will input the date on the decisions taken regarding the process and the system will communicate the final act to the contractor.
- **Appeal:** The module supports the presentation of legally valid appeals in an electronic form. These claims may be either against Initial Act or Final Act. Mer-link's intelligence will allow the contractor to request a two-tier appeal, according to the current national regulation. In the latter case, the appeal action will be transferred to two instances automatically, specifically in the case of motion for reversal with subsidiary appeal.
- **Private E-Record:** According to Costa Rican regulation on these kind of procedures. The record during the administrative and dispute resolution process is private to third parties. Only the parties involved will have access to it, however the content of the final act's resolution will become automatically available once it is officially published.

Innovation in Contract Management: Mer-link's case

Through this e-Procurement tool, institutions in Costa Rica and citizenry will have a complete electronic record available for public auditing and scrutiny. According to the Costa Rican legal framework, e-government and open government policies, this system will set an important milestone for the country's further public administration practices development towards important new trends which enhance citizen's direct participation and collaboration between government and civil society.

Mer-link is a national platform, it offers advanced and complex functionalities to all the users involved whether private sector vendors or public institution users. It not only automates the entire contracting but also provides an advanced service to its users. Beginning with the capacity to overcome physical barriers of space and time, this procurement IT tool allows a more transparent and efficient flow of information, and greater access to data and government accountability services. As part of its operation model, the system provides free training twice a week to vendors, as well as free e-learning courses that

may be downloaded from the portal site (www.mer-link.go.cr).

Mer-link as a successful government initiative has accomplished to establish a practical example of sustainable procurement. This statement is based on three important perspectives. First, the fact that government contracting is oriented towards an Economic perspective, enabling savings of a 12% through lower prices of products due to substantial cost reductions and higher participation promotion in public open contracts. Followed by a social vision, where Mer-link has ensured to promote and enable Small and Medium Enterprise participation by accomplishing a USD \$1,500/process^[9] reduction on bidding participation costs. Last but not least, this procurement initiative has followed an environmental vision, which included a paper-less design from scratch, preventing physical transportation and visits to public institutions and promoting through an ubiquitous online service, lower to none procurement related visits to institutions and therefore reduced transportation effects, lower fuel consumption and gas emissions.

In this regard, the platform's organization has accomplished an important growth during the last years. It was awarded in 2010 at national level as the most innovative science and technology based innovative initiative^[10]. In 2013, the system was granted a regional award that acknowledges excellence in e-government practices, the ExcelGob Awards^[11]. Recently being appointed as National e-Procurement System, it has projected potential operating savings of USD \$165^[9]. Currently available real-time statistics in Mer-link Portal report that it has more than 97,000 goods and services in its national catalogue, accounts 7,500 registered vendors, and has enabled contracting procedures for USD \$181 Million^[12].

Within government practices, Mer-link complies with basic conditions to carry out innovation. It transformed a process, which was hardly available to the citizens (due to space, time and paper barriers) to an online, cloud-based 24/7/365 available service. And it enabled to disseminate an important idea into a new context: Mer-link has made possible for the citizen to gain trust into public expenditure and management, through its real promotion of transparency, efficiency and procurement data democratization.

According to IDEO^[13] innovation can be defined as “the process of improving, adapting or developing a product, system or service to deliver better results and create value for people”. Upon the previous detailed explanation it may be confirmed that Mer-link's case, its scope and its service platform has accomplished to milestone a no-return development process within government procurement.

References

- [1] J. Poltronieri (2011): IV encuesta sobre corrupción en la función pública de Costa Rica. (http://www.cimpa.ucr.ac.cr/encuesta/Informe_de_la_encuesta_de_corrupcion_2011.pdf)
- [2] IDB-WB (2010): Public Expenditure and Financial Accountability Program Assessment (<http://www.pefa.org/en/assessment/cr-oct10-pfmpr-public-en>)
- [3] IDB-WB (2009): COSTA RICA, Informe sobre el Gasto Público: Hacia una mayor eficiencia en el gasto
- [4] IDB-OEA (2012): Integración del Sistema Nacional de Compras Públicas (http://www.hacienda.go.cr/docs/51dc72f8b02c7_Integracion_del_Sistema_Nacional_de_Compras_Public-DGABCA.pdf)
- [5] JC. Barahona, A.Elizondo, G. Jimenez (2009): Estrategia para la adopción, apropiación e implementación de un sistema de compras públicas ([http://www.gobiernofacil.go.cr/e-gob/gobiernodigital/Modernizacioncompraspublicas/documentoscompraspublicas/Estudios%20de%20Factibilidad/Estrategia para la implementacion sistema compras electronicas.pdf](http://www.gobiernofacil.go.cr/e-gob/gobiernodigital/Modernizacioncompraspublicas/documentoscompraspublicas/Estudios%20de%20Factibilidad/Estrategia_para_la_implementacion_sistema_compras_electronicas.pdf))
- [6] CGR - General Comptroller's Office Report (2012): Informe Nro. DFOE-IFR-IF-5-2012 Informe sobre las Iniciativas que impulsan el desarrollo del gobierno digital y de una sociedad basada en la información y el conocimiento en Costa Rica. (http://www.hacienda.go.cr/docs/51dc7283c011f_DFOEIFRIF52012-DGABCA.pdf)
- [7] CGR - General Comptroller General Information System (2013): Procurement Volume from Total National Procurement in colones and %, for 2013, per Institution. (http://cgrw01.cgr.go.cr/apex/f?p=307:25:0::NO:25:P25_ANIO:2013)
- [8] OECD (2013): Implementing the OECD Principles for Integrity in Public Procurement: Progress since 2008, OECD Public Governance Reviews, OECD Publishing. (<http://dx.doi.org/10.1787/9789264201385-en>)
- [9] eStrategia Publica (2014): Informe Final del Reloj del Ahorro de Costa Rica (<http://www.relojdelahorro-costarica.com/>)
- [10] C. Ruiz (2010) El Financiero Newspaper: Congreso CRInnva escogió 12 innovaciones más destacadas entre el 2006 y el 2012. (http://www.elfinancierocr.com/ef_archivo/2010/noviembre/07/tecnologia2580972.html) + (http://www.elfinancierocr.com/ef_archivo/2010/noviembre/07/Media/0000010708.pdf)
- [11] M. Vargas (2012) La Nación Newspaper: Mer-link ganó premio internacional a la mayor práctica de gobierno electrónico (http://www.nacion.com/archivo/Mer-Link-internacional-practica-gobierno-electronico_0_1307869271.html)
- [12] Mer-link (2014): Consulta Ciudadana, Estadística General (www.mer-link.go.cr)
- [13] T. Fox, H. Brewer (2011): Innovation in Government, Partnership for Public Service / Rockefeller Foundation / IDEO

Collaborative Public Procurement:

A Comparative Review of the Indian Position with International Practices on Pooled Procurement from Competition Law Perspectives

Sandeep Verma

Unique Identification Authority of India
3rd Floor, Tower II, Jeevan Bharti Building, Connaught Circus
New Delhi, India – 110001.
E-mail: sverma.ias@gmail.com

Abstract

Collaborative public procurement, and in particular pooled procurement, through the use of joint purchasing contracts or inter-agency framework agreements is now gaining wide acceptance amongst a number of important jurisdictions such as the United States and the EU. While such collaboration amongst distinct procuring entities may result in economic efficiencies under certain circumstances, co-operative purchasing amongst dominant market players can sometimes raise significant anti-trust and other competition concerns, especially when collaboration is enforced rather than voluntary, and when collaborating procuring entities operate in similar geographical markets. This paper contains a detailed exploration of important issues of intersection between public procurement rules on the one hand with competition law issues on the other, insofar as collaborative public procurement is concerned. It covers important aspects of relevant procurement rules and competition/ anti-trust guidance in the US, EU and China, comparing them with the Indian position in this regard; and concludes with suggestions for better design of public procurement rules that can potentially avoid identified competition/ anti-trust concerns with collaborative public procurement.

I. Introduction

Collaborative public procurement in its various forms, including pooling of procurement volumes by distinct procuring entities and by way of common framework agreements, is expressly permitted under procurement regulations in India; for instance, her rules on public procurement envisage the creation of a *Central Purchasing Organisation* to bring in rate contracts for common user items frequently needed in bulk by various Ministries/ Departments [1]. Pooled procurement has indeed been encouraged by the Government in a variety of cases for reasons of public interest; and recent instances include an attempt by public sector banks to jointly procure ATM services [2] and the ongoing joint industry tenders for ethanol procurement by Oil Marketing Companies (OMCs) for blending with retail petrol marketed by them [3]. Current proposals in India also include creation of a *Special Purpose Vehicle* for direct aviation fuel imports where the *Airports Authority of India*, OMCs and airlines will have equity participation [4] as well as a proposed joint venture company promoted by public sector oil companies for streamlining crude oil imports into India [5]. In fact, under certain situations, collaborative public procurement may perhaps be the only significant strategic tool available to developing countries, as producers from industrialised countries are known to operate as international cartels in markets of interest, with potential for considerable harm to consumers and producers in developing countries [6].

However, all possible forms of collaborative procurement may not be necessarily compliant with Indian competition laws [7]; and it is in this context that a quick study of international best practices and a comparative review of the Indian situation may be of value to various stakeholders such as public policy-makers, procurement entities, anti-trust regulators, end-consumers of public services, and of course, the affected suppliers as well. The analysis of the Indian situation in this paper has been undertaken from a competition law and case law perspective, and specifically excludes analysis from a competition policy perspective, as the *National Competition Policy 2011* is still in a draft form [8] and is yet to formally adopted by the Government of India.

Collaboration in public procurement implies the coming together of various purchasing entities, which may or may not be competitors in their respective markets of interest. For instance, government hospitals could combine their procurement volumes in order to obtain best price discounts for drugs or medical equipment [9], and electricity utilities could combine their strengths to drive hard bargains with other wholesale players in electricity markets [10]. In a different context, as in India, Oil Marketing Companies (OMCs) competing with each other in the retail

petroleum market could pursue joint buying of transportation services in order to encourage overall allocative efficiencies in transportation assets management [11].

Such contract collaboration can take both “hard” well as “soft” forms: the former *hard* category being cases where procurement qualities are clubbed together (“demand aggregation”) usually for the purposes of obtaining efficiency and better value for money, although requisite economies may not necessarily arise particularly in cases where inefficient purchasers (high credit risk purchasers) club their procurement with relatively inefficient purchasers [9]. Another variant of the former *hard* approach is framework agreements (rate contracts as they are known in India) for use by various procuring entities, where both technical specifications and prices could be negotiated and/ or finalised by a contract-setting authority, but individual sub-contracts or supply orders may be placed separately by each procuring entity, as in the United States, where a commonly-used framework agreements is an *Indefinite Delivery Indefinite Quantity* (IDIQ) contract (in this context, refer [12] for an exact definition of IDIQ contracts). The latter *soft* category includes cases such as mandatory common technical specifications or interoperability standards for equipment/ supplies as in India, where the *Ministry of Home Affairs* routinely issues standard technical specifications/ qualitative requirements for technical equipment procured by central armed forces under its jurisdiction [13]. However, standardisation *per se* can have a *de facto* adverse effect in terms of limiting suppliers or innovation under certain circumstances [14]. For reasons of focus and brevity, only the former category of *hard* collaborations is examined in this paper.

II. Institutional Arrangements for Collaborative Procurement

In terms of the possible institutional arrangements for joint purchasing, the available literature classifies them into two broad categories [15]: (i) *Permanent Collaborative/ Joint Procurement Organisations* where a central purchase organisation (CPO) is established by various procuring entities to provide a centralised procurement function, whose services could be financed through a small commission charged on all procurement actions; and (ii) *Collaborative agreements* between contracting authorities, without separate legal status, that come together on a one-time basis or permanently through an agreed model of participation, with a lead entity normally taking responsibility for contract-setting on behalf of all members.

Examples of the first category in the form of permanent organisations are the *Eastern Shires Purchasing Organisation* in the UK, owned by member local authorities, and the *Eco-Procurement Service of Vorarlberg* in Austria providing a centralised procurement service for 80 local authorities in the Region of Vorarlberg [15]; and examples in the USA of such permanent organisations include the *STARS Alliance LLC*—an association of seven nuclear utility operators that procures certain supplies/ services jointly on behalf of association members [16]. In Tanzania, the *Petroleum Importation Coordinator* (PIC) collects procurement requirements from *Oil Marketing Companies* (OMCs) and concludes and administers contracts with suppliers and between the PIC and OMCs [17].

As instances of the second category, permanent collaborative arrangements in the UK include the *London Contracts and Supplies Group* providing for coordinated procurement actions on behalf of the *Greater London Council*, the *Inner London Education Authority* and *London Boroughs* [18]. Such collaborative arrangements can also be *one-off*, such as the joint procurement of ATM services recently attempted by public sector banks in India, or the ongoing cases of joint industry tenders for ethanol procurement by Oil Marketing Companies in India, for blending with retail petrol marketed by them [2].

III. Effects of Collaborative Purchasing

Under certain circumstances, collaborative public procurement can have beneficial impacts in terms of lower prices [19], administrative cost savings and pooling of skills and expertise amongst various procuring entities [15], although as stated earlier, clubbing high credit risk purchasers with relatively inefficient purchasers may lead to higher procurement costs for those purchasers who were already more efficient than the rest of the group [9]. In addition, particularly in the European Union, collaborative public procurement is also being increasingly used as a convenient entry door for introducing sustainable procurement and standardising environmental demand [15], although frequent use may also result in creation of artificial entry barriers for non-domestic suppliers of competing products [20].

Perhaps a matter of greater concern with joint purchasing agreements is their potential to result in *buyers' cartels*, especially when large competitors come together with an illegitimate aim of using their high degree of buyer power to cause competitive harm to suppliers or for retaining excess profits without any pass-through to their end-consumers [21]. In addition, large buyers may also collaborate to abuse their monopsony (or *near-monopsony*)

power to depress the purchase of a product below competitive levels, or, at another end, buying group formation can become a convenient instrument/ front to facilitate collusion through downstream coordination amongst suppliers (for a more detailed analysis of theories of harm relating to joint buying, including monopsonies and bilateral monopolies, refer [22]).

IV. International Perspectives on Collaborative Public Procurement

Collaborative public procurement, either through joint buying by distinct procuring entities, or through *piggybacking* mechanisms such as framework agreements, falls within an interesting intersection of public procurement law and competition law. However, to the extent that public procurement marketplaces in advanced jurisdictions such as the United States have comparatively fewer public procurement entities that are expected to compete in commercial marketplaces, a cursory review of available literature seems to suggest that anti-competitive effects of collaborative public procurement have not received due attention in academic or regulatory documentation on the subject. A recent OECD/EU publication [23], however, clearly recognises *market concentration, uniformity & standardisation*, and *reduction in SME opportunities* as potential adverse effects of collaborative (centralised) procurement.

The United States' acquisition guidance for federal contracts does not specifically require a competition/ anti-trust law analysis, and even the European Commission's toolkits on joint public procurement do not contain any specific references to the otherwise rather extensive EC guidelines on horizontal co-operation agreements. Public procurement laws in these jurisdictions allow for collaborative procurement amongst procuring entities; and separately, specific government/ regulatory guidance is available that addresses joint purchasing agreements in general *amongst competitors*, without focusing on joint purchasing agreements *amongst government entities* as such. The following section discusses certain best practices in both procurement law and competition law guidance on collaborative procurement in some of these national jurisdictions.

a. Collaborative Public Procurement in the United States

The US Federal Acquisition Regulation (FAR) contains extensive guidance on a number of ways in which federal public procurement authorities may collaborate in respect of their procurement actions. As an important example, the FAR permits "inter-agency acquisition" as a permissible procedure by which an agency needing supplies or services (*requesting agency*) can obtain them through another federal government agency (*servicing agency*), either through: (i) *direct acquisitions*, where the requesting agency places an order *directly* against a servicing agency's contract; or (ii) *assisted acquisitions*, where a servicing agency and a requesting agency enter into an inter-agency agreement *pursuant to which* the servicing agency performs acquisition activities on behalf of the requesting agency, such as awarding a contract or issuing a task or delivery order [24]. Contractual arrangements that are most frequently used for inter-agency acquisitions are *IDIQ contracts*, using vehicles such as *GSA Schedules (Multiple Award Schedules/ Federal Supply Schedules)*, *GWACS* (Government-Wide Acquisition Contracts) and *Multi-Agency Contracts*. As mentioned earlier, the FAR does not appear to contain any specific requirements for addressing potential anti-trust implications of such contracting arrangements; although as a separate, unrelated matter, the FAR requires contract *unbundling* to be examined at the acquisition planning stage from a small business set-aside perspective [25].

Insofar as anti-trust issues are concerned, the Federal Trade Commission (FTC) and the Department of Justice (DoJ) issued extensive guidelines [26] in 2000 for collaboration amongst competitors. Under these guidelines, joint purchasing agreements, to the extent that they do not/ tend not to raise prices or reduce output are required to be addressed under the "Rule of Reason" and may not be *per se* illegal. Under these guidelines, the analytical framework for horizontal co-operation requires a close assessment of: (i) the nature of the relevant agreement, especially if it facilitates collusion; (ii) relevant markets affected by the collaboration, including goods markets, technology markets and innovation markets; (iii) market shares and market concentration; (iv) factors relevant to the ability and incentive of the participants and the collaboration to compete, for instance, exclusivity, control over assets, financial interests, control of the collaboration's competitively significant decision-making, likelihood of anti-competitive information-sharing, and duration of the collaboration; (v) entry requirements; (vi) identification of any pro-competitive benefits; and (vi) overall competitive effect. These Guidelines also establish safety zones for competitor collaborations in general at no more than twenty percent in relevant output market and thirty-five percent in the relevant input market in which competition may be affected [27].

In terms of executive/ regulatory guidance, the DoJ in a joint purchasing alliance case recently issued a business review letter [28], indicating that, *inter alia*, the following aspects could be important in a determination whether such horizontal cooperation agreements would be in violation of anti-trust law: (i) monitoring the buying group's

market shares in the input and output markets for compliance within permissible safety zones; (ii) whether the purchasing program imposes minimum purchasing requirements on association members; (iii) whether participation of members is equally available to all and is not limited by size, type or location of member; (iv) whether joint purchasing results in control/ stabilisation of prices, or is used to boycott suppliers; (v) whether competitively important information is shared between association members; and (vi) whether joint buying activity is independently handled and negotiated with suppliers [27, 29].

b. Collaborative Public Procurement in the European Union

As in the United States, framework agreements are a favoured contractual vehicle for collaborative procurement in the EU. More specifically, EU directives on public procurement allow the use of one agency's framework agreements by another [30] (including collaborative procurement by utilities [31]). In addition, procurement agencies are also allowed pooling through the process of national governments designating one or more *central procurement body(ies)* (CPBs) that could be exclusively mandated to procure certain goods and services for user departments. One such CPB in the UK is the *Government Procurement Service* (GPS) in the UK setup as a *trading fund* under its *Government Trading Funds Act of 1973*, and works on a *supplier commission* model. The GPS provides essentially three models of procurement services' delivery: (i) self service by buying organisations through frameworks and other contracting arrangements; (ii) assisted delivery such as spot buying and eAuctions; and (iii) end-to-end managed procurement services [23].

The EU does not appear to have specific procurement guidance addressing collaborative public purchasing from a competition law/ anti-trust law perspective. Collaborative public procurement in the EU may therefore need to satisfy the *normal* competition requirements placed by EC laws and guidance on co-operation agreements. In particular, joint purchasing agreements, if carried out as a full-function joint venture, need to comply with the *EU Merger Regulation* (EUMR) [21]; and other forms of horizontal cooperation need to comply with Article 101 of the *Treaty on the Functioning of the European Union* (TFEU) [32]. There is, however, one view [33] that the Court of Justice of the European Union (CJEU) has excluded the applicability of Art 101 to public contracting authorities in a clear line of case law; but this contrarian view assuming a complete exemption to procurement actions of public entities in the EU may not be entirely correct or complete, in that the cited judgments essentially related to appeals on abuse of dominant position in relation to Article 82/86 of the EC Treaty¹ generally, and not specifically in relation to Article 101 of the TFEU. Further, the two cited judgments in this contrarian view may need to be viewed in the specific context of the appeals where purchasing/ regulatory authority exercised by the public entities was not treated as "economic activity" inviting the application of competition law provisions of the EC Treaty on the grounds that: (i) purchasing activities of public procurement authorities were not disassociated with subsequent use of the subject of procurement (in the 2006 judgment); and (ii) the subsequent use happened to be of a purely social nature (in the 2006 judgment) or related to technical standardisation in exercise of pan-European regulatory powers (in the 2009 judgment). Since procurement actions of a large number of public entities in the EU may extend well beyond the specific scenarios averred to in the two judgment of the CJEU, for instant in the case of State-owned Enterprises (SoEs), it may not be entirely correct to presume that all procurement actions of public entities are exempted from operation of competition provisions of the EU Treaty. In any case, and at the very least, EU guidance on collaborative procurement under TFEU provides useful frameworks for conducting an anti-competition effects analysis that could guide meaningful policy and legal formulations internationally.

Inter alia, Article 101 of TFEU declares as prohibited any agreements that directly or indirectly fix purchase prices between covered undertakings, but allows qualified derogation in respect of any agreement or category(ies) of agreements. In pursuance of this authority, the EC has issued *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements* (EUHC Guidelines) [34]; and part 5 of these guidelines deals specifically with co-operative purchasing agreements.

¹ Article 82 of the EC Treaty states that any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Article 86 of the EC Treaty states that: (i) in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the EC Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89; and (ii) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the EC Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

The EUHC Guidelines recognise that joint purchasing could be pro-competitive in cases where they allow smaller rivals to achieve similar purchasing economies to larger competitors in the form of lower prices, but also caution about the complexities involved when dominant market operators enter into joint purchasing agreements [35]. These guidelines therefore require joint purchasing agreements to be analysed in terms of both horizontal and vertical elements: the horizontal arrangements between competitors purchasing jointly, and the vertical arrangements between the suppliers and the joint purchasing group, including, in some cases, the downstream arrangements between the purchasing group and its members. In addition, the EUHC Guidelines also require an examination of the purchasing markets (input markets) and the selling markets (output markets) in terms of geographical distribution and the collaborating parties' market positions.

In general, the guidelines indicate that competition harm would be less likely if the collaborating parties have a combined market share of not more than fifteen percent on both the purchasing market(s) and the selling market(s). If these "safe" harbours are breached, the guidelines then require a detailed examination of a number of issues under a "Rule of Reason" approach as follows: (i) whether the cooperating purchasers are active in different selling markets; (ii) whether commercial sensitive data is being collated by a joint purchasing agency which does not pass on information to its members [35]. Separately, the UK Office of Fair Trading has adopted a more benign approach to joint purchasing in a short-form opinion in 2010 on joint purchasing agreements, indicating that competitive harm would be unlikely where the collaborating parties have no downstream market power [36].

c. Collaborative Public Procurement in China

Centralised procurement is permitted under China's Government Procurement Law for items decided by Central/ Provincial governments [37], although the law by itself does not cover SoEs, implying thereby that various forms of collaborative procurement could, in fact, be practiced by SoEs in China, although detailed/ specific reports on the same are not available. A separate anti-monopoly law came into effect in China in 2008, and regulates monopolistic behavior and unfair competition possibly including government procurement in China, although, in practice, no intervention seems to have been noticed by administrative departments entrusted with competition compliance [38]. Article 13 of its anti-monopoly law prohibits five types of horizontal monopoly agreements: (i) price-fixing; (ii) production/ sales quantity restrictions; (iii) dividing sales/ procurement markets for raw materials; (iv) restrictive practices relating to procurement of new technologies/ equipment; and (v) restrictive practices on development of new technologies/ equipment. Price-fixing includes: (i) fixing or changing price levels of products; (ii) fixing or changing magnitude of price changes; (iii) fixing or changing fees or discounts that influence prices; (iv) applying an appointed price as the basis for transacting with a third party; (v) agreeing to apply a standard formula as the basis to calculate prices; and (vi) agreeing to a price that cannot be changed without the consent of competitors. Based on this limited guidance, it may be fair to presume that China prohibits most forms of joint purchasing under a *per se* rule, and in particular, the case of separate public entities arriving at identical procurement prices through collaborative procurement efforts.

d. Lessons from International Best Practices

A number of useful pointers can be safely drawn from a review of US and EU guidance on collaborative public procurement. Firstly, insofar as joint purchasing arrangements between competitors is concerned, the general inclination seems to be to adopt a "Rule of Reason" approach rather than a "per se" approach for analysing the competition effects, although certain countries such as South Africa, for instance, appear to treat joint purchasing as *per se* illegal [22]. The primary intention in these two major anti-trust jurisdictions to allow the survival of collaborative procurement seems to be to permit joint purchasing amongst *smaller* economic operators to enjoin the benefits of joint purchasing in terms of lower prices, and both US and EU therefore draw tolerance limits through *safe harbours* in input (buying) markets and output (selling) markets beyond which an analysis of competition effects is necessarily warranted.

An important and common area of concern in these two jurisdictions is the potential for sharing of commercially sensitive information between collaborating entities, where anti-trust guidance seems to suggest that maintaining an arms-length between collaborators may be necessary by routing collaborative purchases through a *separate/ independent* purchasing agency. Other important lessons, arising out of the US experience, relate essentially to: (i) whether participation in the joint purchasing arrangements by association members is voluntary—the anti-competitive effects being presumed to be much less if participation is voluntary rather than mandatory; and (ii) whether joint purchasing arrangements are used by collaborators for price stabilisation and/ or price control, without passing on economic benefits to their consumers—the anti-competitive effects being higher if the economic advantages of joint buying are retained by collaborators rather than being passed-through to end-consumers.

In regard to joint purchasing by public procurement entities that are not competing amongst themselves in commercial marketplaces, a common tendency under public procurement laws both in the US and the EU, is to permit or encourage such collaboration, although as stated earlier, the procurement guidance seems to avoid a specific discussion on potential competitive harm issues, rather than addressing them upfront from an anti-trust perspective. To that extent, while highlighting competition concerns with agglomerated buying, the procurement guidance in the two jurisdictions does not really attempt to distinguish collaborations between *hard-core government purchases vis-à-vis collaborations between public entities operating as dominant economic operators in commercial marketplaces*.

V. Collaborative Purchasing in India

The Government of India have allowed joint tenders by *Central Public Sector Enterprises* (CPSEs, internationally known as *State-owned Enterprises—SoEs*) in a few cases in the recent past, although cases of different government departments bundling their requirements appear to be absent. This appears to have been done sometimes through *plain administrative orders* by the concerned administrative Department (as in the case of joint tendering for ATMs by public sector banks), and sometimes through *policy decisions* of the Government (as in the case of ethanol procurement by OMCs), without citing any specific provision of *General Financial Rules 2005* (GFR-2005) or any other relevant/ applicable procurement rules of concerned entities or statutory authority of the Government. In order to appreciate the legal position better, it may therefore be worthwhile to examine the procurement rule position, as well as the competition law position, relating to joint purchasing agreements in India.

a. The Procurement Rule Position in India

While both *GFR-2005* as well as the *Manual for Policies and Procedures for Purchase of Goods* (“Manual”) issued thereunder are silent on collaborative purchases through one single contract issued by one procuring entity on behalf of a group, the *Manual* does contain an enabling provision for rate contracts (framework agreements), whereby a designated *Central Purchase Organisation* (CPO)² can bring in rate contracts for common user items frequently needed in bulk by various Ministries/ Departments [1]. Two important features of the provision are: (i) placement of supply orders by a user organisation against a rate contract established by a CPO is at the *option* of the user organisation; and (ii) the provision does not appear to allow for one user organisation to place supply orders against rate contracts established by *other* user organisations, but *only* against a rate contract established by a CPO. Separately, certain recent CVC instructions [39] that apply uniformly to government departmental purchases as well as purchases by CPSEs, to the extent that they cast aspersions only purchase orders placed by one government organisation/ PSE on another followed up by single source procurement without any “value-addition” in the process, could be interpreted to imply that *interagency contracting*—a key feature of some joint purchasing agreements—is perhaps also not really prohibited under the CVC guidance.

Read together, these two instructions issued independently by the Ministry of Finance and by the CVC appear to have a small area of divergence: as per CVC instructions, one government department/ CPSE can nominate another government department/ CPSE for undertaking its procurement activities so long as the order receiving government department/ PSE conducts its procurement in an open and competitive manner, presumably also through open and competitive framework agreements; while the Ministry of Finance guidance only allows a designated CPO to undertake procurement actions on behalf of a government department, without clarifying what rules are to be followed in respect of collaborative purchases between CPSEs.

b. The Competition Law Position in India

Under Indian law, insofar as horizontal co-operation is concerned, any agreement entered into between enterprises/ associations or any other enterprises, which, *inter alia*: (i) directly or indirectly determines purchase prices; (ii) limits or controls the production, supply, markets or technical development of services; (iii) shares markets by way of allocation of geographical area or number of customers; or (iv) directly or indirectly results in bid rigging or collusive bidding, shall be *presumed* to have an appreciable adverse effect on competition and shall be void, with the exception of agreements by way of joint ventures if such agreements increase efficiencies in acquisition of goods or services [40].

Under this rule, it would appear that collaborative procurement amongst competitors by way of joint purchasing agreements through a joint tender—an exercise that *inherently* involves the fixation of a common price of procurement of supplies by participating members—would be presumed to have an appreciable adverse effect on

² The *Directorate General of Supplies and Disposal* (DGS&D) under the Ministry of Commerce is one such CPO in India; see www.dgsnd.gov.in.

competition and shall be void under a *per se* approach (this legal position under Indian law is not different from the legal position for joint tenders in South Africa [22]. On the other hand, collaborative procurement through joint ventures, if such arrangements increase efficiency in acquisition of goods or services, shall not be presumed to have an appreciable adverse effect on competition, and would therefore need to be analysed for potential anti-competitive effects under a “Rule of Reason” approach [41]. Also, joint purchasing agreements that contain elements of exclusive supply agreements and “refusal to deal” agreements are void under Indian law if they can be shown, under a “Rule of Reason” approach, to result in appreciable adverse effect on competition in India.

In respect of vertical co-operation, the competition law in India prohibits, inter alia: (i) imposition of unfair or discriminatory conditions in purchase or sale of goods or services, or imposition of unfair or discriminatory price in purchase of goods or services; (ii) arrangements that result in denial of market access in any manner; and (iii) use of the dominant position of one enterprise or group to enter into another relevant market [41, 42]. Joint purchasing agreements that incorporate these elements would therefore be anti-competitive under a “Rule of Reason” approach; and to the extent that the competition law in India does not exclude public entities from its coverage, collaborative public procurement in India would also be subject to the aforesaid analysis on both horizontal and vertical co-operation aspects.

c. The Competition Case Law Position in India

There appears to be no case law in India dealing with collaborative public procurement across government departments *inter-se* from a competition law perspective. However, in the context of joint purchasing agreements between CPSEs that can be competitors in the commercial marketplace, majority opinion in the two cases [43, 44] that have been settled by the competition regulator in India—*Competition Commission of India*—on the subject thus far create a very different legal position, as compared to the strict position in law described in the preceding section. For instance, majority opinions in both these cases did not adopt a *per se* approach in analysing the anti-competitive effects of joint purchasing, and therefore closed both cases *without* specifically analysing the competition law aspects of either the joint tenders issued by the OMCs or the underlying government instructions regulating prices, purchases and supplies.

A review of these two cases of interest reveals the following case law conclusions for future guidance: (i) that joint purchasing by government departments/ CPSEs may not be reviewed by the competition regulator in India under the *per se* rule mandated by the competition law, but under a “Rule of Reason” analysis; (ii) that joint purchasing by government departments/ CPSEs may not be put to the prescribed mandatory tests by the competition regulator in India for abuse of dominance or for agreements-in-concert with potential appreciable adverse effects on competition, even though the competition law in India, by itself, does not allow any special or deferential treatment of co-operation agreements between public entities or government-owned commercial entities.

Interestingly, case law evolution on the subject seem to have suffered from a lack of timely action by competition regulators in India: the typical scenario has been a delay on part of the Competition Commission of India to intervene in joint tenders through timely investigations, or a general hesitance to grant injunctive relief to affected parties even though joint purchasing amongst economic operators appears to be illegal in India under the *per se* rule. This has invariably resulted in conclusion of contracts by the time a case is ripe for decision by the forum of first or the second appeal, by which time injunctive relief or final decisions of competition authorities are rendered redundant or infructuous [45].

d. The Comparative Situation in India, So Far

The strict legal situation in India on collaborative public procurement is more akin to the South African position, where joint tenders resulting in fixation of a common purchase price for supplies procured by competing entities would be deemed to be *per se* illegal. Other elements of competition law in India are more similar to the US and the EU guidance, in that aspects such as geographical distribution of buyer and seller markets, dominant positions of the buyers in the relevant markets, and arbitrary restrictions on supplier behavior, are all required to be analysed for an overall *anti-competitive effects* determination.

But the regulatory orders in the two cases dealt with so far, as stated earlier, have created an interesting situation because of the divergence between the competition law and the case law in India. The *India Glycols* case, for instance, probably contained a significant number of important tender design issues with potentially anti-competitive effects as commonly understood in academic literature on the subject, for instance: (i) dominance of buyers in both input markets as well as in output markets; (ii) consumer expectation of competition between the dominant buyers in the commercial market place (the downstream market); (iii) mandatory (involuntary) participation of dominant buyers in the scheme with pre-fixed purchasing commitments; (iv) sharing of

commercially sensitive information amongst the members of the buying group; (v) artificial geographical market segregation and similar unilateral restrictions imposed on suppliers during the contract finalisation process; (vi) denial of responses to tender queries by the purchasing entities unless such queries were *jointly* raised by suppliers; (vii) invitation of expressions of interest from suppliers without intimating in advance intended purchase prices or specific quantities to be allocated to each participant, and subsequent restrictions on future participation of any respondents who choose not to sign final contracts if the purchase prices unilaterally mandated or quantities unilaterally allocated by the OMCs were unacceptable to ethanol suppliers; and (viii) arbitrary and non-monitorable restrictions on use of transport assets by suppliers during return trips³.

VI. Recommendations and Conclusions

A comparative review of the Indian legal position and case law on collaborative procurement suggests that the time may perhaps be ripe for regulators to issue explicit guidance on joint purchasing agreements, on the same pattern as in the US and in the EU that have issued detailed, explicit guidance on joint purchasing agreements. This task could perhaps be undertaken jointly by the Ministry of Corporate Affairs and the Competition Commission of India; and may perhaps involve altering the legal position by allowing the application of a “Rule of Reason” approach rather than a *per se* approach for *anti-competitive effects* determination. In addition, insofar as collaborative procurement between government agencies or government-owned entities, there appears to be an emerging, definite need for clearer and more coherent instructions on the subject, as the existing guidance under procurement rules issued by the Ministry of Finance is far too limited to effectively address the important emerging issues in joint purchases by government departments/ CPSEs, and as stated earlier, may not always tally with the advisories independently issued by the CVC.

While joint purchasing by public entities can have beneficial effects in terms of lower procurement costs and other efficiencies that can be passed on directly to consumers of public services, or indirectly to citizens in the form of reduced public expenditure. At the same time, the design of underlying public policies and procurement processes for collaborative procurement would need to be undertaken with due diligence, as it is imperative for the cumulative scheme to stay clear of any adverse competition law concerns. A proper study and understanding of joint purchasing agreements is therefore important from strictly legal perspectives, as quite apart from liabilities of joint collaborators under the competition laws arising out of the collaborations being held to be anti-competitive, the collaborating entities could face additional legal consequences, since if the objective of a joint purchasing contract violates the relevant competition law, then the underlying agreement itself may be *void ab initio* in terms of the contracts law as applied in that particular jurisdiction; for instance, under Indian contract law, an agreement is *void ab initio* if it is made with an unlawful object [46].

Additional research into anti-competitive effects of joint purchasing in other BRICS countries, such as Brazil and South Africa, could also inform our understanding of *State-run* or *State-sponsored cartels*, similar to standardisation cartels in the EU that operate by getting the EC to impose health and environmental restrictions that discriminate against foreign bidders and foreign technologies, or *Military-Industrial cartels* in the US that survive because of, *inter alia*, extreme “Buy American” requirements and subjective methods of public procurement such as competitive negotiations [47]. In addition, a full and proper understanding of joint purchasing arrangements could also inform public policy formulation particularly in developing countries, with relatively poorer policy-making, accountability and oversight mechanisms, where joint purchasing could be a completely artificial cover for artificial government intervention, using its control over government entities and SOEs to cause undue benefits to private monopolistic/ oligopolistic suppliers.

³ These possibilities have been extrapolated by the author from a joint reading of the underlying purchasing framework on ethanol purchase by OMCs (<http://www.pib.nic.in/newsite/erelease.aspx?relid=89270>) and a subsequent joint EOI issued by OMCs, specifically, EOI No. Ethanol/ Industry/2012-2013 (copy available with author), presuming that similar tender design defects would have existed in the relevant joint EOI invitation as well. The identified potential competition design defects in the joint EOI listed earlier are *in addition to* other procurement design defects noticed in the EOI, for instance, the EOI under reference contained the following elements that could be problematic from a purely procurement rule perspective: (i) invitation of expressions of interest from suppliers without intimating in advance intended purchase prices or specific quantities to be allocated to each participant; (ii) non-specification of the pricing formula that would govern ethanol supplies upon changed specifications; (ii) non-specification of specific delivery schedules other than mentioning the total annual requirement per annum at various depots; (iii) restrictions on offerors to make any individual queries, presumably even genuine ones; (iv) seemingly contradictory clauses on supplier responsibility in the event of non-issue of movement permits by State Excise authorities; (v) prohibitions on sub-letting of the contract eventually awarded but permission to execute an irrevocable power of attorney to be executed by suppliers allowing *de facto* sub-letting of the supplier's performance obligations under contract; and (vi) permitting individual OMCs to recover pending dues/ penalties of other, unrelated contracts executed by a supplier with the same or any other OMC while receiving payments for supplies against the ethanol contract(s). In addition, the majority order in the *India Glycols* case notes that the *Cabinet Committee on Economic Affairs* is the *apex body for deciding the prices of commodities for procurement and supply by the Government of India*—a statement that is different from the procurement rule stipulation in India assigning this role specifically to designated *Central Purchase Organisations*—a problem that could get further compounded in view of the fact that procurement in the *India Glycols* case was not being undertaken by departments or offices of the Government of India, but by *government-owned enterprises* as distinct legal entities operating in commercial markets.

In the near future, an important constructive outcome of intensive research in this area could be useful in the context of international co-operation in cartel-prevention, as the present national or regional frameworks, for instance in the EU, appear to permit joint purchasing arrangements as long they cause competitive harm only to foreign economic entities [35]. The OECD has already taken initial steps for establishing international cooperation in cartel investigations [51]; and legal studies on collaborative public procurement, both from a procurement law as well as from a competition law perspective, could significantly inform this important emerging engagement. Of course, the biggest gainers in this process of alignment of public procurement rules with competition law issues could be developing countries themselves, as collaborative procurement is beginning to emerge as an important strategic tool of public policy in their efforts at containing domestic as well as international cartels that are active both in raw materials markets and in production markets, for the end-purposes of obtaining proper economic gains for consumers of public services and for their citizens.

References

- [1] Government of India (2006), *Manual of Policies and Procedures for Purchase of Goods*, ¶1.1.3(iii), p.4, http://finmin.nic.in/the_ministry/dept_expenditure/acts_codes/MPProc4ProGod.pdf.
- [2] Yahoo, *State Bank of India led state-run bank's consortium to install 40,000 ATMs by March 14*, <http://in.finance.yahoo.com/news/state-bank-india-led-state-120603813.html>.
- [3] Government of India, *PIB Press Release*, November 22 2012, <http://www.pib.nic.in/newsite/erelease.aspx?relid=89270>.
- [4] Business Standard, *AAI to create common infra for direct aviation fuel imports*, June 07 2013, http://www.business-standard.com/article/companies/aai-to-create-common-infra-for-direct-aviation-fuel-imports-113060600692_1.html.
- [5] The Hindu Business Line, *Panel moots joint venture of PSUs for smooth crude oil imports*, May 08 2013, <http://www.thehindubusinessline.com/companies/panel-moots-joint-venture-of-psus-for-smooth-crude-oil-imports/article4696154.ece>.
- [6] Levenstein, M., and Suslaw, V.Y. (2004), *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 Antitrust Law Journal No. 3, <http://www-personal.umich.edu/~maggie/ALJ.pdf>.
- [7] The Financial Express, *Ethanol Bid Process under CCI Scanner*, June 03 2013, <http://www.financialexpress.com/news/ethanol-bid-process-under-cci-scanner/1124070>.
- [8] Ministry of Corporate Affairs (2011), *Draft National Competition Policy 2011*, http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf.
- [9] Barbosa, K. and Fiuza, E. (2011), *Demand Aggregation and Credit Risk Effects in Pooled Procurement: Evidence from the Brazilian Public Purchases of Pharmaceuticals and Medical Supplies*, pp.8-9, <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/10009/TD%20299%20-%20C-Micro%2014%20-%20Klenio%20Barbosa%20e%20EduardoFiuza.pdf?sequence=1>.
- [10] *Florida Municipal Power Agency-Fact Sheet*, FMPA, <http://www.fmpa.com/index.php/about-us/fact-sheet>.
- [11] *Chapter II-Marketing Organisation Structure*, Report of the Standing Committee on Petroleum & Chemicals, ¶4.5, <http://164.100.24.208/ls/committeeR/Petro&Chem/23/2-4.html>.
- [12] Federal Acquisition Regulation, ¶16.504.
- [13] Ministry of Home Affairs, *Police Modernisation Division-Qualitative Requirements*, http://mha.nic.in/uniquepage.asp?Id_Pk=240.
- [14] Pappalardo, K. and Suzor, N. (2011), *Standardisation and Patent Ambush: Potential Liability under Australian Competition Law*, Competition and Consumer Law Journal, <http://nic.suzor.net/wp-content/uploads/2009/11/Pappalardo-Suzor-2011-Standardisation-and-patent-ambush-Potential-liability-under-Australian-competition-law-CCLJ.pdf>.
- [15] European Commission (2008), *Joint Procurement -Fact Sheet*, pp.4-5, http://ec.europa.eu/environment/gpp/pdf/toolkit/module1_factsheet_joint_procurement.pdf.
- [16] *STARS Alliance LLC*, http://www.starsalliance.com/about_us.asp.
- [17] *Functions of PICL*, www.picltz.com.

[18] *About LCSG*, <http://www.lcsg.org/site/about.htm>.

[19] Burnett, F. (2003), *Reducing Costs Through Regional Pooled Procurement*, Essential Drugs Monitor No. 32/2003; <http://apps.who.int/medicinedocs/en/d/Js4940e/4.html>.

[20] Brenton, P., Sheehy, J., and Vanvcauteren, M. (2000), *Technical Barriers to Trade in the European Union: Importance for Accession Countries*, CEPS Working Document No. 144, <http://www.ceps.eu/files/book/54.pdf>.

[21] Koponen, J. (2011), *Joint Purchasing Agreements-The EC's 2011 Horizontal Co-operation Guidelines*, [https://www.coleurope.eu/content/gclc/documents/J.%20Koponen%20-%20Joint%20purchasing%20agreements%20\(2\).pdf](https://www.coleurope.eu/content/gclc/documents/J.%20Koponen%20-%20Joint%20purchasing%20agreements%20(2).pdf).

[22] Fiandeiro, F., Choudhary, K. and Anderson, P. (2011), *The Assessment of Joint Purchasing: Can Too Much "Buying Power" Ever Be A Problem*, Journal of Economic and Financial Studies, pp.113-132, http://reference.sabinet.co.za/webx/access/electronic_journals/jefs/jefs_v4_si1_a2.pdf.

[23] SIGMA (2011), *Central Purchasing Bodies*, p.6, Brief 20 Public Procurement, <http://www.oecd.org/site/sigma/publicationsdocuments/48630136.pdf>.

[24] Chapter 11 of 165th *Contract Attorneys Handbook* (July 2012).

[25] FAR 2.101, read with FAR 7.107. See, also, §413, Pub. Law No. 105-135 and FAR 7.104(d) read with 15 USC §644(a) & (e).

[26] Federal Trade Commission & Department of Justice (2000), *Antitrust Guidelines for Collaborations Amongst Competitors*, <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

[27] Bigart, A., Fales, L.J., and Tenenbaum, J.S. (2013), *Managing Association Joint Purchasing Programs without Violating the Anti-Trust Laws: Lessons from a DOJ Business Review Letter*, <http://www.venable.com/managing-association-joint-purchasing-programs-without-violating-the-antitrust-laws-lessons-from-a-doj-business-review-letter-02-08-2013/>.

[28] Department of Justice (2013), *STARS Alliance LLC Second Business Review Request*, <http://www.justice.gov/atr/public/busreview/290492.htm>.

[29] Fales, L.J., and Bigart, A.E.(2013), *United States: Ten Practical Tips for Joint Purchasing without Violating the Antitrust Laws*, <http://www.venable.com/ten-practical-counseling-tips-for-joint-purchasing-without-violating-the-antitrust-laws-01-09-2013/>.

[30] Article 1(5) of EC Directive 2004/18/EC (the "Classical" Directive) for a definition of framework agreements under EU Law.

[31] Article 1(4) of EC Directive 2004/17/CE (the "Utilities" Directive) for a definition of framework agreements in the context of covered utilities.

[32] Consolidated version of TFEU is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

[33] Sanchez-Graells, A., *Email to Sandeep Verma dated October 11, 2013*, copy available with the author, citing: (i) *FENIN vs. Commission of the European Communities & Ors.*, CJEU Grand Chamber Judgment dated July 11, 2006, available online <http://curia.europa.eu/juris/document/document.jsf?text=&docid=56460&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=24590> and (ii) *SELEX Sistemi Integrati SpA vs. Commission of the European Communities & Eurocontrol*, CJEU Second Chamber Judgment dated March 26, 2009, available online <http://curia.europa.eu/juris/document/document.jsf?text=&docid=73630&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=24610>.

[34] European Commission (2011), *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

[35] Ashurst (2011), *Quickguides: Co-operation Agreements between Competitors*, ¶5, pp.4-5, http://www.ashurst.com/doc.aspx?id_Resource=4712.

[36] Office of Fair Trade (2010), *P&H/MAKRO Joint Purchasing Agreement*, http://www.oft.gov.uk/shared/oft/SFOs/SFO_on_Joint_Purchasing.pdf.

[37] Article 7, The Government Procurement Law of the People's Republic of China, Order of the President No. 68, June 29, 2002, available online http://english.gov.cn/laws/2005-10/08/content_75023.htm.

- [38] China (2012), *Written Contribution by China for Roundtable on Competition Policy and Public Procurement*, UNCTAD, available online http://unctad.org/meetings/en/Contribution/ciclp2012_RT_PP_China_en.pdf.
- [39] Central Vigilance Commission (2012), *Transparency in Works/ Purchase/ Consultancy Contracts Awarded on Nomination Basis—Reg.*, http://cvc.nic.in/181212_12122012.pdf.
- [40] §3(3) and its *Proviso*, Competition Act 2002 (Act No. 12 of 2003).
- [41] Competition Commission of India (2012), *Cartels*, <http://www.cci.gov.in/images/media/Advocacy/Cartels2012.pdf>.
- [42] Competition Commission of India (2012), *Abuse of Dominance*, <http://www.cci.gov.in/images/media/Advocacy/AOD2012.pdf>.
- [43] *India Glycols Ltd. vs. Indian Oil Corporation & Others*, Competition Commission of India Case No. 14/2012, Orders dated July 26, 2012, available online <http://www.cci.gov.in/May2011/OrderOfCommission/142012.pdf>.
- [44] *M/s Royal Energy Ltd. vs. M/s Indian Oil Corporation & Others*, Competition commission of India MRTP Case No. 1/28(C-97/2009/DGIR), Orders dated May 09, 2012, available online <http://www.cci.gov.in/May2011/OrderOfCommission/MRTP1-28main.pdf>.
- [45] *India Glycols Ltd. vs. Competition Commission of India & Ors.*, Competition Appellate Tribunal, IA 45/2013 in Appeal No. 25/2013, Orders dated November 12, 2013, available online http://compat.nic.in/upload/PDFs/novordersApp2013/12_11_13.pdf.
- [46] §2(g) read with §10 and §24, Indian Contract Act, 1872 (Act No. 9 of 1872).
- [47] Wikipedia, *State Cartel Theory*, http://en.wikipedia.org/wiki/State_cartel_theory.
- [50] Verma, S. (2013), *Too Big for the Recycle Bin: A Procurement Insight into the Latest USTR Report*, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2251199.
- [51] OECD (2012), *Policy Roundtables: Improving International Co-operation in Cartel Investigations*, <http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf>.

CONTRACT MANAGEMENT ACCORDING TO THE PUBLIC PROCUREMENT LAW OF KOSOVO

Mr. Safet HOXHA, President of the Public Procurement Regulatory
Commission–Kosovo

Mr. Ilaz DULI, Board Member of the Public Procurement Regulatory
Commission–Kosovo

ABSTRACT

Contract management is one of the most important stages in a procurement process. The applicable Public Procurement Law of Kosovo No. 04/L-042 dedicates a whole separate chapter to contract management stage. In order to successfully conduct a procurement process, the law requires that each Contracting Authority, after signing the contract and prior to its implementation, should prepare a Contract Management Plan. This plan should be prepared and signed by the Project Manager of Contracting Authority and Project Manager of Economic Operator, and covers in detail all the steps that are related to the implementation of the Contract up to its completion. Having in mind that the Public Procurement Law of Kosovo is one of the first such laws in the Western Balkan countries that covers contract management, it would be very important to elaborate in this paper the issue of contract management, as well as impact of this stage on the successful implementation of projects in the area of public procurement.

INTRODUCTION

Awarding the contract, as well as its signing by the contracting parties is not the final objective of a procurement activity. The final objective of a procurement activity is successful implementation of the contract in all its aspects, according to terms and conditions prescribed in the contract, as well as achievement of best possible results in accordance to such contract. For a successful completion of a contract, it is required to manage the implementation of that contract. Managing the contract implementation includes several steps that should be undertaken together by the Contracting Authority and selected Economic Operator, with the aim to achieve objectives of the Contract.ⁱ When a contracting authority signs a contract with an economic operator, such a contract should be managed up to its full completion. Contracts are often complicated and may involve many people, may take a lot of time or may last longer, and may consume extensive resources; therefore, it is essential that they are properly managed.

Public Procurement Law of Kosovo No. 04/L-042 is one of the first procurement laws in the Western Balkan countries, which covers the contract management part.ⁱⁱ Having a separate chapter in the procurement law that deals with contract management activities, from the moment a contract is

signed all the way to its completion, may be considered as a positive aspect of this law. Bearing in mind that the procurement law covers only superficially the contract management stage, this issue is regulated in more details with secondary legislation on public procurement in Kosovo, i.e. with Operational Guidelines for Public Procurement.ⁱⁱⁱ Once they have signed the contract, contracting authorities are required to develop a detailed plan defining how the contract is going to be implemented. This plan should include all organizational, economic, technical, and legal aspects of contract management, taking into account every situation that may be created and respective solutions up to the final completion of the Contract.^{iv}

Although the Law on Public Procurement does not define strictly if the Department of Procurement is responsible for Contract Management, the Law however, contains provisions requiring from contracting authorities to include a section related to Contract Management when they prepare procurement activities.^v Although according to legal provisions, and based on the best international practices and other reasons, the Procurement Officer who performs the procurement activity cannot also be the person who manages the contract due to conflict of interest, and despite the fact that the Law on Public Procurement contains specific provisions which provide that the Public Procurement Regulatory Commission should supervise contract management activities and produce standards forms to that end, the Procurement Department continues to be responsible for supervising Contract Management activities.

Contract Management is the application of knowledge, tools and techniques in activities to complete the contract and to fulfil the forecasted contract terms and conditions.^{vi} This process is implemented by applying and integrating it in the project implementation process, from the commencement of procurement activity, through planning, implementation, monitoring and controlling all the way to the completion of procurement activity. Thus, Project Management process includes all the above mentioned stages and not only managing the contract execution, as the latter has to do with responsibilities and authorizations of Project Manager, who is responsible person for meeting the objectives of the Contract.

Contracting is a continuous concern of all contracting authorities. The increased public demand for greater accountability and efficiency in managing public funds and in conducting more qualitative procurement, based on improved cost-benefit ratios, has challenged the traditional ways of governance striving to achieve tangible results in public management. A result-based contract requires a new approach of its management. Managing a contract in a genuine way and achieving the expected results means continuous increase of management skills, i.e. accountability and efficiency of public administration. Therefore, procurement officers should understand that contracts and relations with economic operators should be managed and this should be done by submitting a request to contracting authorities to continue management process. The role of public procurement officer is to

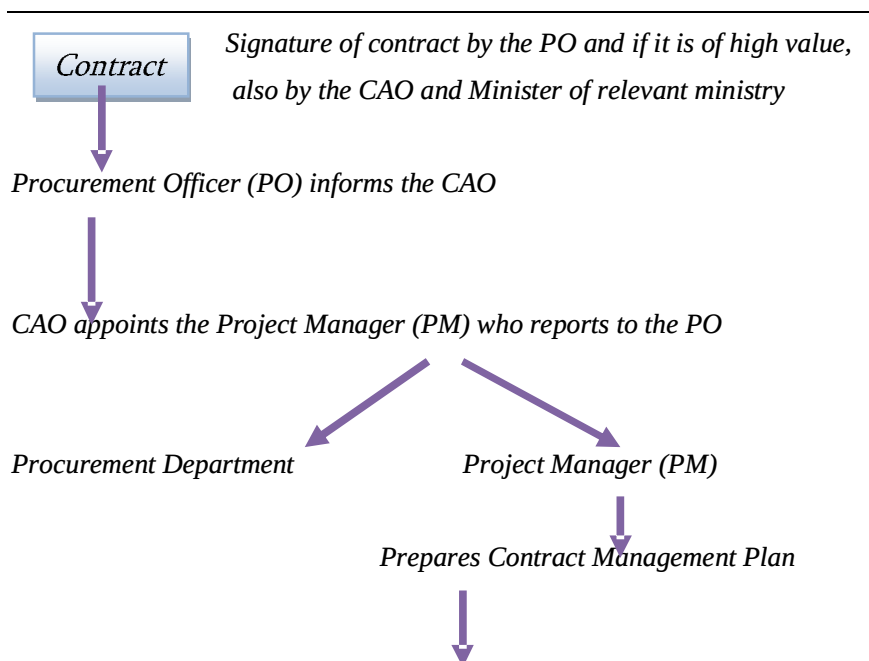
request from the Contracting Authority to manage the contract signed by the procurement department and to supervise if such process is conducted in line with legal requirements. The responsibility of procurement manager under the Kosovo Public Procurement Law is more focused on verification of what contract management officials say rather than on direct verification of [contract management] statements. Of course, this in no way releases the procurement officers from the reporting responsibility if he/she is in any way informed that there are fraudulent reports or contradicting information.

According to the Operational Guidelines for Public Procurement in Kosovo, after a Contract has been signed by both parties the Procurement Officer shall inform the Chief Administrative Officer,^{vii} and the CAO shall, appoint in writing, a Project Manager responsible for the management of the specific contract and for informing the Procurement Officer.^{viii}

The Procurement Officer shall inform the nominated Project Manager about his appointment and shall distribute internally in the organisation a copy of the signed contract to the:

1. Originating Requesting Unit (which has initiated procurement activity)
2. Finance Department
3. Project Manager who is responsible for managing the specific contract

The scheme of contract management steps from the moment of signing the contract to its completion would look as follows:



PM & EO sign the Contract Management Plan



PO issues to the EO:

*Notification on initiation of contract
implementation*

*for Works, for services, and if foreseen by
the contract, Purchase Order for supplies*

Activities representing steps after the signing of contract include:

- Checking receipts;
- Supply;
- Comparing goods with requests;
- Requesting documents from the economic operator
- Listing quality problems;
- Returning items that do not meet standards;
- Controlling the quality of invoices;
- Monitoring the execution of payments;
- Notification of Procurement Manager for alteration or termination of the Contract.

After the contract has been distributed, contract management, except the capacity to amend or terminate, shall pass from the Procurement Department to the Project Manager. Upon receipt of the contract, the Project Manager shall prepare a Contract Management Plan using the standard form adopted by Public Procurement Regulatory Commission.^{ix} The Contract Management Plan shall be prepared for all contracts, except for minimal value contracts.

The contract management plan shall be prepared before the initiation of the implementation of the contract and shall be agreed between the parties of the contract. This shall be documented with the signatures of both parties, respectively the Project Manager and the Economic Operator.^x The Project Manager, within 2 working days, shall forward a copy of the signed contract management plan to the procurement department. After the Procurement Officer receives the signed contract management plan the Procurement Officer shall issue to the Economic Operator:

- The Letter for commencement, in case of a work contract;
- The Letter of notification letter, in case of a service contract;
- The Purchase Order, in case of a supply contract.

Procurement Officer will give to the Project Manager a copy of the document – letter for commencement of work, letter of notification or Purchase Order which shall become integral part of the contract. In case of public framework contract or longer term agreement, Procurement Officer shall issue the Purchase Order each time the need arises and the Project Manager takes over after receiving the copy of Purchase Order. Whenever the project manager has reservations or difficulties with terms and conditions of the contract, they shall be discussed and resolved with procurement department.

Project Manager shall report to the Department of Procurement:

- Any departure from the terms and conditions of the contract;
- Any alteration to conditions of the contract, either before or during the course of implementation, that in effect could have impacted the evaluation and rankings of tenders and the selection of economic operator.

Chief Administrative Officer shall appoint a member of staff from the Requesting Unit, with appropriate skills and experience, as Project Manager. When appropriate, Chief Administrative Officer may appoint a staff member from another department as Project Manager. A contract of large value or which is complex or forms part of a larger project may be assigned to a Contract Management Team, who shall have the same responsibilities as a Project Manager. A contract may be managed by a body or person external to the Contracting Authority, provided that Requesting Unit supervises the external Project Manager. The appointment of the external body or person shall be done using the appropriate procurement procedure services.

Project Manager shall have the following duties and responsibilities:

- Manage the obligations and duties of the Contracting Authority specified in the contract;
- Ensure that the economic operator performs the contract in accordance with terms and conditions specified in the contract;
- Ensure that the economic operator meets all performance or delivery obligations in accordance with the terms and conditions of the contract;
- Ensure that the economic operator submits all required documentation in accordance with terms and conditions of the contract;
- Ensure that the contracting authority meets all payment and other obligations in accordance with terms and conditions of the contract;

- Ensure that there is adequate cost, quality and time control where appropriate;
- Ensure that all contract obligations are completed prior to closure of the contract file;
- Ensure that all contract management records are kept and archived as required;
- Issue any required variations or change orders in accordance with terms and conditions of the contract;
- Provide full details of a required contract amendment to the procurement department or to obtain the approval;
- Manage handover or acceptance procedure;
- Provide full details of any proposed termination of a contract to the procurement department;
- Submit reports on the progress or completion of a contract as required by the procurement department or Chief Administrative Office.

An amendment to a contract refers to a change in terms and conditions of an awarded contract. Where contract is amended in order to change original terms and conditions, the amendment of to the contract shall be prepared by the procurement department.

Contract amendment shall not be issued to the economic operator prior to:

- Obtaining approval of the Chief Administrative Officer;
- Commitment of the full amount funds of the amended contract price.

Contract amendment for additional quantities of same items shall use the same or lower unit price as in the original contract. No contract amendment shall increase the total contract price by more than 10% of the original contract price.^{xi}

Where project manager believes that a contract should be terminated, the project manager shall submit a recommendation for termination to the procurement department.

A recommendation for contract termination should include:

- The name of economic operator and the procurement reference number;
- The reasons for the termination;
- The actions taken to avoid termination;
- The contractual grounds for termination;
- The costs, if any, resulting from the termination;
- Any other relevant information.

No contract shall be terminated prior to obtaining the approval of the procurement department. Where a contract is terminated, the procurement department shall inform the economic operator involved of the reasons for termination and shall undertake immediate steps in accordance with the conditions of the contract.

Summary of contract management records

Contract management shall establish and maintain a summary contract management record in respect of each procurement procedure containing the following:

- Signed contract document, including any signed contract amendments;
- Copy of the contract management plan;
- Any variations or change orders issued under the contract;
- Contract documents related to the fulfilment of contract obligations, in particular bank securities and payment guarantees;
- Minutes of any meetings related to contract management, including contract progress or review meetings;
- Delivery documents evidencing delivery of supplies or completion certificate related to a contracts for goods, services or works;
- Copy of all invoices for works, services or supplies, including work papers verifying the accuracy of payments claimed and details of actual payments authorized by the project manager;
- Copy of payment worksheets evidencing management of all payments made;
- Copy of any claims made by the project manager on behalf of contracting authority in respect of warranty, no-warranty, short supply, damage or other claims upon provider.

According to the Law on Public Procurement in Kosovo, the Public Procurement Regulatory Commission is responsible to monitor Contract Management.^{xii} Contract Management starts when the contract is signed and goes on until after the expiry of guarantees and warranties. Public Procurement Regulatory Commission shall monitor if the contract has been implemented according to the conditions of the contract. A contract defines the objective of the contract, the scope, specification and the responsibilities of the contracting authorities and the bidder. It binds the Contracting Authority and Bidder to be committed to the contract and their respective obligations.

Public Procurement Regulatory Commission shall mainly focus on facts whether:

- The Contract was performed according to the obligations, the right quality and right quantity and at correct delivery time;
- Signed certifications had been issued by the project manager for handovers;

- If handovers not in time, whether the liquidated damages had been imposed;
- The contract was terminated and performance security confiscated, if the liquidated damages imposed reached the maximum limit allowed for liquidated damages;
- Performance security had been furnished, if applicable;
- Advance security had been furnished, if applicable;
- Insurance policy had been submitted, if applicable;
- Guarantee for the defects liability period had been furnished, if applicable;
- Payments were done in due time.

In order to eliminate the conflict of interest in conducting the procurement process, the legislation on public procurement in Kosovo also provides for the separation of duties:^{xiii}

Separation of duties means that the authority of a person(s) to approve and sign approval in one area of responsibility does not also include those of another area of responsibility. The specialist disciplines of contract preparations, contract implementation and payments must be kept as separate activities with separate signatory approvals. The Chief Financial Officer, the Procurement officer and the receiving unit officer may not sign any documentation outside their area of specialization.

Under the separation of duties a department may only sign a document originating from inside of their own department. No department is allowed to approve a document from the other department.

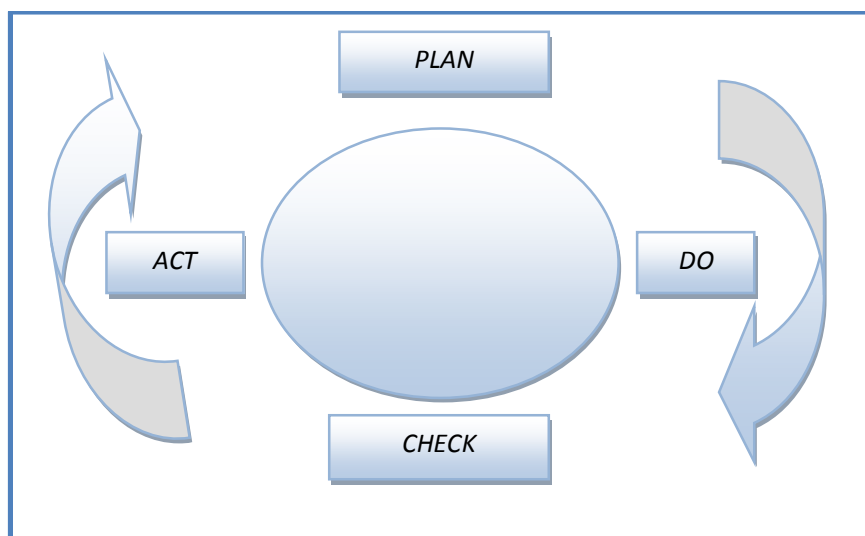
The separation of duties principles are as follows and give authority only to the following persons (or designated deputy of that department) in the management of all procurement and contract activities carried out in the name of the Contracting Authority.

1. The Procurement Officer shall sign a Purchase Order / Contract, but is forbidden to sign for the receipt of the goods, items installed, completion of a Project, phased handovers, or the payment of an Invoice;
2. The Chief Financial Officer shall sign the payment of an Invoice, or their associated documents, but is forbidden to sign for the receipt of the goods, items installed, completion of a Project, phased handovers, or the Purchase Order / Contract;
3. The Receiving unit, project manager, Engineer, Consultant shall sign for the receipt of the goods, items installed, Quality Standards, completion of a Project , phased handovers, but not the payment of an Invoice, or the Purchase Order /Contract;

4. A person from a department who prepared the Specification or determined Quality Standards, or prepared Drawings, cannot sign for any of the articles 1, 2 or 3 above, nor may participate as an evaluation committee member;

* * *

Key element in the process of successful contract management is for the contracting authority to plan, to do, to check and to act. This cycle – Plan, Do, Check, Act is based on the theory of Edward Deming^{xiv}, who spent considerable time advising the Japanese industry on how manage the overall quality. The diagram below summarizes the above mentioned concept;



In public procurement terminology the ‘Planning’ phase according to Deming’s Cycle refers to the phase prior to contract award, whereas “Doing” refers to activities of economic operator during the entire duration of contract life cycle. ‘Checking’ phase refers to checking done in order to monitor the performance, while ‘Acting’ refers to the necessary activities to ensure that everything has moved in the desired direction. Many procurement officers are very careful during the ‘Planning’ phase, but then they allow the Economic Operator to implement the Contract – the ‘Do’ phase, while at the end they forget to check the contract execution – the ‘Check’ phase and undertake actions during the ‘Act’ phase. Therefore, the effective contract management is the only way possible to successfully complete a Contract, that is, to complete the respective procurement activity. The management of the Contract should be done by coordinating actions between procurement officers and other actors of Contracting Authority by working proactively

with people from the economic operator in order to implement the contract in accordance with the agreed specifications.

* * *

Every contracting authority after signing the contract should monitor if goods, services or works that are being provided by the economic operator are in compliance with required specifications.

This means having the possibility to check two things

a) Whether what has been requested is procured:

- Whether goods are as described;
- Whether services are at the required level;
- Whether works are performed as envisaged;

b) Whether costs of claim are higher than then those forecasted;

Good contract management by the Contracting Authority may be done if preliminary stages of procurement process until the signing of contract were completed properly.

- If you do not state clearly what do you want, do not be surprised if you do not receive what you expected;
- A good contract defines precisely what you want, when it should be provided, how much should be paid, and other issues;
- Determine procedures to ensure compliance, define risk for unforeseen events and create procedures to address with them;

The Procurement Officer who conducts the procurement, because of good practice and for legal reasons shall not be the person that will manage the Contract. Every Procurement Officer should make sure that the Contract should include everything that is needed.

Properly prepared contracts should include:

- Clear definition of what should be provided and criteria that should be met;
- Level of services or standard of fulfilment according to the contract;
- Means for measuring fulfilment of contract compared to agreed standard;
- Mechanisms for determining the price including specific payments, as required;
- Strategy of acceptance or testing plan;
- Clarity related to ownership over assets and intellectual property;

- Billing agreements;
- Agreed option for termination;
- Locations where goods/ services should be delivered;
- Agreements regulating issues of health and safety, sustainability, equality and environment management,
- Agreements regulating subcontractors.

In addition, the more complicated contracts should also include:

- A mechanism for management of default;
- A clear separation of risks between the parties;
- A plan that covers the implementation, transition and commencement;
- Procedures for scaling and dispute resolution;
- The communication channels, usually in three levels:
 - a) Operational (end user/technical support staff),
 - b) Business (contract manager and manager for relations in both sides),
 - c) Strategic (senior management/ board of directors);

- Clear statement of responsibilities of contract manager;

In order for a contract to be fulfilled fairly, we should take into account:

- To put the right persons to manage the contract;
- A proper management of every stage;
- To monitor the attendance of personnel;
- To establish precise measuring criteria;
- To stimulate contractors for fulfilling the contract;
- To link the payment with the fulfilment of contract.

Contracting authority/ procurement officer should define provisions in the contract so that everybody would understand:

- Who is responsible for data collection and reporting on availability and fulfilment;
- Who is responsible for maintaining detailed data on fulfilment;
- Who is responsible for invoicing, payments, and deduction of earlier payments;
- Who is responsible for poor fulfilment;
- Who is responsible for rationality of time
- Who is responsible for comparing the contracted and invoiced prices?

Making payments to economic operators

Making payments according to the contract reflects the process of making payments to economic operators for goods, works and services they provided to the Contracting Authority. Department of Finance of Contracting Authority should verify all invoices and delivery notes before allowing the payment and should see whether invoices contain all the required information in order to make the payment.

The minimum required information that a document for payment should contain are:

- Invoice number and date;
- VAT number;
- Economic Operator's contracts and reference points;
- The name and address of contracting authority;
- Description of goods, works or services for which the invoice is made;
- Dates and time of service provision;
- The invoiced amount.

Invoices, delivery notes, situations, and other documents are fully standardized. They contain basic elements reflecting the payment claims such as, EO's identification data, references for tax purposes, description, value, deadline for payment, and other details.

In Kosovo's practice, the method and form for paying the VAT is defined with the Law on VAT. In every invoice, EO is required to write its VAT number and fiscal number, through which it is identified in the Tax Administration. The content of tax invoice is regulated with the Law on VAT,^{xv} and contains the following elements:

- VAT registration number and fiscal number of the taxable person under which goods, works or services are provided;
- VAT registration number and fiscal number of economic operator, if he is liable to pay VAT on goods, works or services provided;

Whereas those who are not VAT filers are required to issue a written statement stating they are not subject to VAT.

Completion of Contract

The objective of final stage of contract is to ensure that the contracting authority is satisfied with supply of procured goods, works or services. In the final concluding stage all the steps of procurement process will be reviewed starting from the first step – procurement planning, up to the completion of contract. A contract may be considered completed when the above described physical labour is done, or when goods are supplied. The real end of a contract is the end of a guarantee or of a defect liability period. However,

there are different stages that should be completed before arriving to the full completion of contract.

Completion of the contract is the activity when one of the steps considered as the guarantee period or retention of money or defects liability period is applied in respective procurement processes as below:

- Supply contracts end after the end of guarantee period;
- A work contract ends after the end of the period for retention of money and defect liability period;
- A service contract ends after the ending of defects liability period

These steps for completion of contract are not mentioned in the Law on Public Procurement in Kosovo No. 04/L-042, nor in the earlier laws, but they have been addressed in the secondary legislation for public procurement, as well as in the tender dossier.

Defects Liability Period

Defects Liability Period is closely linked to the complete implementation of terms of the contract, respectively, with the fulfilment of agreement for supply of goods, performing works or providing services under the requirements defined in the contract.

The work contract and also the service contract, as part of tender dossier, foresee all these details thus regulating the relations between parties up to the final completion of works and services. Some sections of these documents contain all final respective obligations leading to formal ending of the contract, covering risks such as:

- Remedying the defects in time and according to existing standards;
- Responsibility and safety at the site for workers and adjacent property;

Whereas these articles in both these respective documents also address the mutual actions of parties in their order and time to remedy all defects in the remaining guarantee period.

The contractor shall ensure that all works related to the correction of defects during the completion of works shall be performed in time and in accordance with the existing standards, practices, methods and procedures provided for in the contract. From the Starting Date until the Defects Correction Certificate has been issued, the risks of personal injury, death, and loss of or damage to property (including, without limitation, the works, plant, materials, and equipment) are Contractor's risks.

Completion and taking-over certificate

When all works have been completed and have passed any Test on Completion prescribed by the Contract, the contractor shall give a notice to that effect to the Project Manager, by a written undertaking to finish with due

expedition any outstanding work during the Defects Liability Period. Such notice and undertaking shall be deemed to be a request by the Contractor for the Project Manager to issue a Taking-Over Certificate in respect of the Works.

Within 21 days of the date of delivery of such notice the Project Manager shall either issue to the Contractor a Taking-Over Certificate, stating the date on which, in his opinion, the works were substantially completed or give instructions specifying all the work which is required to be done by the Contractor before the issue of such Certificate. The Contractor shall be entitled to receive such Taking-Over Certificate within 21 days of completion, to the satisfaction of the Project manager, of the works so specified and remedying any defects so notified. The Contracting Authority shall take over the site and the works within seven days of the Project Manager's issuing of a certificate of completion.

Whenever appropriate, a final account may be issued. A typical contract requirement that would describe the issuance of a final account may be as follows:

“Final Account will be issued by the Contracting Authority at the end of Damage Liability Period and will be binding for both parties and will provide final evidence that the work has been completed to the satisfaction of Contracting Authority and in accordance with the Contract.” The account confirms final completion of the project.

Formal Ending of Contract

Final activities of Procurement Cycle are concluded with formal taking-over of the supply, service or works. This stage is addressed in detail in the secondary legislation on procurement, respectively, in the Tender Dossier.

These include activities for quality control of supplies, works or services, which apart from their physical verification during the taking-over, are also conducted through inspection and tests which usually are supplier's obligation. Of course all these activities are formalized with the issuance of relevant documents such as work acceptance certificate, guarantee period certificate, final accounts, payment certificates, etc. Here, also are defined those who are responsible for the activities provided in the Contract, as well as some legal deadlines for their implementation.

NOTES

- ⁱ DULI, Ilaz Mr.Sc. "Public Procurement Phases", Published by "BPC-Balkan Procurement Consultancy", June 2012, Prishtina, page 4.
- ⁱⁱ Law on Public Procurement in Kosovo No. 04/L-042; <http://krpp.rks-gov.net>, Part V - Article 81.
- ⁱⁱⁱ <http://krpp.rks-gov.net>; Secondary Legislation.
- ^{iv} Mr. Sc. DULI. Ilaz, "Public Procurement Reforms in Kosovo – The First Decade", Publisher: "BPC-Balkan Procurement Consultancy", July 2011, Prishtina, page 136.
- ^v Law on Public Procurement of Kosovo No. 04/L-042; Article 81.
- ^{vi} <http://krpp.rks-gov.net>; Secondary Legislation, Article 55.
- ^{vii} The Chief Administrative Officer in ministries of the Kosovo Government is General Secretary, in municipalities it is the Mayor of Municipality, whereas in public companies it is Managing Director.
- ^{viii} Operational Guidelines for Public Procurement, <http://krpp.rks-gov.net>, Secondary Legislation, Article 55.4, page 125.
- ^{ix} Form C01, Contract Management Plan: <http://krpp.rks-gov.net>; Secondary Legislation.
- ^x Minimum value contracts are public contracts value of which is less than 1.000 €; Law on Public Procurement of Kosovo, No. 04/L-042; <http://krpp.rks-gov.net>, Article 19.4.
- ^{xi} Law on Public Procurement of Kosovo No. 04/L-042; <http://krpp.rks-gov.net>, Article 35.
- ^{xii} Law on Public Procurement in Kosovo, No. 04/L-042; <http://krpp.rks-gov.net>, Article 81.
- ^{xiii} Operational Guidelines for Public Procurement; <http://krpp.rks-gov.net>, Secondary Legislation, Article 56, page 129.
- ^{xiv} <http://www.skymark.com/resources/leaders/deming.asp>.
- ^{xv} Law No.03/L-146, dated 01.01.2010; "On Value Added Tax in Kosovo".

REFERENCES

- Law on Public Procurement of Kosovo No. 04/L-042
- Law No.03/L-146, dated 01.01.2010; "On Value Added Tax in Kosovo"
- Mr. Sc. DULI. Ilaz, "Public Procurement Reforms in Kosovo – The First Decade", Publisher: "BPC-Balkan Procurement Consultancy", July 2011, Prishtina
- DULI, Ilaz Mr.Sc. "Public Procurement Phases", Published by "BPC-Balkan Procurement Consultancy", June 2012,
- Secondary Legislation on Public Procurement in Kosovo
- Regulation of Public procurement in Kosovo
- Operational Guidelines for Public Procurement
- Form C01, Contract Management Plan

Legal Issues of the Procurement in Latvia. Complements made in the conditions of austerity

Lolita Ēdolfa

MJur, Public Procurement Law Expert,
former Director Procurement Policy Department Ministry of Defence of the Republic of Latvia and Latvian
Representative in NAMSO
E-mail: lolitacelma@yahoo.ie

Abstract

The global financial crisis of 2007-2010 has affected practically all countries in the world, bringing substantial changes to the economy of Baltic States, and the Republic of Latvia in particular. These changes have effect on the area of the public procurement as well, as being one of the spheres, where considerable part of the state budget funds are directed to. Therefore, in order to ensure the effective use of the financial resources, ensuring an appropriate and qualitative fulfilment of the tasks under the jurisdiction of the state and local governments, Latvia, for the time period 2013 – 2009 has made major changes to the public procurement legislation, in accordance with European Union directives and further investments in the public procurement framework, modernising normative regulation in the national level.

Introduction

The legal framework of the public procurement of the Republic of Latvia is based on the European Union Directives on public procurement policy. The very objective and guidelines of the Latvian Public Procurement policy is to ensure flexible, fast, effective, and economic state system of the public procurement, suitable for rapidly changing needs and demands of the public sector.

Global financial crisis in 2007 - 2010 has the most stunning effect on Latvia out of all the Baltic States. In order to save Latvian economy and prevent deepening of the political crisis, European Commission, International Monetary Fund, World Bank, The European Bank for Reconstruction and Development, as well as several European Union member states, agreed on the financial assistance[1]. In years 2009 -2011 Latvian government was forced to perform a radical consolidation of the national budget. Thus, for example, in the period from the 2009 till 2011 the consolidation process has raised its fiscal effect up to 16% of the GDP or 2,188 000 million LVL [2].

As a consequence, national budget reduced dramatically, although the range of the state functions remained in the previous level. This led to the consideration of the development of all economic sectors and the state policy in other spheres facilitating competitiveness, in particular, in the field of the public procurement. The Ministry of Finance of the Republic of Latvia, the competence of which implies formation of the public procurement policy, including integration of the EU legal instruments in the field, and development of corresponding policy and planning documentation [3], prescribed and realized a string of activities to make public procurement legislation more effective.

In the present paper major changes in the public procurement system, accomplished in the so-called „crisis period”, from 2013 – 2009, are investigated. The special attention is paid to the changes in the normative regulation of the public procurement with a special view to the electronic procurement system, “green procurement” and the development of the dispute settlement procedures.

1. Public procurement policy and legislation

Since Latvia joined EU in 2004 public procurement legislation is based on the EU public procurement directives, in particular on Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, implemented in Latvian public procurement legislation with amendments in Public Procurement Law

made in 1 May 2006[4]. With adoption of the directive all the necessary procurement procedures were introduced in the national law, such as, open and restricted procedures, negotiated procedures, design contests, excluding competitive dialogue, which was prescribed as alternative procedure for implementation in the national statutory acts.

Competitive dialogue being essential in public and private partnership projects, as well as, in the realization of large and complex projects, was adopted only in 2009, with a reference that commissioner may use this procedure only if the procurement contract is concluded in the framework of public and private partnership, and is regarded as particularly complicated [5]. The reasons why competitive dialogue was not adopted at once, was justified with concern on wrongful implementation of the procedure and on the corruption risk accordingly. That is why, along with the adoption of the competitive dialogue procedure, "additional safety measures" were employed, namely, it was stated that every case of the implementation of the competitive dialogue procedure has to be accepted by the Cabinet of the Ministers of the Republic of Latvia.

Another amendments concern statutory regulation of so called "small procurements" (procurements with estimated contract price higher than 1000 LVL but less than 10 000 LVL). The procedure of realisation of the small procurements was provided by Cabinet Regulation No. 762 of 12 September 2006 on Procedure for the performance of procurements where estimated contract price is higher than 1000 but less than 10 000 lats [6]. Regulation was declared null and void in 1 November 2009 with an argumentation that there is no grounds for regulation of any procurement procedures outside the framework of the Public Procurement Law, and the aim of Cabinet regulations is to establish more flexible procedure than those stated in the Public Procurement Law.

Instead the Public Procurement Law was supplemented by the Article 8.¹ providing more facilitated conditions for the implementations of the procurements procedures, where estimated price of the public delivery contract or public service contract is 3000 LVL or more, but less than 20 000 LVL, and estimated price of the public construction contracts is 10 000 LVL or more, but less than 120 000 LVL.

The thresholds of public procurement contract price mentioned above, from which procurement procedures have to be applied, was stated taking into account the practice of other EU Member States, among them Lithuania and Estonia[7], as well as grounded on the Commission interpretative communication on EU statutory acts applied in the assignation of contractual rights that is not regulated or are regulated just partly by the provisions of Public Procurement Directives (*Commission Interpretative Communication of 23 June 2006 on the Community law applicable to contract awards not or fully subject to the provisions of the Public Procurement Directives (OJ C 179 of 1 August 2006, p.2)*). The communication underlines an obligation of the Member States to provide contract notice publishing and implementation of open procedure for the public procurement under the contract price thresholds stated in the public procurement directives.

Essential amendments in the Public Procurement Law of 16 July 2009 provided reduction of administrative burden in the process of the investigation of complaints in extrajudicial procedure, i.e., in the Procurement Monitoring Bureau[8]. The Procurement Monitoring Bureau was delegated to accept obviously unjustified applications regarding violations of the procurement procedures, as well as to oblige applicant to pay the application security along with the submission of an application.

The Cabinet Regulation No.968 of 25 August 2009 "on the amount of the security of a complaint regarding violations of procurement procedure, the procedures for payment and reimbursement thereof and the procedures for exemption from payment of the security"[9] provided an amount of the security from 200 LVL till 10 000 LVL depending of the contract price proposed.

The Paragraph 10 of the Cabinet Regulation No.968 proscribed exemption from payment of the application security:

"individual merchants and natural persons, who submit a complaint regarding the results of the procurement procedure, and, upon submitting a tender in the particular procurement procedure, have not joined in a group of persons with a merchant, which is not an individual merchant, as well as merchants, who mainly (more than 50% of the average number of employees per year) employ disabled persons."

The Article 83.² of the Public Procurement Law stated occasions of reimbursement of the application security. For example, (1) the Procurement Monitoring Bureau has not accepted the application for revision, (2) the commissioner has entered into a procurement contract before he/she receives the application (3) the commission has approved an application as justified or partially justified.

Introduction of the application security was performed taking into account the results of practical analysis of other EU Member States, with an aim to decrease an amount of unjustified complaints, thus obstructing appropriate functioning of the state and local government institution[10].

According to the information provided by the Procurement Monitoring Bureau, comparing with 2008, an amount of unjustified application has increased in 2009 up to 5 % (in 2008 - 37,1 %, in the first 10 months of 2009 - 42.2%). In total the Procurement Monitoring Bureau has received record number of applications - 900 complaints [11]. This situation substantially and negatively affects both, the work of the Procurement Monitoring Bureau, leading to useless labour load and wasting of the financial resources; and the course of the public procurement in general by obstructing appropriate functioning of the state and local government institution. After new provisions came into force, from the applications received in two months' time, 30% were declared unjustified [12].

Regardless of an improvements in the realisation of public procurement after the introduction of the institute of application security, the Constitutional Court of the Republic of Latvia has received constitutional complain on the provisions of the application security as violating Article 1 and Article 92 with request to admit them null and void from the time of their adoption [13]. The general arguments were, first, statutory norms mentioned infringe person's` rights to require revision in the fair trial of the legality of state and local governments` finance utilization; second, the means, chosen by the legislator, are not appropriate for the achievement of the legal aims of the rule of law.

The Constitutional Court held that the challenge of the procurement procedure:

- is the measure, how low-based state ensures fairness and equity;
- promotes effective utilization of the budget, prevents competition distortion, reduces corruption risks and facilitates favourable commercial environment;
- is the only way that allows commissioner revise his/her decision, thus being exclusive mean for reaching effective evaluation of the legality of commissioner`s decisions and actions.

The Constitutional Court found that Article 83.² of the Public Procurement Law is considered as disproportionate restriction of person`s rights to fair trial not promoting effectiveness of the procedure and does not confirm with the interests of society. The Court stated this legal norm as not corresponding to the Article 92 of the Constitution of the Republic of Latvia [14] (*anyone can defend his/her rights and lawful interests in a fair court*), and declared it null and void from the time the judgements enters into force [15].

In 2010 an active campaign against “shadow economy” was started in Latvia. Some modifications affected also the Public Procurement Law. Amendments in the Public Procurement Law of 20 May 2010 prescribed possibility for merchants with small tax debts (less than 100 LVL) to participate in the public procurement procedures [16]. At the same time, with the Clause 6 of the Article 39 a provision was introduced providing exclusion of the candidate or applicant from the further procurement procedure, as well as possibility not consider application, if the average monthly income of the employees of a candidate or applicant in the first three quarters of the four quarters last year period until the date of submission of the application or tender was less than 70% from the average income of workers in the sector in the country during that period. The legal aim of this rule was directed at promoting public welfare, tax paying, registered and legal employment, as well as of fair competition.

Nevertheless, already in 2011 SIA Hansa World Latvia filed in the complaint into the Constitutional Court of the Republic of Latvia with request to consider on the compliance of the legal norm mentioned before with Article 91 of the Constitution of the Republic of Latvia [17], as well as suitability of the legal means chosen by the legislator for the achievement of legal aim of the norm contested [18]. It was stated in the complaint that the legal norm under discussion restricts person`s rights to participate in the procurement procedure in the cases, when tax liabilities to the state have been met, yet the applicant comply with exclusion criteria stated in the legal norm contested. Thus restrictions stated are disproportionate and do not ensure the reaching of the legal aim.

In the 3 November 2011 the Constitutional Court of the Republic of Latvia in the case No.2011-05-01 held that Clause 6 Part 1 Article 39 of the Public Procurement Law is regarded as not corresponding with Article 91 of the Constitution of the Republic of Latvia and is declared null and void from 1 March 2012, as long as it does not restrict the rights of the tax paying public procurement candidates and applicants [19].

In 2010 state budget consolidation process was still in force, and a number of measures were introduced to reduce the number of state administration workers and their remuneration. As a consequence, the number of the rest of employees was not enough to ensure realization of the state administration's functions and tasks. In the result of the overload of the state workers, timely financial funds acquisition was often delayed, increased level of all potential risks, dropped by the quality of the procurement procedures. This, in turn, led to the discontent of the merchants and, in spite of the existing obligation to pay application security, quite a significant number of complaints – 595 [20]. Increased the number of procedures suspended on the time of the examination of complaints, what, in its turn, enlarged the workload of the Public Procurement Bureau and hindered the timely and qualitative realisation of the state administration functions.

As a possible solution for this situation more active development of an idea of centralisation and e-procurement was brought forward, supplementing the law with norms holding more detailed conditions for centralised procurement. Thus Part 2.¹ and Part 2.² Article 16 of the Public Procurement Law [21] oblige *institutions of direct administration to purchase products and services stated by the Cabinet of Ministers from the particular institutions of centralised procurement again stated by the Cabinet of Ministers, or with their assistance, if such products and services are in the scope of those proscribed by the Cabinet of Ministers if contract price in the 12 months' time period is 100 lats or more*. This ensured more wide utilization of the Electronic procurement system (developed on 2005) [22], and released commissioners, who uses assistance of centralized procurement institutions, from the obligation to implement procurement procedures.

It was an efforts also to reduce administrative burden and to improve the effectiveness of the procurement procedure. The Section 30, Article 1 of the Public Procurement Law [23] implies commissioner's obligation to ensure free and direct electronic access to the procurement procedure documents, the right to reduce the deadline for the submission of tenders for five days.

In this year the Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts and Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles were adopted.

Amendments in the Public Procurement Law of 20 May 2010 introduced more elaborate and strict conditions on the size and composition of the Application Review Commission, as well as education and work experience of its members and the chairman of the commission (Article 82 of the Public Procurement Law), thus ensuring more professional and qualified performance. The Article 82 stated that the Application Review Commission has to be composed of three members. The chairmen of the commission has to have higher legal education and at least two years of work experience in the review of applications on procurement procedure violations (Article 82 (2)); and at least one member of the commission shall have a higher legal education. These conditions, although by the very nature are insufficient to ensure the quality of the complaints' examination process, are considered to be a first step in the improvement of the impartial and qualitative process of complaints' examination in the Procurement Monitoring Bureau.

In 2008-2009 by the assignment of the Ministry of Defence of the Republic of Latvia and Ministry of Economics of the Republic of Latvia, the Institute of Economics of the Latvian Academy of Sciences carried out an investigation "Development opportunities of the Latvian defence industry and related sectors" [24]. In the framework of this study capabilities of Latvian industry were evaluated to manufacture military and dual-use goods, perform deliveries and provide services for the needs of Latvian and partner states' military forces. A specific section was devoted to the study of the refund, or „offset" policy in Latvia, which until now did not exist. An analysis of the refund policies in the EU countries and the development of the EU legal and political framework in the field showed that offsets could be applied to a procurement of goods for military needs in significant extent. The refund policy challenge for Latvia is a long-term relationship between the Latvian companies and the defence industry in accordance with the European Defence Agency on a Code of Conduct on Offsets [25]. The aim of refund policy is to support involvement of small and medium-sized enterprises in the European defence technologies' and industry

environment, to involve foreign enterprises of the production of modern arms (experience, progressive technologies, connections, etc.), to establish long term economic cooperation between foreign and Latvian enterprises, thus promoting Latvian economic development, by introducing innovations and stimulating technological progress and employment in Latvia [26].

In the light of the said above, in 30 September 2010 the Cabinet Regulations No.924 on Compensation Transactions in Procurements for State Defence Needs"[27] came into force. The regulation stated the cases and procedures when procuring goods of military significance produced abroad referred to in the particular list pursuant to 346 of the Treaty on the Functioning of the European Union of the compensation transaction conditions shall be applied to a procurement by entering into a public supply contract with a foreign supplier of goods of military significance (Article 1). Compensation transaction conditions shall be applied if the estimated contract price of the supply contract is 2 000 000 LVL or more (Article 3). The supplier has a right to choose one or more types of the compensation transactions (Article 7):

- (1) engagement of subcontractors - for purchase and production of original products, goods, constituent parts of components and services in Latvia;
- (2) attraction of foreign direct investments - long-term investments in a merchant or organisation registered in Latvia for a period of at least five years for development of new factories or the place of supply of services;
- (3) research and development - a deal with research institutions registered in Latvia for the performance of the study or the technology or purchase of the technologies created in Latvia, intellectual property or investments in the infrastructure or research institutions.

In 2011 new redaction of Defence and Security Procurement Law was developed [28] with amendments under the Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, thus ensuring effectiveness of the procurements for military and defence needs.

In regard to the type of the procurement procedures, Defence and Security Procurement Law implies: closed competition, negotiation procedure, as well as a competitive dialogue (Part 3 Article 6), if a contract is considered to be especially complicated and there is a significant risk of failing to confer the rights to conclude a contract in the closed procedure or negotiation procedure. Open tender procedure, in accordance with the conditions laid down in Directive 2009/81/EC, is not included in the law as not suitable for the defence and security needs, taking into account necessity to ensure protection of information, as well as the necessity to give the opportunity to submit tenders or to participate in the negotiations, a sufficient number of suppliers of high qualifications.

In 2012 the Public Procurement Law was changed once in 1 August 2012, providing series of amendments. As the most essential should be mentioned one concerning regulation of the legal framework for the candidates who employ convicted persons in places of imprisonment. Thus, taking into account the number of the persons convicted, as well as the importance of re-socialisation and ensuring of law-abiding life style after being released from the prison, in order to increase merchants' interest in job creation in the institution of deprivation of liberty, and extent the opportunities to employ all convicted persons; to enlarge the payments made in accordance with the execution documents and promoting public safety in general. The Article 46 of the Public Procurement Law was supplemented the fourth subparagraph, stating that, if the commissioner, before a decision on the conclusion of the procurement contract, ascertains that the evaluation of tenders in accordance with the selected selection criterion is the same in all tenders, it shall select a tender submitted by the supplier, which employs at least 20 convicted persons in places of imprisonment [29].

2013 - In addition to the Part D of the Annex 1, "Structural issues and reforms" of the "Memorandum of Understanding (the third supplement of the Memorandum of Understanding) between the European Union and the Republic of Latvia, which aimed to strengthen public procurement, one of the tasks was till *end of March 2011 submit legislative proposals on government procurement centralisation, in order to make them compulsory*" [30].

The objective to make compulsory centralised procurement of municipalities is also included in the Section 14 (c) Part „D” Annex 1 „Structural issues and reforms” of the Advanced Memorandum of Understanding (the fourth supplement of the Memorandum of Understanding) between the European Union and the Republic of Latvia,

stating that before the *end of October 2011 prepare the relevant legislative proposals to make compulsory centralised procurement for local governments* [31].

In accordance with the information included in the Report drawn up by the Ministry of Finance [32], percentage of the centralised procurement in the total procurement by state and local governments is essential — 4-5% of the total procurement. In addition, in the total sum of centralised contracts the amount of local government procurements decrease every year, because there is disproportionately high share of „small procurements” in the municipalities.

Such structure of local government procurements means that:

- 1) there is a the tendency of uniform small volume procurements (the uniform procurement fragmentation);
- 2) the large amount of procurements restricts the increasing of administrative resources and the improvement of quality of procurement procedures;
- 3) the procurement requirements do not contained equal requirements for identical procurements, and vendor qualification, thus promoting challenging of the procedures, and diminishing of the confidence in the municipality competence and impartiality in procurements;
- 4) the procurements provide different price levels for similar goods and services that affect efficiency of the local government budget utilization [33].

Thus, Article 16 of the amendments to the Public Procurement Law of 5 July 2013 [34] included the provisions, which naturally continue the process of centralisation of the procurements of direct administrative institutions started in 2010. The norms provide centralised procedure of local governments and local government institutions to purchase goods and services from a centralised procurement institution or with their assistance, if the goods or services are part of the goods or services specified by the Cabinet of Ministers, and the contract price in the time period of last 12 months is 3000 lats or more in the particular group of goods or services (Part 7 Article 16). In accordance with Part 8 Article 16, government and local authorities can make purchases from the centralised procurement institution appointed by the Cabinet of Ministers or establish their own centralised procurement institution, which shall ensure the procurement of goods and services to the local governments and all its institutions.

In addition, the Public Procurement Law provides the possibility of international centralisation, enabling the customer to buy goods and services from a centralised procurement institution located in another EU Member State, or receive construction works, supplies and services with an assistance of such institution. In this case, carrying out the procurement, the commissioner shall apply legal acts confirming with EU legal instruments in the field of public procurement (Part 4 Article 16). Such commissioners` cooperation model is preferable in realisation of projects under EU Structural funds or other international financial instruments involving partners from several EU Member States.

The amendments to the Public Procurement Law allows to perform evaluation of applicants more effectively by obliging commissioners to get information in electronic form regarding the applicants from the Register of Enterprises, the State Revenue Service and Latvian municipalities (Part 7 Article 8.2), thereby reducing the bureaucratic burden and the volume of documents to be submitted by the applicants and saving manpower and financial resources.

As a result of the campaign against the „shadow economy”, Article 39.¹ of the Public Procurement Law is supplemented by a set of conditions, when the candidate or applicant shall be excluded from participation in the procurement process:

“... with the punishment prescription of a prosecutor or a court judgment, which has come into effect and become non-disputable and not subject to appeal, has been found guilty of any of the following criminal offences:

- (a) taking of bribes, bribery, embezzlement, intermediation of bribery, the acceptance of unauthorised benefit or commercial corruption;
- (b) fraud, embezzlement or the laundering of the proceeds of crime;
- (c) avoidance of tax and analogous duty evasion and ... ”.

The candidate or applicant shall be excluded from participation in the procurement process also in cases of employment of citizens or nationals of countries, which are not the Member States of the EU or citizens of EU Member States, if they are staying illegally within the territory, and are employed without a contract concluded in writing (Part 1 Paragraph 2 Article 39.¹). This also applies to the breaches of competition law, in case of a vertical agreement, aimed to restrict the buyer's ability to determine the resale price, or horizontal cartel agreement (Part 1 Paragraph 3 Article 39.¹).

This legal framework is a crucial step in ensuring fair competition and entrepreneurship in the state. In accordance with the information provided by the Competition Council of the Republic of Latvia [35], six out of ten identified breaches of the competition law have been linked to the activities of the procurement. During the period from 2005 to 2013 23 prohibited agreements between procurement applicants were revealed, and involved 94 companies. While procurements with fair competition has been much more. For example, in the framework of one case of infringements detected in 2013 there were 322 procurements, in which part or all of the applicants were illegally agreed. Leadership position with 61% of all the established procurement cartels take construction industry, construction, road building and civil engineering works.

In 2013 major amendments to the Latvian Administrative Violations Code [36] was developed, introducing administrative fines for administrative violations in the area of public procurement and public and private partnership. Thus, amendments to the Latvian Administrative Violations Code of 15 May 2013 provide administrative penalties not application of the normative regulation concerning public procurement, choosing of inappropriate procurement or concession procedure, non-observance of the provisions on prevention of the conflict of interests and exclusion requirements of candidates or applicants, as well as requirements specified in the procurement documentation concerning candidates or applicants; for failing to comply with provisions regarding the conclusion of the procurement contract, framework agreement, and the amendments, and preparation of information and documentation. Penalties range from a warning and various amount of fines (from 70-700 euros) till forfeiture of rights to hold offices of the State official [37].

According to the Article 215.¹¹ of the Latvian Administrative Violations Code, to examine administrative violation matters and to impose administrative penalties on behalf of the Public Procurement Bureau is entitled the Head of the Public Procurement Bureau and his/her authorised official. For this purpose in 2013 the Public Procurement Bureau underwent structural changes establishing the Department of Administrative Penalties with two divisions: Division of Administrative Infringement Proceedings and the Legal Division [38].

2. Electronic Procurement System

Latvian Electronic Procurement System (hereinafter – EPS) is the oldest in the Baltic States. It was launched in 6 December 2005 and initially was controlled by the Procurement Monitoring Bureau. Now, in accordance with Cabinet Regulation No. 526 of 11 June 2009 on amendments to the Cabinet Regulation No.28831 March 2009 "By-law of the State Regional Development Agency", EPS security and development functions are implemented by the State Regional Development Agency.

The State Regional Development Agency, as centralised procurement institution within the meaning of the Public Procurement Law, organises centralised public procurement procedures in the EPS Portal (website www.eis.gov.lv), with a view to conclude framework agreements between one or more direct administration institutions, and one or more suppliers on electronic procurement transactions. The EPS is an electronic platform for public institutions to purchase goods and services, and can be used by unlimited number of registered subscribers - public institutions. EPS registered customers is provided with free of charge website for ordering goods by choosing items from the cheapest quote published in the electronic catalogue [39]. In addition, the system provides the option for customers to choose extra equipment or products with certain characteristics, i.e., customers can complete the goods according to their needs [40].

The e-procurement process between the supplier and the buyer are electronically signed deal implying basic terms for the supply of goods (the number of items, prices, etc.) in addition to the standard terms of delivery (delivery deadlines, the parties' rights and obligations, penalties etc.) that are stated in the Agency agreements with the successful candidates of the open competitions. Taking into account that customers has rights to buy one product only, namely, the cheapest one in each specification, EPS suppliers are competing also after the conclusion of the

agreement. This led to the reduction of the prices of goods and services, unlike the results of the public procurement.

Development of EPS in Latvia is closely linked to the EU strategy for the development of electronic procurement and conditions of bilateral international documents. For example, supplement of the Memorandum of Understanding between the EU and the Republic of Latvia and „First Appendix of the Memorandum of Understanding of 13 July 2009” [41]. Section D of the memorandum „Structural reforms” implies determination of the Republic of Latvia to ensure centralisation of the public and municipal procurement and more widely use of the EPS, in order to improve efficiency and transparency according to the Green Paper on the Modernisation of EU public procurement policy Towards a more efficient European Procurement Market (European Commission, 27 January 2011 (COM (2011) 15) [42].

The amount of procurements in the framework of the EPS clearly shows a steady upward trend (see Fig. 1).

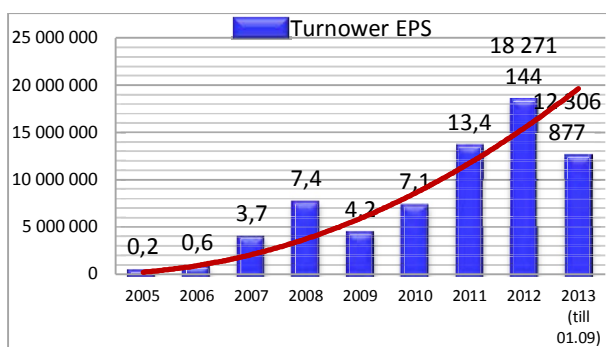


Figure 1, the scope of the amount of procurements in EPS[43]

The use of EPS has an inspiring effect on the difficult financial situation of the Republic of Latvia. Thus, according to the data provided by the Ministry of Environmental Protection and Regional Development of the Republic of Latvia, the economy of the finances in the time period from 1 October 2012 till 31 March 2013 was 2,15 million to 2,63 million lats, taking into account that the total EPS turnover during this period was 13 071 259 lats [44].

The use of the EPS gives not only immediate, i.e., financial benefits, but also provides indirect benefits, for example, the reduction of the administrative burden. The European Commission assessment report "Impact and Effectiveness of the EU Public Procurement Legislation" of 27 June 2011 [45] indicates that the average number of man-days a commissioner spends for realization of one procurement is 27 man-days. Instead, procurements via EPS take on average 2 man-days. Consequently, the total administrative resource savings are 25 man-days!

In accordance with the Section D „Structural reforms” of the Supplementary Memorandum of Understanding between the EU and the Republic of Latvia „The Second Appendix of the Memorandum of Understanding of 20 July 2010” [46], Latvia till the end of February 2010 has carried out particular measures increasing effectiveness of the public procurement, including application of the standardised methodology and guidelines, and development of the legal bases providing compulsory use of EPS in all state administration institutions. Thus the Cabinet Regulation No.1241 of 28 December 2010 on centralized electronic procurements implies requirement for the institutions of direct administration from 1 February 2011 purchase goods from the groups stated in the EPS regulation (office equipment, software, office paper, medicine, computer equipment, printing supplies and standard server devices), using EPS e-catalogues. The centralisation of electronic procurement process, as previously mentioned, continued over the next few years, and from 1 January 2013 local governments and their institutions are obliged to purchase goods via EPS.

The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions „E-procurement strategy” [47], as well as a positive opinion of the European Economic and Social Committee (2013/C 11/10) and EU Commission support has marked unambiguous progress towards EU public procurement modernization, providing complete transition to the e-procurements in EU till the middle of 2016. This means that achieving „direct e-procurement”, where all the stages from the notification until payment are performed electronically [48]. In this respect, in 4 September 2012 the Latvian Cabinet of Ministers has considered information report "On the operational programme „Infrastructure and

services” Appendix 3.2.2.1.1 sub-activity „Development of information systems and electronic services” project „Development of the functionality of e-tenders and e-auctions under EPD” providing solutions for further electronization of the procurement procedures by the development of the functionality of electronic notice, electronic auctions and the electronic tenders in addition to EPS e-catalogues, in perspective, providing introduction of dynamic purchasing systems and virtual profile, and formation of a list of qualified suppliers [49]. The solution provides gradual introduction of the EPS functionality, starting with the creation of unified platform and launching of portal www.eiepirkumi.gov.lv. The portal would imply already existing e-catalogues and gradually supplemented with such subsystems as e-notice, e-auctions, e-tenders ensuring infrastructure for complete public procurement process [50].

The Ministry of Environmental Protection and Regional Development of the Republic of Latvia is responsible for the development and launching of the e-notice subsystem till 1 January 2014, and e-tender and e-auction subsystems – till 1 January 2016, thus ensuring the implementation of the strategy developed by the European Commission and modernising public procurement environment in Latvia [51].

3. Green procurement

The inclusion of environmental requirements in public procurement procedure documentation was initiated by the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the grant of public works contracts, public supply contracts and public service contracts. However, it was applied rarely, only 20% of all procurements implied certain environmental conditions (from one to three) into the procurement documentation [52].

In Latvia, in accordance with the Informative report on the recommendations of the promotion of green public procurement in state and local government institutions and the recommendations of the promotion of environmentally friendly construction [53], a number of specific barriers are identified, hindering development of the green procurement:

(1) information barriers

the procurement specialists often lack knowledge and information on environment friendly goods and services; environment problems and the impact of consumption of the environmental; methods for the dominion environment friendly goods and services, as well as assessment of impact of goods and services on the environment, etc.

(2) economic barriers

the market of environment friendly goods in Latvia is not developed and the prices are higher than for alternative products. In crisis this aspect often is very important. The second aspect, in preparation of procurement documentation, the assessment of social and life cycle costs is not provided. Consequently, assessment of goods cannot be fully perform.

(3) technical barriers

Is based on the still existing small proposal of environment friendly goods in the market. In the field of construction, often the problem arises with environment friendly and alternative solutions to technical harmonisation.

Since 2006 various measures have been taken in Latvia to promote green procurement, organising training seminars for national and local authorities, preparing guidelines and information material („Green Procurement Manual”, Order „Green Freedom”, 2006). In 2008, the Procurement Monitoring Bureau has prepared:

- *Guidelines in promoting Green Public Procurement in state and local government institutions*, which along with green procurement implementation strategies and legislative framework contains six environmental criteria for the groups of products and services, addressing the problems state and local government institutions usually face with in the public procurement, and showing the possible solutions to promote green procurement,
- *Guidelines for the promotion of environmental friendly construction*, intended for the procurement of construction works, including construction related services, considering possible environmental criteria (energy consumption, renewable energy resources, construction materials and articles, etc.) in each stage of the construction process.

Minimum criteria for environment friendly procurement was included into the legislation in 2010, when Public Procurement Law was supplemented with the norms on the procurement of motor vehicles (Article 46.¹), stating that operational energy and environmental impacts has to be considered in procurement of the motor vehicles.

In 23 April 2009 of the European Parliament and the Council adopted Directive 2009/33/ EC on the promotion of clean and energy-efficient road transport vehicles in order to facilitate and stimulate the vehicle market and increase the contribution of the transport sector to the environment, climate and energy policy. In the result of implementation of the directive in Latvian legislation in 21 December 2010 the Cabinet of Ministers passed the regulation No.1184, regarding categories of motor vehicles which specific procurement requirements and the methodology for the calculation of the operational lifetime costs of the motor vehicles [54]. The regulation provides obligation for commissioners to consider the impact of exploitation of the vehicles on the power industry and environment, evaluating at least the energy consumption and carbon dioxide, nitrogen oxides, non-methane hydrocarbons` and rigid parts` emissions.

Although Latvian legislation comply with the EU public procurement directives and informative work with employees of state and local government institutions has been carried out, one have to admit that the green procurement is not widely used in Latvia.

4. Dispute settlement procedure

In the Republic of Latvia there is a two-stage dispute settlement procedure for public procurement cases. The first institution for settlement of disputes is Procurement Monitoring Bureau. According to Paragraph 7 Article 81 of the Public Procurement Law, Procurement Monitoring Bureau examines applications on procurement procedure violations.

Applications on procurement procedure violations in the Procurement Monitoring Bureau are examined by Application Review Commission composed of three members. Where necessary, the commission may invite procurement specialists or experts who participate in the meeting without voting rights, and shall provide an independent professional opinion to the commission regarding the facts or provide an opinion regarding the questions raised by the Commission (Paragraph 4 Article 82).

Complaints may be filed on the candidates` or applicants` selection provisions, technical specifications, evaluation criteria and other requirements, which relate to the specific procurement procedure, or regarding the activities of the commissioner or the procurement commission during the procurement procedure.

Applications may be submitted in 10-15 days` time until conclusion of the contract or framework agreement, where the submission deadline is dependent on the nature of the suspected infringement, and other obstacles. For example, if the contract price shall be equal to the margins of contract prices specified by the Cabinet or larger, the application shall be submitted to the Procurement Monitoring Bureau within 10 days from the day, when the notification regarding the results of the procurement is published on the Procurement Monitoring Bureau home page or the Official Journal of the European Union [55]. Whereas the applications relating to the procurement procedure documentation may be filed in not later than four working days before the deadline for submission of tenders in a closed competition (regarding requirements stated in the invitation in the closed procedure, negotiated procedures and competitive dialogue)[56].

The Commission shall examine the submission within a time period of one month from the date of its reception in the Procurement Monitoring Bureau. Where necessary, in case of objective obstacles, the Procurement Monitoring Bureau may extend the term of the examination [57].

According to the information provided by the Procurement Monitoring Bureau, 20% from all procurement procedures are disputed, while 10-15% from the Procurement Monitoring Bureau decisions are appealed in court. Yet, about half of all the complaints submitted are unjustified [58].

The decision of the Procurement Monitoring Bureau may be appealed to the Administrative District Court in accordance with the procedures specified in the Administrative Procedure Law, and it shall be heard by the court composed of three judges. Administrative court judgment in accordance with cassation procedures may be appealed to the Department of Administrative Cases of the Supreme Court Senate (Article 85, Public Procurement Law). The appeal of the decision of the Procurement Monitoring Bureau does not affect its being into force.

Yet, there is a situation in Latvia that the state institution cannot appeal the decision of other state institution regarding the decision the second even if the second is wrong. The decisions of the Procurement Monitoring Bureau are not always objective. Thus, in 2013 the Administrative Court 7 cases of 56 (i.e. 13% of all things), the Procurement Monitoring Bureau's decision were repealed entirely or partly or sent to the Administrative Court of First Instance to review the merits [59].

The establishment of the legal norms and judicature related is based on the judgement of the European Court of Justice of 21 October 2010 in the case C-57008 *Symvoulia Apochetefseon Lefkosias v Anatheoritiki Archi Prosforon* [60]. The Court stated that Paragraph 8 Article 2 of the Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts with amendments made by the Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that it does not entail the Member States and the contracting parties rights to apply to the court on the decisions of the award of public procurement of authorities that are not juridical authorities. In Latvia is not taken into account the note in the decision mentioned that this provision does not prevent Member States, if necessary, lay down in their respective legal systems, such as the right of appeal.

The Department of Administrative Cases of the Supreme Court in the case No.SKA-306 of 23 May 2006 acknowledged that the customer, acting in accordance with the Public Procurement Law, is not entitled to appeal the decisions of the Procurement Monitoring Bureau. Initially, this thesis was expressed with regard to the institution of direct administration acting as customer and wanting to appeal the decision of the Procurement Monitoring Bureau regarding the same organised procurement. The Senate declared that the Republic of Latvia cannot sue to herself, i.e., direct administrative institution cannot sue with another institution of direct administration (the Procurement Monitoring Bureau). The Senate later acknowledged that the indirect administration institution, municipality, cannot appeal the decision of the Procurement Monitoring Bureau [61].

Whereas with decision in the case No A7038109/2 SKA-24/201 of 18 February 2011 the Department of Administrative Cases of the Supreme Court declared that customer - private law legal person (capital company established by the public persons for performing commercial activities) is not entitled to appeal decisions of the Procurement Monitoring Bureau, because it acts in the public interest, therefore, it is not possible that interests of such legal person (a company) could conflict with the interests of Procurement Monitoring Bureau, as a higher institution.

In accordance with Part 3 Article 80 of the Public Procurement Law, the Procurement Monitoring Bureau is functionally the highest authority reviewing applications on procurement procedure violations. Although the Bureau is the part of the state administration and is subordinated to the Ministry of Finance, this provision ensures the higher state institutions regarding revision of application on violations of the procurement procedure. This situation is an appropriate in legal and democratic state for separation of legislative and executive powers, ensuring maximum objectivity in the performance of the tasks delegated. However, in the light of all the above, it is concluded that the state and local governments, as customers are not given the legal opportunity to defend their interests.

Acknowledgements

Author acknowledge Mrs Inese Palepa and Ms Ilze Kukute for help and support.

Conclusion

The present paper provides an overview of the development of public procurement in the Republic of Latvia during the time period from 2009 until 2013, when the state underwent a serious financial crisis.

An emphasis in the national public procurement strategy were set on the adoption of the European Union public procurement directives into national legislation, as well as on the development progress of public procurement system in accordance with the international public procurement initiatives and other international instruments.

During this period the campaign against the „shadow economy” in the state actualized, promoting tax payment, registered and legal employment, and fair competition. A number of laws were adopted to reduce the administrative burden, and facilitate to the development of the procurement process. The process of gradual centralisation of the public procurement was initiated, as well as certain steps made for further development of electronic procurement

system, a „green procurement”, and for the improvement of the process of disputes` resolving and reduction of time for handling complains.

The area of public procurement is connected closely to the growth and development of the state in general, which is a logical and continuous process requirements and challenges for the next stage of development. Therefore, the scope of the public procurement will never be fully complete, but will be in constant forward, still searching for and finding new opportunities and solutions for sustainable and high-quality development in Latvia and in each EU Member States in general.

References

- [1]] Ministry of Finance of the Republic of Latvia, (21.03.2012), <http://www.fm.gov.lv/lv/aktualitates/jaunumi/26442-sanemta-pirma-svf-aizdevuma-dala-590-miljoni-eiro>
- [2] Ministry of Finance of the Republic of Latvia, (07.05.2012), <http://www.fm.gov.lv/lv/aktualitates/jaunumi/27969-veikta-budzeta-konsolidacija-laika-posma-no-2008-2011-gadam-faktu-lapa>
- [3] Ministry of Finance of the Republic of Latvia, (2009), Public Report, Article 29, <http://www.fm.gov.lv/files/files/D19DF4822025001279008624504516.pdf>
- [4] Saeima, (25.04.2006), Public Procurement Law, „Latvijas vēstnesis”, 65 (3433), 25.04.2006. came into force 01.05.2006
- [5] Saeima, Amendments to Public Procurement Law, (16.04. 2009), „Latvijas vēstnesis”, 120 (4106), 30.07.2009. came into force 13.08.2009., Article 64
- [6] Cabinet of Ministers of the Republic of Latvia, (12.09.2006) Regulation No.762 on Procedure for the performance of procurements where estimated contract price is higher than 1000 but less than 10 000 lats, „Latvijas Vēstnesis”, 148(3516), 15.09.2006., came into force 16.09.2006
- [7] Ministry of Finance of the Republic of Latvia, (03.03.2009), Annotation for Draft Law „Amendments to Public Procurement Law”, No.90/TA-1135
- [8] Saeima, Amendments to Public Procurement Law, (16.04.2009), „Latvijas vēstnesis”, 120 (4106), 30.07.2009., came into force 13.08.2009, Article 83.²
- [9] Cabinet of Ministers of the Republic of Latvia, (25.07.2009), Regulation No.968 on the amount of the security of a complaint regarding violations of procurement procedure, the procedures for payment and reimbursement thereof and the procedures for exemption from payment of the security”, „Latvijas Vēstnesis”, 146 (4132), 15.09.2009., came into force 16.09.2009
- [10]] Ministry of Finance of the Republic of Latvia, (25.07.2009), Annotation for Draft Regulation of the Cabinet of Ministers on the amount of the security of a complaint regarding violations of procurement procedure, the procedures for payment and reimbursement thereof and the procedures for exemption from payment of the security”
- [11] LETA, (19.04.2010), Tīkness pēc ST sprieduma prognozē strauju sūdzību skaita pieaugumu, <http://www.delfi.lv/news/national/politics/tiknuss-pec-st-sprieduma-prognoze-strauju-sudzibu-skaita-pieaugumu.d?id=31345769>
- [12] Constitutional Court of the Republic of Latvia, (19.04.2010), The judgement of the Constitutional Court No.2209-77-01, p.7, „Latvijas Vēstnesis”, 63 (4255), 21.04.2010.
- [13] Constitutional Court of the Republic of Latvia, (19.04.2010), The judgement of the Constitutional Court No.2209-77-01, p.3, „Latvijas Vēstnesis”, 63 (4255), 21.04.2010.
- [14] Latvian Assembly of Constitution, (15.02. 1922.), Constitution of the Republic of Latvia, „Latvijas Vēstnesis”, 43, 01.07.1993
- [15] Constitutional Court of the Republic of Latvia, (19.04.2010), The judgement of the Constitutional Court No.2209-77-01, p.19, „Latvijas Vēstnesis”, 63 (4255), 21.04.2010.
- [16] Saeima, Amendments to Public procurement law, (20.05.2010), „Latvijas vēstnesis”, 91 (4283), 09.06.2010. came into force 15.06.2010., Clause 5, Part 1, Article 39
- [17] Latvian Assembly of Constitution, (15.02. 1922.), Constitution of the Republic of Latvia, „Latvijas Vēstnesis”, 43, 01.07.1993, Article 91 „All people in Latvia are equal ahead of Law and Court. The rights of person are implemented without any diskrimination”
- [18-19] Constitutional Court of the Republic of Latvia, (03.11.2011), The judgement of the Constitutional Court No.2011-05-01, „Latvijas Vēstnesis”, 176 (4574), 08.11.2011

- [20] I. Knusle-Jankevica, (15.04.2011), Iepirkuma procedūra nav labvēlīga pasūtītājiem, www.ielgavasvestnesis.lv
- [21] Saeima, Amendments to Public Procurement Law, (20.05.2010), „Latvijas vēstnesis”, 91 (4283), 09.06.2010., came into force 15.06.2010.
- [22] Ministry of Finance of the Republic of Latvia, (2005), Public Report, p. 62
- [23] Saeima, Amendments to Public Procurement Law, (20.05.2010), „Latvijas vēstnesis”, 91 (4283), 09.06.2010., came into force 15.06.2010.
- [24] Institute of Economics of the Latvian Academy of Sciences, (13.07.2009), Development opportunities of the Latvian defence industry and related sectors. Closing report, www.em.gov.lv/images/modules/items/150709.doc.
- [25] European Defence Agency, (03.05.2011), A Code of Conduct on Offsets agreed by the EU Member States participating in the European Defence Agency
- [26] Ministry of Economics of the Republic of Latvia, (08.09.2010), Initial influence assessment Report of Draft Cabinet Regulations on Compensation Transactions in Procurements for State Defence Needs (Annotation), Riga
- [27] Cabinet of Ministers of the Republic of Latvia, (30.09.2010), Regulation No.924 on Compensation Transactions in Procurements for State Defence Need, „Latvijas Vēstnesis”, 157 (4349), 05.10.2010., came into force 30.09.2010.
- [28] Saeima, Defence and Security procurement law, (13.10.2011), „Latvijas Vēstnesis”, 173 (4571), 02.11.2011, came into force from 16.11.2011.
- [29] Saeima, Amendments to Public Procurement Law, (02.02.2012), „Latvijas Vēstnesis”, 24 (4627), 10.02.2012, came into force from 11.02.2012
- [30-33] Ministry of Finance of the Republic of Latvia, (25.09.2012), Initial influence assessment Report of Draft Law Amendments of Public Procurement Law (Annotation), Cabinet of Ministers of the Republic of Latvia, Minutes No.53, Riga
- [34] Saeima, Amendments to Public Procurement Law, (20.06.2013), „Latvijas Vēstnesis”, 129 (4935), 05.07.2013, came into force from 01.08.2013
- [35] Competition Council of the Republic of Latvia (16.12.2013), Iepirkumu kārdinājums, Bulletin of the Competition Council of the Republic of Latvia „Konkurence tuvplānā”, No.4, Riga
- [36] Saeima, Amendments to the Latvian Administrative Violations Code, (25.04.2013), „Latvijas Vēstnesis”, 42(4898), 15.05.2013. came into force from 29.05.2013
- [37] Saeima, Amendments to the Latvian Administrative Violations Code, (25.04.2013), „Latvijas Vēstnesis”, 42(4898), 15.05.2013. came into force from 29.05.2013, Paragraph 166.²¹ - 166.²⁵
- [38] <http://www.iub.gov.lv/node/34>
- [39-41] Ministry of the Environment and regional development of the Republic of Latvia, (10.02.2012), Informative notification „On the concept of the implementation of "electronic procurement system", p. 2 - 3
- [42] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF>
- [43-44] Ministry of the Environment and regional development of the Republic of Latvia, (01.10.2013), Information report on the progression of the concept of „electronic procurement system” in the time period from 1 January to 1 September 2013, pages 4 - 7
- [45] http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf
- [46] Ministry of Environmental Protection and Regional Development of the Republic of Latvia, (10.02.2012), Informative notification „On the concept of the implementation of "electronic procurement system”, p. 2
- [47] Brussels, 20.4.2012. COM(2012) 179 final
- [48] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions „E-procurement strategy”, (20.04.2012), COM (2012) 179 final, p. 3
- [49-50] Cabinet of Ministers of the Republic of Latvia, (04.09.2012), Information report "On the operational programme „Infrastructure and services” Appendix 3.2.2.1.1 sub-activity „Development of information systems and electronic services” project „Development of the functionality of e-tenders and e-auctions under EPS”, Riga, p.1-2, http://www.varam.gov.lv/lat/pol/ppd/e_parv/?doc=12648
- [51] State Regional Development Agency, Central Agency of Finance and Contracts, (08.05.2013), Agreement 3DP/3.2.2.1.1/12/IPIA/CFLAS/009/005, Riga

[52] Green Public Procurement in Europe 2006 – Conclusions and Recommendations, <http://europa.eu.int/comm/environment/gpp>

[53] confirmed by Cabinet of Ministers of the Republic of Latvia on 22.12.2008, (Protocol Nr.94, 92.§)

[54] Cabinet of Ministers of the Republic of Latvia, (21.12.2010), Regulations No.1184 regarding categories of motor vehicles with specific procurement requirements and the methodology for the calculation of the operational lifetime costs of the motor vehicles, „Latvijas Vēstnesis”, 2 (4400), 05.01.2011, came into force 06.01.2011

[55] Saeima, Amendments to Public Procurement Law, (06.04.2006), „Latvijas Vēstnesis”, 65 (3433), 25.04.2006., Clause 83 Part (2) Article 3

[56] Saeima, Amendments to Public Procurement Law, (06.04.2006), „Latvijas Vēstnesis”, 65 (3433), 25.04.2006., Clause 83 Part (3) Article 3

[57] Saeima, Amendments to Public Procurement Law, (06.04.2006), „Latvijas Vēstnesis”, 65 (3433), 25.04.2006., Clause 84 Part (1)

[58] A.Kļavis, (25.09.2013), Pēdējā instance, Iepirkumi, Rīga

[59] www.tiesas.lv

[60] <http://curia.europa.eu/juris/liste.jsf?language=lv&jur=C,T,F&num=C-570/08&td=ALL>

[61] The Department of Administrative Cases of the Supreme Court, (13.06.2008.), The judgement of the Supreme Court in Case No.SKA-446 / 2008, Rīga

EXAMINING PROFESSIONALIZATION IN PUBLIC ADMINISTRATION: THE CASE OF PUBLIC PROCUREMENT PRACTITIONERS

Josh Steinfeld¹, Cliff McCue², and Eric Prier³

¹Florida Atlantic University
777 Glades Rd.
Boca Raton, FL, 33401
E-mail: jsteinf4@fau.edu

²Florida Atlantic University
111 E. Las Olas Blvd.
Fort Lauderdale, FL 33301
E-mail: cmccue@fau.edu

³Florida Atlantic University
2912 College Ave.
Davie, FL 33314
E-mail: eprier@fau.edu

WORKING Paper No. 7

ABSTRACT

This study investigates the appropriateness for professionalizing the field of public procurement by analyzing the results of a 2012 survey that included 2,593 public procurement practitioners. The research study, first, examines the similarities and differences between private and public procurement. Although the U.S. Bureau of Labor Statistics identifies a field of “purchasing managers, buyers, and purchasing agents,” there is no mention of procurement and no distinction between public and private in the job description. Next, public procurement practitioner job positions are rank-ordered according to job activities using cross tab and descriptive methods. The common and uncommonly performed/ managed job activities are identified and then job positions are rank ordered accordingly. Proximately, job positions are analyzed in terms of job specifications to determine how achievement such as experience, education, training, and performance serves to promote (or demote) an argument for professionalization in public procurement, and more broadly public administration.

INTRODUCTION

Currently, the United States Bureau of Labor Statistics (BLS) denotes “purchasing managers,” “buyers,” and “purchasing agents” as a single occupation within the business and financial occupational group (U.S. Bureau of Labor Statistics, 2013). Collectively, the three purchasing positions belonging to the field of procurement are indicative of the strategic and managerial aspects of purchasing (Mol, 2003; de Boer, 2003). However, BLS offers no designation between ‘private’ purchasing managers, buyers, and purchasing agents and those workers of the occupation operating in the public sector, where workers occupying purchasing positions are deemed to belong to the field of ‘public’ procurement based upon the socioeconomic and political ramifications of the job (Thai, 2001; McCue & Gianakis, 2001). Yet, differentiating the occupations of public and private procurement does not suffice for an argument in support of professionalization. Job tasks (job activities) and specifications of various public procurement practitioner domains must also be analyzed in order to determine whether or not various practitioner job positions require esoteric knowledge, skills, and abilities (KSA’s) that deem the field of public procurement to be sufficiently unique and demanding of particular expertise.

The research study will, first, examine the similarities and differences between private and public procurement as identified by conducting the following computations: Using cross tab analysis, match the

BLS occupational tasks with the job activities indicated by survey respondents to determine differences in tasks between the two sectors. Then, combine job activities identified on the survey that were not on BLS list into occupational tasks to determine frequency of public procurement practitioner management/ performance of these particular occupational tasks. Several concentrated job activities make-up an occupational task and thus job activities that were reported in the survey but not on BLS must be combined so that occupational tasks, at the more generalizable level as denoted by BLS, can be established for public procurement. Additionally, the public procurement specific job activities are grouped so as to indicate completion of *all* job activities within an occupational task, as a means of validating the public procurement occupational tasks.

Second, public procurement practitioner job positions are rank-ordered according to job activities using cross tab and descriptive methods. The common and uncommonly performed/ managed job activities are identified and then job positions are rank ordered accordingly. A sensitivity analysis will be conducted to determine the threshold for determining which job activities are labeled as being “commonly” or “uncommonly” performed/ managed. A factor analysis can be used here to validate groupings as well.

Third, job positions will be analyzed in terms of job specifications by employing multiple linear regression analysis. The objective is to determine how variables such as number of years experience, formal education, and credentials implicate practitioners’ job positions in terms of the occupational tasks performed/managed and the commonly performed/managed and uncommonly managed job activities.

Finally, Kline’s (1981) universalistic criteria for professionalism, devised for the purposes of his public administration research, are used to assess the results of the qualitative statistical analysis. For the purposes of this study, an argument for professionalization of public procurement, as a field within public administration, can be supported or refuted through qualification of the following consolidated criteria:

1. The word profession is generally applied to a vocation or occupation built on a systematic body of knowledge and theory.
2. Members of a profession are assumed to be imbued with a “sense of calling” or “mission” that transcends “baser, more self-seeking, less altruistic” motives and goals.
3. A close relationship commonly exists between professional and the faculty, departments, and professional schools of universities.
4. Pre-professional training is not confined to the university setting.
5. At some point in an occupation’s profession to professional status, an association is formed.
6. The strong service orientation of professionals leads them to strive constantly for ways to increase their knowledge for the betterment of those they serve.
7. Organized professions have typically set rules and standards for the behavior of their membership.

LITERATURE REVIEW

What is a Profession in the Public Sector?

One of the earliest attempts to identify the criteria of a profession was offered by Abraham Flexner (1915) who stated “Professions involve essentially intellectual operations with large individual responsibility; they derive their raw material from science and learning; this material they work up to a practical and definite end; they possess an educationally communicable technique; they tend to self-organization; they are becoming increasingly altruistic in motivation.” Ernest Greenwood (1957) restated these characteristics when he contended that all professions seem to possess: (1) systematic theory, (2) authority, (3) community sanction, (4) ethical codes, and (5) a culture.

In terms of public administration, Green, Keller and Wamsley (1993) challenge the sociological conception of what is a profession by noting that sociologists have diverted attention away from the

normative perspective so important to public administration. They contend that a different model is necessary in public administration, a model that builds upon political rather than technical justification for professional practice. For public administration, the field should re-conceptualize to identify what constitutes a profession in the public sphere, one that includes professional roles, competencies and structure. The hallmark of this model is founded on the premise that public administration should embrace the distinctiveness of its work, one that is predicated upon political awareness and technical proficiency.

Although we may still be debating what constitutes a profession one thing does become apparent across all the different perspectives; all professions require some given level of expertise. It is upon this premise that we look specifically at public procurement.

Public procurement has been defined as the “designated legal authority to advise, plan, obtain, deliver, and evaluate a government’s expenditures on goods and services that are used to fulfill stated objectives, obligations, and activities in pursuant of desired policy outcomes” (Prier and McCue, 2012). If this definition is correct then public procurement practitioners serve a central role in determining how governments across the world allocate resources that produce the goods and services demanded by citizens, and to do so in an economic and just manner. Similar to Green, Keller and Wamsley (1993) in terms of public procurement, what its practitioners do, and why, requires an understanding of its basis in fact and in law. Meanwhile, Arlbjorn and Freytag (2011) demonstrate how the advent of public-private-partnerships (PPP) and public-private-innovation (PPI) has blurred the distinctions between public and private procurement practitioners.

Doubtless there are at least three important dimensions that need to be recognized by those engaged in public procurement and they include 1) the legal basis for practitioners’ activities in discharging their responsibilities; 2) the organizational and structural boundaries of operative activities; and 3) the functional activities and intended outcomes of the practices used in the pursuit of governmental obligations. While the legal authority provides the basis for action of government, it also can prescribe specific procedures in how to do things or how to set up the institutions involved in procurement. The organizational dimension connects and structures the authoritative basis for pursuing any procurement action by aligning the functional activities and the choices practitioners make in a specific context. The functional procurement activities consist of the practices used in the pursuit of governmental obligations all of which operates within a particular institutional environment.

What are Political Factors of Professionalization in PA?

The acceptance of public administration as a profession would imply a certain level of autonomy for the field. However, autonomy in public administration presupposes freedom from close supervision and presumes discretion (Freidson, 1986, 147). Additionally, the autonomy that comes with professionalization affects the processes by which laws are interpreted (Waldo, 1968, 145). It is the efficacy of constitutional arrangements involving bureaucratic reasoning in the delivery of public goods that has been a major challenge for understanding the behavior of public administration professionals (Buchanan, 1985; Ostrom, 1974).

The conduct of government and the adequacy of its public services are shaped by the performance of professionals in government (Gargan, 1998). However, performance of government tasks is largely guided by theory and values. For example, Argyris (1991) cites the continual designing and action-orientation of public administrators on the basis of “theories-in-use” that may be tacit or taken for granted. Meanwhile, regarding values, the salience of power in the study of public administration professionalism is paramount (Gargan, 1998, 1099). Different combinations of theory and value orientations create varied interpretations consisting of preferred political styles, public issues, and qualities of citizenship (Elazar, 1984).

Despite the ambivalence that may emanate from professionalization, several arguments suggest that professionalism in public administration serves to provide clarity. Ingraham & Rosenbloom (1989) believe that the “politics” resulting from public administration professionalization should not be concentrated on political action or equity but rather the recreation of confidence in the expertise and competency of public administrators to become politically neutral administrators. Furthermore, White & McSwain (1990) support the idea of professionalization in public administration through the creation of *doers*, those who have a direct impact on accomplishing tasks, not as contract managers who outsource much of public sector activity due to lack of professional abilities. The advent of “think tanks” that provide elected officials advice also demonstrates a lack of public administrators’ professional abilities. No longer

are expertise and knowledge predicated by public officials (Niskanen, 1988). In the future, the stature of public administration professionalism will be largely dependent on the ideas, institutions, and policies that constitute public administrators' approaches to governing (Harris & Milkis, 1989).

How Does An Occupation Emerge?

Before an argument for professionalization of public procurement can take shape, public procurement must be identified as its own occupation. Simpson (1985) believes sociologists need to more closely examine the nexus of occupations and organizations, instead of concentrating attention on the dilemmas created by transactions between professions and organizations. Each occupation has its own unique history and possesses a pattern of structural and ideological features (Levi-Strauss, 1966, 24). "Two major considerations impel an individual to choose his occupation: the income it may bring him and the social status with which it is traditionally associated. With the first, the individual and his family may sustain their lives. Because of the second, society evolves a scale of values which are identified with the folkways and mores and which find expression in the social hierarchy of occupations" (Chen, 1947, 43). An individual's desired values and expression, and those associated with the occupation of choice, are reflective of self-image. A person's self-image is defined as a set of attitudes, beliefs, and opinions held by a person of himself or herself (Faunce, 1968, 93). In turn, a person's self-image is dependent upon the support, encouragement, recognition, and acceptance of those whom that actor shares a relationship (Salaman, 1974, 22). Typically, we build relationships with the people we work with; the people who share our daily experiences and can relate to our interests and endeavors.

According to Freidson (1970), an occupation exists when workers perform the same activities and devise common methods that are used by new recruits (p. 71). In this manner, established practices become affiliated with specific tasks inherent to a particular occupation. Hughes (1958) observes that new occupations recruit from existing occupations leading to issues regarding formalized training for the new occupation that eventuates into a more formal credentialing system placing clearer boundaries and ways to create barriers to entry into the occupation around the occupation and governing entry (pp. 134-135). As an example, the development of the Certified Public Purchasing Officer (CPPO) and Certified Professional Public Buyer (CPPB) certification programs by the Universal Public Procurement Certification Council (UPPCC) illustrate how a new occupational area may be starting to take shape through a credentialing system.

New occupations develop when workers are needed by employers to do tasks that have not been done before or when needed tasks are sufficiently different from what exists and it becomes the primary job of enough workers (Crosby, 2002, 17). Economic expansion, population growth, technological innovation, intellectual advancement, and changes in trends could all have the effect of creating new tasks. Yet, it is particularly important to the development of an occupation that individuals from different backgrounds perform similar services (Blum et al., 1988, 112).

Theoretical Similarities/ Differences of Private and Public Procurement

Beginning in the 1980s and 1990s, the formation of public-private partnerships established the necessity of public practitioners to consider stakeholder interests such as business private investors (Kettle, 2002; Cooper, 2003). However, best practices have not been vested to address the various dynamics at each level of government (Steinfeld & Thai, 2013, 68). At one extreme, there are prescriptive and regulated structures, where executives or directors are heavily involved in the majority of the procurement process. At the other end, there are loosely guided approaches where responsibilities are devolved and procurement is viewed as a managerial function (Peters, 1996).

The objectives of the public sector, and also for public procurement, are wider than traditional private sector objectives such as profit maximization, sustenance, advancement, and networking. Such objectives involve the delivery of a wide range of public services, such as law and order, health, education, defense, transportation, the environment, and social services. Thus, the scope of public sector organizations is typically broader than the scope of private companies with regards to diversity and serving consumers' needs (Erridge, 2007). As a result, an increasing recognition of the strategic role of public procurement has emerged which applies cost saving functions to cover more general governmental objectives (Zheng et al., 2007).

The direct responsibility of politicians in public procurement is another differentiator from private procurement (Murray, 1999). Evald and Freytag (2007, p. 31) find that, in the public sector:

- Users are citizens not customers.
- Target groups are identified according to rights not segmentation.
- Changes are politically driven instead of demand-driven.
- Services are mostly defined by experts and politicians less defined by users.
- Communication is geared towards regulating behavior and informing of rights, not positioning the enterprise.
- Public enterprises are budget-driven and less concerned about market innovation.

In the public sector, procurement practitioners seek to include as many vendors as possible to increase competition, whereas in the private sector practitioners minimize the number of vendors in order to reduce risks (Vaidya et al., 2006). Arlbjorn and Freytag (2012) determined that clear rules and regulations play decisive roles for the organization of purchasing in the public sector, especially in the tendering process which can be described as share purchases in the public and lost-for-good or always-a-share purchases in the private sector (p. 214).

METHODOLOGY

An overview describing the importance and process of emergence for new occupations has been presented. Also, from a literary and theoretical perspective, public and private procurement have been juxtaposed in the previous sections and what it means to be a professional in the public sector was discussed. Now, secondary data analysis of the UPPCC job survey is used to address professionalization in public procurement, and more broadly PA, by applying qualitative statistical methods.

The UPPCC is the primary certification body in the area of public procurement, offering the CPPB and CPPO training and credentialing process for individuals who are able to complete the program and pass certification examinations. In 2005-2006 the UPPCC determined that it was in the best interest of the certification process to conduct a thorough job analysis of public procurement in an effort to provide a defensible, valid, and sound method to test public purchasing practitioners wishing to achieve the CPPB or the CPPO designation. In 2006 the UPPCC hired Prometric, Inc. to execute the job analysis. Prometric has a long history of conducting job analyses, developing test specifications, and administering the exams across a host of professional certifications (CPA, JD, MD, etc.). Prometric conducted the job analysis for the UPPCC in 2007 and 2012. For the purpose of this study, the 2012 job analysis is being utilized for data collection and analysis.

The survey was sent to 30,980 valid e-mail addresses on May 3, 2012. There are 2,593 respondents that completed the survey, which is estimated to have taken 35-45 minutes to complete. The final survey instrument was sent to members of the California Association of Public Procurement Officials, Florida Association of Public Procurement Officers, National Association of Educational Procurement, National Association of State Procurement Officials, National Contract Management Association and National Procurement Institute and the National Institute for Governmental Procurement: The Institute for Public Procurement.

There are two main challenges that arise when using secondary data: validity and reliability. First, content validity refers to the extent by which the measure samples the domain adequately (Westen & Rosenthal, 2003, 609). The large number of job tasks (75) and the consultation of UPPCC committee members in designing the survey instrument sufficiently address issues related to content validity. Meanwhile, issues of criterion validity, such as the ability for the indicator values to accurately reflect practitioners' management and performance of job tasks, is also not a problem because survey respondents quite simply, have either performed or managed the given job task currently or in the past. There is no regard as to the extent or frequency of performance or management therefore the criterion validly likely reflects true activity. Third, construct validity, which deals with the ability to use the measures to make assessments and reach conclusions in the study (Nunnally & Bernstein, 1994), is addressed through use of job tasks to portray KSA's of public procurement practitioners. It is the KSA's that determine the uniqueness of an occupation and can be assumed that KSA's unique to the field of procurement, or public procurement exclusively, will be inherent to the specific job tasks (job activities) surveyed. Practitioners

would not be performing or managing job tasks beyond personal KSA's because their supervisors would therefore not assign the job task or the practitioner would otherwise not be able to complete the task.

Reliability is an issue in this study for two reasons. First, response bias, which is the effect of nonresponses on the survey's estimates (Creswell, 2009, 151), could have changed the survey results. Of the 30,980 valid e-mail addresses that surveys were sent to, only 2,593 respondents completed the survey. A different combination of respondents would have likely resulted in varying results regarding performance or management of job tasks, especially given the 75 tasks surveyed. Next, if the 2,593 respondents were to complete the survey for a second time, there may be a reliability issue on some of the more generalizable job tasks such as "facilitate movement of goods" or "conduct value analysis" whereby job tasks may relate to a large number of processes that could be considered arbitrary to the surveyed job task. For example, "facilitate movement of goods" could be an indicator for processes as varied as making a call to resolve a delivery issue to designing distribution channels. If a call was placed to resolve a delivery during one period but not another, then a survey respondent may have a different response as to whether that particular job task was performed and/or managed. However, since the data analysis is binary, the job task is either performed/ managed or not, then it is unlikely responses would change across periods, as respondents' perception of whether or not their duties correspond to the job task in question would have no impetus to change even if actual duties changed, since the expectation may be that duties performed/ managed in the past may resurface in the future.

RESEARCH DESIGN

The research design is illustrated by the following three sets of hypotheses. First, in order to determine whether public procurement is different from the occupation of private procurement, as denoted by BLS, each job task on the UPPCC survey is aligned according to BLS occupational work duties. Each corresponding job task (job activity) variable is clustered around the inclusive BLS work duty and is thus recoded so that frequencies can be measured in terms of private procurement occupational work duties performed by public procurement practitioner survey respondents, in terms of specific job tasks inherent to each respective occupational work duty. By recoding the job tasks that correspond to each work task, and computing a new variable, it can be determined what proportion of public practitioner survey respondents perform and/or manage *all* the job tasks associated with the BLS occupational work task, thus indicating whether the BLS work task is comprehensively performed and/or managed by survey respondents. Secondly, surveyed job tasks that do not correspond to BLS occupational work tasks are clustered and aligned with corresponding job tasks in order to identify the job tasks that are completed by only the public procurement practitioner, not the private sector counterpart. The first research hypothesis is as follows:

H₁: Private procurement occupational work duties are reportedly performed and/or managed by public procurement practitioners.

If the alternative hypothesis is accepted, then it can be argued that public procurement is a part of the more generalizable occupation of procurement. Yet, in order to state a case for the establishment of public procurement as its own occupation, the job tasks, and corresponding occupational work tasks of public procurement, must be sufficiently different from the BLS work duties of private procurement practitioners. The second research hypothesis is:

H₁: There are occupational work tasks reported by public procurement practitioners that are not performed by private practitioners.

If both alternative hypotheses are accepted, then a case can be stated for the emergence of public procurement as an occupation.

In order to garner support that public procurement is an occupational field warranting pursuit of professionalization, there must be a ranking of job descriptions (job positions) so that the field's participants can be situated within the public procurement department or organization. First, the most commonly performed and/or managed public procurement job tasks are identified. Next, the uncommonly managed job tasks are identified. The public procurement job descriptions that most often perform and/or manage the common job tasks and those that most often manage the uncommon job tasks may be ranked higher in the organizational structure.

However, determining the threshold to use in establishing which job tasks are commonly performed and/or managed and which job tasks are uncommonly managed requires sensitivity analysis. For the threshold used to categorize commonly performed and/or managed job tasks, the 75 surveyed job task variables are recoded so that if the job task is neither performed nor managed, then a value of “1” is assigned to the variable. A value of “0” is assigned to each job task variable when a survey respondent indicates “performance,” “management,” or “both.” After recoding, if a job task variable has a mean of .2 across all survey respondents, for example, then 20% of survey respondents neither perform nor manage the job task. In this case, 80% of respondents do perform and/or manage the job task. The sample mean and standard deviation are calculated for the means of each job task so that only job tasks performed and/or managed by a proportion of respondents falling beyond one standard deviation are included. The one standard deviation benchmark is used to separate those job tasks that are statistically more common.

For the threshold used to categorize uncommonly managed job tasks, the 75 surveyed job task variables are recoded. A value of “1” is assigned to each job task variable when a survey respondent indicates “management” of a job task. A value of “0” is assigned to survey responses such as “neither,” “perform,” or “both.” The mean of means from each job task is calculated along with the standard deviation of the means. Since two survey responses, “manage” and “both,” indicate management of a job task, the recoding process is repeated except in the second case a value of “1” is assigned to “both” (perform and manage) with values of “0” assigned to the three other responses. The two resulting sample means are summed and the standard deviations are averaged to determine the threshold percentage for uncommonly managed job tasks.

The research questions are as follows:

Research Question A-

What job tasks performed and/or managed serve to rank survey respondents’ job descriptions into a hierarchy of public procurement practitioners?

H₁: There are job tasks commonly performed or managed by survey respondents that serve to rank employees hierarchically.

Research Question B-

What job tasks managed serve to rank survey respondents’ job descriptions into a hierarchy of public procurement practitioners?

H₁: There are job tasks uncommonly managed by public procurement practitioners within each job description that serve to rank employees hierarchically.

Once public procurement practitioners are ranked according to job descriptions (job positions) then categories can be formed in order to create tiers among the group. The categories can then be compared to each other according to job specifications such as experience, education, and credentials. If public procurement practitioners in job positions at the top of the hierarchy have more job specifications than those at the bottom, and there is an escalating prevalence of job specifications as a practitioner moves up the hierarchy of job positions, then it can be argued that certain categories, or classifications, of job positions should be professionalized based upon the esoteric job tasks and specifications of particular classifications within public procurement. The hypothesis and model specification is as follows:

H₁: Job positions ranked higher in the hierarchy have more job specifications than job positions low in the hierarchy.

Model Specification

RESULTS

DISCUSSION

REFERENCES

- U.S. Bureau of Labor, (2010), *Standard Occupational Classification: Classification Principles and Coding Guidelines*, U.S. Government Printing Office, Washington, DC.
- Mol, Michael J. (2003). "Purchasing's Strategic Relevance." *Journal of Purchasing and Supply Management*, 9(1): 43-50.
- De Boer, Luitzen, Ebben, Mark, Pop Sitar, Corina. (2003). "Studying Purchasing Specialization in Organizations: A Multi-agent Simulation Approach." *Journal of Purchasing and Supply Management*, 9(5&6): 199-206.
- Thai, Khi V. (2001). "Public Procurement Re-Examined." *Journal of Public Procurement*, 1(1): 9-50.
- McCue, Clifford, P., and Gianakis, Gerasimos A. (2001). "Public Purchasing: Who's Minding The Store?" *Journal of Public Procurement*, 1(1): 71-95.
- Kline, Elliot. (1981). "To Be A Professional." *Southern Review of Public Administration*, 5(3): 258-281.
- Flexner, A. (1915), "Is Social Work a Profession?", paper presented at the National Conference on Charities and Correction, pp. 581-590.
- Greenwood, Ernest. (1957). Attributes of a Professional. *Social Work*, 2(3): 55-61.
- Prier, Eric, and McCue, Cliff. (2012), "The Implications of a Muddled Definition of Public Procurement", *Journal of Public Procurement*, Vol. 9 No. 3&4: 326-370.
- Green, R.T., Keller, L.F., and G.L. Wamsley. (1993), Reconstituting a Profession for American Public Administration. *Public Administration Review*, 53(6): 516-524.
- Arlbjorn, Jan Stentoft, and Per Freytag. (2011), "Public Procurement vs Private Purchasing: Is there any foundation for comparing and learning across the sectors?", *International Journal of Public Sector Management*, 25(3): 203-220.
- Freidson, Eliot. (1986). *Professional Powers: A Study of the Institutionalization of Formal Knowledge*. Chicago: University of Chicago Press.
- Waldo, Dwight. (1968). Public Administration. In D. L. Sills (Ed.), *International Encyclopedia of the Social Sciences* (Vol. 13) (145-156). New York: Macmillan and Free Press.
- Buchanan, James. (1985). *Liberty, Market, and State*. New York: New York University Press.
- Ostrom, Vincent. (1974). *The Intellectual Crisis in American Public Administration*. Tuscaloosa, AL: University of Alabama Press.
- Gargan, John. (1998). The Public Administration Community and the Search for Professionalism. In J. Rabin, W. B. Hildreth, & G. Miller (Eds.), *Handbook of Public Administration* (2nd Ed.) (1089-1161).
- Argyris, Chris. (1991). "The Use of Knowledge as a Test for Theory: The Case of Public Administration." *Journal of Public Administration Research and Theory*, 1:337-345.
- Elazar, D. J. (1984). *American Federalism: A View From the States* (3rd Ed.). New York: Harper and Row.
- Ingraham, Patricia W., & Rosenbloom, David. (1989). "The New Public Personnel and the New Public Service." *Public Administration Review*, 49:116-125.
- White, Orion, & McSwain, Cynthia. (1990). *The Phoenix Project: Raising a New*

- Image of Public Administration From the Ashes of the Past: In H. D. Kass & B. L. Katron (Eds.), *Images and Identities in Public Administration*. Newbury Park, CA: Sage.
- Niskanen, William. (1988). *Bureaucracy and Representative Government*. Chicago: Aldine-Atherton.
- Harris, Richard, & Milkis, Sidney (1989). *The Politics of Regulatory Change*. New York: Oxford University Press.
- Simpson, Richard L. (1985). "Social Control of Occupations and Work." *Annual Review of Sociology*, 11: 415-436, Palo Alto, CA: Annual Reviews.
- Levi-Strauss, Claude (1966). *The Savage Mind*. Chicago: The University of Chicago Press.
- Chen, Ta. (1947). "Occupations." *American Journal of Sociology*, 52, Supplement: Population in Modern China, 43-56.
- Faunce, William A. (1968). *Problems of an Industrial Society*. New York: McGraw-Hill.
- Salaman, Graeme. (1974). *Community and Occupation: An Exploration of Work/Leisure Relationships*. London: Cambridge University Press.
- Freidson, Eliot. (1970). *Profession of Medicine: A Study of the Sociology of Applied Knowledge*. New York: Dodd, Mead.
- Hughes, Everett C. (1958). *Men and Their Work*. Glencoe, IL: Free Press.
- Crosby, Olivia. (2002). "New and Emerging Occupations." *Occupational Outlook Quarterly*, 46(3): 16-25.
- Blum, Terry C., Roman, Paul M., and Deborah M. Tootle. (1988). The Emergence of an Occupation. *Work and Occupations*, 15(1): 96-114.
- Kettle, Donald. (2002). *The Transformation of Governance*. Baltimore, MD: Johns Hopkins University Press.
- Cooper, Phillip J. (2003). *Governing By Contract: Challenges and Opportunities For Public Managers*. Washington, DC: CQ Press.
- Steinfeld, Josh, & Thai, Khi. (2013). Technology Advancement and E-Procurement in the US. In N. Pomazalová (Ed.), *Public Sector Transformation Processes and Internet Public Procurement: Decision Support Systems*. Hershey, PA: IGI Global.
- Peters, B. Guy. (1996). *The Future of Governing: Four Emerging Models*. Lawrence, KS: University of Kansas Press.
- Erridge, Andrew. (2007). "Public Procurement, Public Value, and the Northern Ireland Unemployment Pilot Project." *Public Administration*, 85(4): 1023-1043.
- Zheng, Jurong, Knight, Louise, Harland, Christine, Humby, Stuart, and James, Ken. (2007). "An Analysis of Research Into the Future of Purchasing and Supply Management." *Journal of Purchasing & Supply Management*, 13(1): 69-83.
- Murray, J. Gordon. (1999). "Local Government Demands More From Purchasing." *European Journal of Purchasing & Supply Management*, 5(1): 33-42.
- Evald, M. R., and Freytag, P. V. (2007). *Forandring gennem styring og markedstoenkning*, Borsens Forlag, Copenhagen K.
- Vaidya, Kishor, Sajeev, A. S. M., and Callender, Guy. (2006). "Critical Factors

That Influence E-Procurement Implementation Success in the Public Sector.” *Journal of Public Procurement*, 6(1&3): 70-99.

Westen, Drew, and Rosenthal, Robert. (2003). Quantifying Construct Validity: Two Simple Measures. *Journal of Personality and Social Psychology*, 84(3): 608-618.

Nunnally, Jum and Bernstein, Ira (1994). *Psychometric Theory* (3rd Ed.). New York: McGraw-Hill.

Creswell, John W. (2009). *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (3rd Ed.). Los Angeles, CA: Sage Publications.

WHY AND HOW POLITICIANS MATTER IN PROMOTING EFFECTIVE PUBLIC PROCUREMENT
SYSTEMS IN AFRICA

By

Professor Benon C Basheka, PhD

Uganda Technology and Management University

Email: bbasheka@utamu.ac.ug, bbasheka@yahoo.co.uk

ABSTRACT

In a 2013 book chapter advocating for the science of public procurement, this author penned fundamental questions dear to the public procurement field of study. One such question related to what ought to be the appropriate role of politicians in public procurement. The dividends derived from answering this question go a long way in addressing some of the critical challenges of our times. Governments are traditionally run by politicians (charged with policy making) and administrators (charged with implementation of the policies). Politicians shape public procurement decisions. The award of lucrative contracts attracts political interests steeply. In fact, technical procurement procedures are in most political environments in Africa ignored in favour of political interests. This paper avers that Involving politicians in public procurement appears a pivotal strategy for establishing an effective public procurement regime. Moreover, politicians represent the people and guarantee effective public financial management -- of which public procurement is part -- for the common good. Irrespective of whether we regard politicians as observers in the public procurement processes, they get involved informally, which suggests only they need a formalized platform for their full involvement. It is a fact that whenever administrators that manage public procurement face a problem, they seek solutions and 'protection' from politicians, yet politicians are often accused of 'messing' up the procurement processes. These contradictions demand critical analysis so as to deflate any controversies that downplay the role played by politicians. This paper is premised on democratic theory to elucidate on why and how the politicians matter in establishing effective public procurement systems in Africa.

KEY WORDS: DEMOCRACY, POLITICS, PUBLIC PROCUREMENT, POLICY MANAGEMENT, AFRICA

1. INTRODUCTION

Governments of whatever form are legitimate providers of public services. After years of sharing these responsibilities with other non-state actors, today governments continue to receive renewed attention as providers of essential services, such as health, education, defense, electricity, water and sanitation as well as infrastructure. However,

the most contentious debate relates to how 'involved' should governments be in the actual delivery of public services. The New Public Management (NPM) reforms advocated a minimalist role of government in public services with a preference centred on the private sector and CSOs, arguing government only needed to play a regulatory role. Even where government is to play a role, the distribution of responsibilities between politicians and bureaucrats has often been an area of contention.

It is clear that the effective delivery of public services requires the coordinated acquisition of materials and equipment which the state purchasing apparatus must accomplish (Hunja, 2003). To be able to meet the demand for services, governments purchase goods and services from the marketplace (Odhiambo and Kamau, 2003:1). It is difficult to imagine how a state can deliver substantial improvements in the wellbeing of its citizens without effective public procurement policies and their implementation. Citizens interact with their government through public servants – the backbone and heartbeat of the public service (Mle, 2012:29). These public servants implement policies passed by the political class and they are equally held administratively accountable by the politicians. Through regularly appearing before oversight committees of parliament like the Public Accounts Committees (PACs), public servants answer questions raised by the Auditor General (AG) of a country or are put to task to explain any issues pertaining to their respective sectors of jurisdiction.

While public procurement mainly focuses on yielding value for money for the contracting authorities, it is a powerful tool to pursue broader social economic goals (Albano and Kim, 2010:298). Public procurement is a vital public service delivery initiative, owing partly to the amounts of money that are expended through it. Its effective management has the potential to improve the capacity of governments to deliver public services. It thus becomes an imperative for every public organization put in place effective systems of procurement to protect stakeholders' funds (Shaw, 2010). The stakeholder funds in the context of government agencies are the taxpayer's moneys. The procurement function should form a key part of any management strategy by any government.

Basheka (2008:379) elucidates how it is no longer doubtable among policy makers, professionals and academics that public procurement is central in facilitating government operations in both developed and developing countries, while Arrowsmith (1998), Trionfetti (2000), and Brulhart and Trionfetti (2004) demonstrate how public procurement facilitates the running of governments.

The fact that government spends a lot of money on public procurement makes its management a matter of concern for every level of government (Coggbun, 2003: 1). In this regard, all public agencies, regardless of size or level of government, require the purchase of goods and services to support their functions (Thai & Grimm, 2000). Public procurement is not only an economic but a political activity. It is a central piece of function through which political strings continue to be pulled by people with divergent interests. As well as being an important and sometimes amusing activity, politics is a mechanism for achieving societal goals.

Cox, Burk and Morgan (2011:1) insist that government decision making is the product of interaction of both administrators (civil servants) and politicians (both elected and unelected). However, finding an appropriate balance of political and administrative participation is the central problem of governance in a modern representative democracy. In a democracy, public servants act as agents of the executive which also delegates power to politicians. Politicians also act as agents of the citizens who hold them accountable, especially through elections, for whatever goes wrong. Elected representatives hold the original mandate from the citizens. This logic explains why politicians go to the masses to seek for their renewed mandates at election times unlike administrators who are simply appointed and serve on a permanent basis; notwithstanding the NPM doctrine of contract-based employment. Public servants work for governments to deliver the many public services needed by citizens. Governments deliver services through efficient service systems driven by core public service values as opposed to 'managerial values'.

In many modern societies, more than one-third (and in some cases approaching –or – exceeding-a half) of what is earned in the economy is taken as taxes and then recycled through the public budget to achieve a variety of public purposes (Ball and Peters, 2005:1). A major political choice is what goods and services will be publicly provided and which will be left to the market to provide. With the reassertion of government's role in the last decade, a revival of scholarly and practitioner interest in public services in developing countries (Batley, McCourt and McLoughlin, 2011) has intensified. Scholarly attention on the role of politicians and administrators in policy implementation has come under increased focus.

When public procurement started receiving some attention both in government and in educational programmes, roughly half a century ago, the main emphasis was on executing the purchasing process correctly. Education focused on teaching the legal rules and the steps to be taken to correctly acquire the requested materials and services (Telgen and Thai, 2008:303-304). The field of public procurement has developed quite dramatically from that stage. The public procurement function has become much more complex than before and public procurement officials must constantly deal with a broad range of issues (Albano, Sinder and Thai, 2013: 1); within the changing context of government operations. Public procurement has a significant role in successful management of public resources (OECD, 2007). As the scope and reach of public policies has increased in democracies, there has been a corresponding demand for more participation by affected interests. Within this interest, demands for increased involvement and participation in key government functions emerge from a number of actors. As part of the democratization efforts, many countries have undertaken public procurement reforms. This increased demand for participation challenges the expectations that the task of public administration is primarily the non-political implementation of political will expressed in statutes; and that administration is the purview of experts and professionals (Bryner, 2003:189).

McCue and Pitzer (2000) reported that traditionally, public procurement was organized as a centralized function of government. However, due to the democratization agenda that saw the renewed focus on decentralized systems of management as advocated by advocates of the minimalist state ideology, decentralized public procurement systems emerged. These reforms saw the public procurement function being removed from the hands of politicians and entrusted 'to technical staff' as a strategy of professionalizing the function and making it more efficient. Public procurement reforms in Africa have generally shielded the procurement processes from politicians and more powers are availed to the technical people. While several prescriptions on increasing public procurement efficiency have been advanced, none has covered the role of politicians. Indeed, to divorce the study of development administration from politics would be shortsighted and incomplete (Basu, 1994:374).

John Stuart Mill (1861:104) extensively discussed the proper role of the legislature in a democratic society. He indicated that the proper role of the legislature (composed of politicians) is to watch and control government, to throw light of publicity on its acts, to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and if the men who compose the government abuse their trust, they should be expelled from office and appoint their successor. This historical fact positions the role of politicians at the core of most public administration discourses including public procurement. If those managing public procurement misbehave, it is the duty of the politicians to expel them and appoint their successors.

In the seminal essay entitled, 'The study of administration' that first appeared in the *Political Science Quarterly* of 1887 Woodrow Wilson, planted the seeds for administrative efficiency. A young professor of Political Science at Princeton University at the time, Wilson proposed four issues for study and discussion in the discipline of public administration, namely: (1) separation of politics from administration, (2) comparative analysis of political and private organizations, (3) improving efficiency with

business-like practices and attitudes toward daily operations, and (4) improving the effectiveness of public service through management and training of civil servants, as well as encouraging merit-based assessment. By 1900, in a ground-breaking book, on 'Politics and Administration', Goodnow became a major proponent of the Wilsonian politics-administration dichotomy. Goodnow noted that politics had to do with policies or expressions of the state while administration had to do with the execution of these policies (Henry, 2010: 28). The separation of politics from administration, Wilson and Goodnow believed, would promote efficiency in the running of government. In the 1940s this debate received a stroke with the declaration by Herbert Simon that separating politics from administration was a mere proverb.

2. THE RESEARCH PROBLEM

The desire to have efficient public procurement systems is undoubtedly a key policy agenda in Africa and will possibly remain so in the near future due to the significance of the public procurement function in the running of governments. While the principal target of numerous reforms (including public procurement reforms) during the long existence of governments has largely been the efficiency, or lack of it (Peters, 2004), there continues to be a glaring deficit in the functioning of administrative systems (Anitha, 2007). It is known, as Bolton (2006:193) demonstrates, that the size and volume of government procurement contracts facilitates the government's decisions with regard to when and whom it contracts with, and these decisions affect a number of issues. Meanwhile, Bryner (2003:189) informs us that different policies pose different challenges for public administration. Some policies tend to be associated with political arrangements that implicate bureaucracy in ways that are quite consistent with other strongly-held values of democratic accountability and representation, and yet other policies are simply more problematic. Public procurement policies appear across these two strands of challenges. Public procurement policies are not only associated with political arrangements but they are also problematic.

Today, public procurement officials spend more time answering procurement audit queries and appearing before parliamentary oversight committees and other administrative organs of government like the ombudsman and criminal investigation directorates than ever before. This development portrays signs of a rather problematic function of government. Several oversight bodies are established to increase the levels of transparency and accountability. As a sign of administrative accountability, public officials must respond to any queries about how particular procurement processes could have been undertaken. Other than administrative accountability, the function has to demonstrate political and social accountability in the eyes of the citizens. Political participation in public procurement arguably affords citizens an opportunity to communicate information to government officials about their concerns and preferences and to put pressure on them to respond to any concerns. In a democratic system, citizens have the right to express their views and attitudes towards almost everything happening in the public sphere or concerning their own interests (Verba et al, 1995). Public procurement cannot be an exception to this known democratic principle.

A significant portion of contemporary procurement literature focuses on managing the operation as suggested by the works of Sementelli (2011: 45); yet there are more strategic matters of concern in regard to the public procurement function. The language employed in most of the literature reflects the language of science; evoking disciplined engineered and relatively clean processes (Sementelli, 2011:46). However, the procurement practice is full of ups and downs punctuated by the visible and invisible hand of politicians yet their role is rarely a subject of true scholarship in public procurement discourse. This neglect has created a stream of questions but without answers. Yet, it is such information that would be the bedrock for any strategy to suggest performance improvements. The greatest challenge thus relates to the appropriate role of politicians in public procurement. The existing public procurement laws and frameworks are a demonstration of administrative shields that prevent politicians from participating in the technical processes of procurement. Yet, intriguingly, politicians in reality have ended doing more in procurement decisions. Using the 'kings'

spread across the public bureaucracy, politicians use either direct or indirect interventions to award tenders arbitrarily, disregarding existing policies. This paper attempts to fill this knowledge void by demarcating how, when and where politicians can participate in public procurement through formalized ways. This debate is possibly clearer with an understanding of the context in which the public function operates. The next section turns to that effort.

3. THE CONTEXT OF PUBLIC PROCUREMENT IN AFRICA

African countries have been reforming their public sector with a view to improving efficiency, effectiveness, accountability and transparency. Chanie (2013:1) poses a question why after some 50 years of independence and with putative efforts of the western world trying to help, so much is still unimposing. Public procurement reforms have been implemented for the last 10 or so years in most African countries. Hunja (2003) noted that the objective of such reforms was to establish a strong and well-functioning procurement system that was to be governed by a clear legal framework establishing rules for transparency, and mechanisms of efficiency. Public expenditure management (PEM) is one instrument of government policy. Public expenditure management is a basic means of government policy distributing and utilizing sources productively, effectively and sensitively (Tommasi, 2001:19).

Public procurement has a strong relational focus with public administration generally but specifically more so with public financial management. Public administration is an expression of government power that has profound implications for the effectiveness and efficiency of government as it defines the conduct of democracy and shapes the relationship between government and its citizens (Schoeman & Fourie, 2008:802). Public expenditure must be accomplished with the interests of citizens being prioritized above everything else. One of the means of maintaining this relationship is the oversight role that legislatures play in holding the executive accountable (Madue, 2012:431).

Politicians as representatives of the people in a democracy legitimately demand participation in most public policy initiatives and in the context of our debate in the public

procurement processes. This demand is dressed up by the unquestionable role of the function to the fulfillment of government social, economic and political goals. While this author advocates for their full political participation, it is important to dissect the debate owing to the existence of two types of politicians in the African context, that often have divergent goals. The first type is politicians with a desire to get access to funds expensed through public tenders as a strategy to fulfill their political agenda. Such a type of politicians, for example, need funds to pay the debts incurred during election campaigns given that African politicians incur heavy expenses to get elected. Such politicians also promise tenders to their supporters in return for funding their election. From another context, these politicians may wish to participate fully in public procurement in order to secure resources illegitimately so as to cushion themselves for the next round of elections since politics is highly commercialized. In view of the aforementioned facts, if and when this group is allowed to participate in public procurement, it must be cautiously monitored. .

The second category of politicians in consideration while advocating for participation are those who have a true concern for participation based on their understanding of democratic doctrines as true representatives of the people. While the voices from the former category are most dominant in most debates, improvements in the efficiency within the public procurement systems in Africa must target this later group and exploit its potential. Politicians as conceived in this paper relate to the involvement of the legislature at whatever level depending on which country but taking into account the second category of politicians who occupy these institutions. Studies point to the importance of three main success factors for improving Public Financial Management (PFM). First, there must be active political leadership and support for reforms to be implemented and to have effect. Evidence suggests that high-level commitment from politicians is needed if technical changes are to gain institutional traction and be sustained. Ministers of Finance must lead from the front and transmit their commitment to the technical staff below them.

In Africa the public sector has been neither efficient nor effective in delivering services (Ngowi, 2007). All these problems hinge on the effective role of politicians. Politics in Africa is increasingly fingered as a fundamental impediment to effective policy making. The effectiveness of public procurement systems cannot by any chance be insulated from the activities of politicians. The thesis in this paper is that effective public procurement is heavily dependent on the support of politicians. Public procurement is undoubtedly different from private procurement partly because in public procurement the economic results must be measured against more complex and long-term criteria. Furthermore, public procurement must be transacted with other considerations in mind, besides the economy. Unlike private procurement, public procurement is a business process within a political system and has significant consideration of integrity, accountability, national interest and effectiveness (Witting, 1998). For these reasons, public procurement is subjected to enacted regulations, in order to protect the public interest.

Mafunisa (2008:79) strongly insists that public officials are expected to act in a proper and acceptable manner in performing their duties. This position is based on the understanding that there are right and wrong ways of acting in a given situation. In the domain of public administration, right ways of acting are associated with increasing the efficiency of service delivery in the public interest, thereby promoting the general welfare of society. Under difficult circumstances facing any government, it is imperative to ensure that the crisis does not negatively impact on ethical leadership. Any activity directed toward improved delivery of public service amidst the global crisis starts with the development of purpose and strategies within the context of ethical public administration. If ethics is not part of the overall strategy and purpose of public institutions, then the provision of sound public administration within democratic structures of public institutions will be compromised (Dorasamy, 2010:8).

Bryner (2003:189) demonstrates how the primary task of public organizations is to implement the policies enacted by government. While the success of the policy implementation is to a great extent a function of the capacity of public administration, Bryner suggests other factors like legislative commitments of authority and resources to policy goals; and executive decisions concerning priorities tradeoffs among competing concerns are also critical. On his part, Caiden (1982:16) long relied on two of Plato's principles to guide public leadership. The two, he suggested, include a clear focus on the common good of the people that ensure actions conform to public interest and a commitment toward caring for the welfare of the public and not serving the interests of a certain individual so as to betray the rest. Public procurement within this framework must serve the public interest. The neglect of public interest and the negation of caring for others are responsible for the poor economies in Africa. There are specific examples that can help us suggest the context in which political participation is suggested.

In South Africa, prior to 1994 public procurement was geared towards large and established contractors. It was difficult for new contractors to participate in government procurement procedures. However, the granting of constitutional status to public procurement has made it recognized as a means of addressing past discriminatory policies and practices (Bolton, 2006: 193). The constitutional status was done by politicians to address essential political problems of marginalization. This South African example demonstrates how willing politicians can use public procurement to address societal challenges. Reforms in public procurement in South Africa were initiated to promote the principles of good governance, and the National Treasury introduced a preference system to address socio-economic objectives. The reform processes were due to inconsistency in policy application and the lack of accountability and supportive structures as well as fragmented processes. Although some groups of politicians have continued to use public procurement to attain their individual and cronies' objectives, the above policy initiative is very instructive on how public procurement efficiency can be used to improve governance.

In Africa, as Matthee (2006: 65) insists, the deficiencies and fragmentations in governance, interpretation and implementation of the Preferential Procurement Policy Framework Act (PPPFA) Act No 5 of 2000, resulted in the introduction of supply chain management (SCM) in the public sector as a policy tool (National Treasury, 2005: 8). Politicians played a central role in this debate. Ambe and Bandenhosrt (2012), however, opine that despite the reform processes in public procurement and the employment of SCM as a strategic tool, there are predicaments in South African public procurement practices -- for example, non-compliance with procurement and SCM-related legislation and policies as well as tender irregularities (Smart Procurement, 2011). De Lange (2011) reports cases where taxpayers were fleeced of R30bn and corruption, incompetence and negligence by public servants were to be blamed. The South African government spent R26.4 billion in 2010 in ways that contravened laws and regulations (Smart Procurement, 2011).

In Ghana, to fulfil its mandate, the Ministry of Finance in 1996 embarked on an exercise to reform the government's Public Procurement System as an integral part of a wider Public Financial Management Reform Programme (PUFMARP). The objectives of the reform were, among others: to eliminate the various shortcomings in the public procurement process through the provision of a comprehensive procurement law and standard tender documents supported by relevant institutional and administrative structures and an oversight body, which would promote the use of public procurement as a tool for national development; harmonize the application of procurement related rules in local and international conventions and treaties; and, promote the integrity of the public procurement system and public confidence in the procurement process.

In 2013 Kenya, a comparative analysis of the cost of the railways Kenya and Ethiopia are building raised serious integrity questions about how the total cost rose from the initial Sh 220, 921,502, 221.08 quoted by China Road and Bridge Corporation in its acceptance of the tender award letter dated July 2012 to the current Sh 1.3 trillion.

While the Kenyan one is of inferior technology and covering half the distance that Ethiopia is constructing, it was expected to cost the government \$3.804 billion (Sh 334.8 billion) compared to \$3.9 billion (Sh 343.2 billion) used by Ethiopia. The variations shaped the railway project into the country's biggest financial scandal, beating the Goldenberg, Anglo-leasing and Triton frauds, where the involvement of politicians was dominant. The documents further showed the locomotives and rolling stocks that included 56 diesel locomotives, 1,620 freight wagons, 40 passenger coaches and one simulator would have cost \$1.147 billion (Sh100.936 billion). The Ethiopian locomotives and rolling stocks consisting 35 electric locomotives, six diesel shunting locomotives, 1,100 freight wagons, 30 passenger coaches and one simulator will cost \$230 million (Sh20.24 billion). Construction of the 485km Kenyan railway will require \$2.657 billion (Sh233.816 billion) compared with Ethiopia's budget of \$3.67 billion (Sh322.96 billion) to build 756km from Addis Ababa to Djibouti port on the Red Sea coast. The review upwards of the railway budget elicited questions from managing director of the Public Procurement Oversight Authority, who unsuccessfully sought answers from the ministry over the discrepancies in the tender and raised the matter of the variations in tendering with senior government officials. The railway project scandal is a continuation of a 'tradition' that began in 1992¹.

Although policy makers are interested in the final outcome of their policies, such as an increase in the growth potential, the outcome tends to be determined not only by the policy inputs, but also by external factors. As a result, the effectiveness of public policies, which relates input to final objectives and outcomes, is very hard to measure and the focus of empirical analysis tends to be on efficiency, the latter relating input to output. Studies show that significant efficiency gains in public spending are possible

¹ The information is available online at:

http://www.standardmedia.co.ke/m/?articleID=2000101450&story_title=Why%20rail%20project%20could%20be%20Kenya's%20biggest%20scandal%20yet/business/

(Borge, Falch and Tovmo, 2004: 1). A study to investigate whether political and budgetary institutions have any impact on efficiency in the production of public sector services demonstrated that the emphasis on efficiency is related to the fact that many countries face a demographic development that increases the demand for public services, and at the same time experience substantial fiscal deficits and public debt. Improved efficiency in public service production facilitates more services without increasing Government expenditures.

Wilson (2004) argued that in a situation where there are huge system loopholes coupled with laxity in legal and administrative systems, compounded by non-transparency and extensive discretionary powers at the hands of politicians, there needs to be concerted effort to ensure strict enforcement of laws to achieve the purpose for which those laws were enacted. Studies in Uganda, South Africa, South Sudan, Tanzania and Kenya have revealed that corruption in public procurement has mainly been through hidden violation of laid down procurement rules (Basheka, 2009). Low detection of breaches of the law (Kanaga, 1999), weak enforcement of rules (Larmour, 2006) and regulations will also strengthen the hands of wrongdoers to misapply the law with impunity. Yet these are all core functions of the countries' legislatures and other elected politicians.

From the ensuing discussion, it is clear that the context of public procurement in Africa is one that is characterized by contradictions that range from political will backed by legislation, policy and guidelines for best practice to that characterized by corruption, collusion and patronage. It is against this backdrop that the role of politicians in this conundrum will be examined. The next section illustrates why politicians matter in public procurement

4. DO POLITICIANS MATTER IN PUBLIC PROCUREMENT?

Hunja (2003) maintains that while trying to implement far-reaching procurement reforms, developing countries faced particularly daunting challenges. Such challenges

have marked the journey of public procurement reforms in Africa. While some of these challenges are externally imposed from the development partners who have funded procurement reforms, others are immersed in the internal politics and bureaucracy of individual countries. Public procurement is amenable to divergent interests from a variety of stakeholders notably; taxpayers, funding agencies, the beneficiaries of goods and services, government contractors and politicians. It has objectives aligned to economic development, social and environmental protection as well as ensuring integrity of the administration (Arrowsmith et al., 2000). Politicians should be at the centre of any efforts at finding solutions to challenges affecting public procurement as they legitimately represent the interests of the masses. Thai (2008) demonstrated how public procurement was a function of government most prone to corruption, particularly in developing countries, where there was reported to be insufficient transparency and competition. Politicians ought to make it their duty to use the oversight committees to tackle such challenges so as to neutralize the corrosive effect of corruption.

When a government adopts a programme, it often reflects a compromise among different views of interest groups, policy makers and management. In democratic environments, as Thai (2007:8) illustrates, there are cases of a strong coalition of policy makers, bureaucrats and interest groups in their effort to get their programmes adopted. By their nature, public procurement policies emerge after a compromise among different stakeholders. Considering the mandates that politicians are entrusted with when they are elected into office, any continued attempts to limit their involvement in public procurement would suggest missing out on the representation of one of the big constituencies. Modern democracies are characterized by shared decision-making among the legislative and executive branches of government. Most policy initiatives are enacted into law, and thus must be approved by the legislature after presentation by the executive branch of government. Public procurement policies and laws have gone through this process. The contribution of the legislature to the overall policy-making process, as conveyed to us by Saiegh (2005:8); is an important aspect relevant to the

debate on how to involve politicians in public procurement since most issues that touch this function are of a policy nature and require legitimating.

Public procurement is a business process within a political system and it is a politically sensitive activity (Schapper et al., 2006). It should serve various interest groups, but more so the people -- taxpayers. Traditionally, within the context of democracy, politicians have determined public expenditure management of any government. Public procurement is in itself one of the components of the expenditure side of government. Hence, given their position in public financial management, politicians are central to public procurement activities. Their role, which has remained at the tail end of most public procurement reform efforts in Africa, needs to be elevated. In this regard, given the nature and complexity of the public procurement function, it is pertinent to define the parameters for the involvement of politicians in it.

While most countries have engaged in some institutional reforms, as Curristine, Lonti and Joumard (2007:2) inform us, the empirical evidence of their impact on efficiency is so far limited due to: the lack of resources to conduct evaluations; the lack of pre-reform measures of performance; the complexities in measuring efficiency in the public sector; and the problem of isolating the effects of specific institutional reforms on efficiency from other external influences). Effective public procurement management is an increasingly important function of any government and has been subjected to numerous reforms. It now attracts immense debates from business companies as well as for the public sector of an economy (Dimitri, 2013:1). The nature of procurement as an area where theory and practice naturally meet makes it imperative that its efficiency involves those mandated to make policy decisions. The interaction of the theory and practice components of procurement is both ways since daily procurement design can benefit from the more robust theoretical findings, while practice can fruitfully feed academic research with new problems, suggestions and intuitions. The involvement of politicians in public procurement is better discussed in the context of the principal-agency model.

Agency theory, as advocated by Jensen and Meckling (1976:308), addresses the issues involved in establishing and administering a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf. This involves delegation of responsibilities by the principal to an agent and the agent is expected to work in the best interests of the principal. Public procurement is a tool to be used to satisfy the needs and aspirations of the citizens (as principals in a democracy). Citizens have delegated to the politicians who should act on their behalf. The core of public finance depends on some people spending someone else's money (Djordjević, 2009:1); and in democratic culture, this process has been constructed by the voters who have entrusted the public force to those they have elected (Shah and Hagen, 2007: 27). The politicians usually have original mandates from the citizens (principals) to manage activities that shape what governments are mandated to do. All activities of a public nature should have the full involvement of the politicians in the best interests of the citizens.

Studies based on principal-agent reasoning are replete with the optimism that efficiency gains can be realized within public bureaucracies by invoking self-interest under the right incentive contract (Laffont & Martimort, 2001). For the many government functions characterized by principal-agent relationship, procurement is considered prone to weak management (Bartle & Korosec, 2003). There are significant problems in the public procurement systems in various countries in Africa. Politicians have a duty to address these problems. The engagement by government, of private providers in open tendering procedures has not produced the desired results of efficiency. Due to poor performance, demands for recentralization of the public procurement function in government have become commonplace, especially among the political class who sound 'frustrated' with the agents to whom they have delegated to manage the processes of procurement. Public procurement is a highly regulated function of government. The existence of a set of rules alone has not been sufficient to ensure proper compliance, particularly regarding adherence to the spirit of the law (Edwards & Wolfe, 2005). Politicians have a duty to ensure compliance through the various mechanisms mandated by the legislative

principles. It is their duty to analyze the constraints to compliance and suggest areas for improvement.

Ng and Dastmalchian (2001) found that managers of public organizations generally dealt with more stakeholder groups, such as civil servants and clients and political leaders, than did privately-owned organizations; and this affected their compliance status. At the heart of an effective public procurement system is good governance which is measured by how systems are transparent and accountable. The concepts of transparency and accountability are nowhere more significant in public administration than in procurement, which accounts for more than a third of all of a government's outlays (Schapper, Malta and Gilbert, 2006:1). Politicians are by democratic doctrines mandated to demand accountability as elected representatives to manage people's affairs. Moreover, the politicians control the approval of major technical appointments including secretary to the treasury, ministers of finance and other senior positions of government that drive the country's public procurement agenda at a policy level and the procurement oversight officials who manage the 'operational' processes.

If the politicians conspire to abuse public trust, their decisions are clandestine and the economic implications of such decisions can be disastrous. While several African legislatures have transitioned from being subordinate under single-party rule to become strong and capable agents of change like in the cases of Ghana, Kenya and South Africa -- where legislatures have taken proactive roles to amend constitutions and bills, reform antiquated colonial structures, and approve appointments -- in other jurisdictions they have not been proactive enough. In Kenya, the legislators have claimed their rightful positions in government decision-making processes by asserting themselves with regard to budgetary processes and strengthening committee systems. Public procurement reform processes have seen a high degree of participation by politicians. This has allowed them to deliberate on public spending, and has led to the evolution of systems of portfolio committees that query the executive and hold it to account -- one of the most assertive forms of democratic strengthening. This lesson can be picked by

other countries on the continent. In the next section, we turn to specific concrete examples of how politicians can be involved in public procurement.

5. HOW POLITICIANS SHOULD BE INVOLVED

With the global revolution in public procurement, reforms swept most African countries like Kenya, Tanzania, Uganda, Rwanda, Burundi, Ghana, Senegal, South Africa, and Malawi, among others. In the majority of these African countries, public procurement reforms were used to transfer the processes of procurement from being managed by politicians to the bureaucrats. In Uganda, for example, procurement was initially in the hands of the Central Tender Board and district local governments were not covered by this arrangement. The tender board system had a number of weaknesses that included: use of archaic laws and procedures; bureaucratic delays and lack of institutional coordination; lack of skilled manpower to handle government purchases professionally and malpractice as well as unethical conduct. Reforms had to be undertaken in the procurement system to address these concerns.

The abolition of local government tender boards in most local governments indirectly reduced role of politicians as they previously got involved in directly making procurement decisions. The tender boards made final award decisions; a responsibility that was now transferred to technically composed contract committees. The argument in this reform strategy was to create a system that was transparent and accountable as politicians were assumed to have been part of the problem in tendering at the time. Any effort that would deter the politicians from participating in key stages of the process of tendering was a welcome move at the time. However, despite these reforms, efficiency deficits in public procurement systems have remained. This demonstrates wrong diagnosis at the time such a prescription was made. Politicians at all levels and the legislature in particular, need full involvement within the public procurement processes. There is thus a need for a transition from a one-step-involvement in procurement planning and budget approval, to more extensive involvement at the various stages of the public procurement process.

Firstly, politicians need to be proactively involved at conception of major projects; for experience has shown that in the majority has demonstrated serious procurement challenges due to political interference at later stages. Projects with a high political stake in the construction and extractive sectors have been characterized by delayed implementation which in itself is an attempt by politicians to 'reclaim' their missed opportunity. Procurement for the construction of the dam for the Bujagali Power Project in Uganda was delayed for about two years due to political interference at later stages of contracting. Such costly delays would have been minimized if politicians had been involved in all procurement-related undertakings during the early stages of the contracting journey. Quite often, politicians in Africa involve themselves in decisions to award huge contracts; and where the award decisions do not favour their interests, they will overturn them through whatever means available to them. To reverse this trend, their proactive involvement at conception of such projects will shield the public procurement processes from unnecessary delays occasioned by such interference. The need to seek for a political 'no-objection' to save time and resources that come with a rejected procurement award decision is an important strategy. This proposal is suggested on the caveat that the existing public procurement laws need amendment.

Secondly, as a constitutional duty in a democratic society, politicians pass the public procurement legal frameworks. They need to proactively suggest appropriate structures, institutions and processes that they feel will ensure efficiency and effectiveness of the public procurement processes. For example, it is becoming increasingly clear that Africa needs centralized and specialized units to manage complex procurements like for the oil and gas sector where it exists, major construction projects of dams and airports, sophisticated highway networks and railway infrastructure, among others. Political involvement has been in passing the procurement acts, while the putting in place of enabling regulations has often been left to the technical people. Recent examples in Uganda and Tanzania, however, attest to the desire by politicians to be involved at this stage as well. Their wish is a welcome attempt at ensuring ownership of the procurement regulations.

Thirdly, in countries using well entrenchment mechanisms and committees, politicians should get substantially involved in monitoring and supervision of the public procurement systems. As an oversight duty, it is critical for politicians to closely monitor and supervise the performance of public procurement regulatory authorities through receiving and discussing annual procurement performance reports. These reports should analytically give the state of public procurement in a particular country and they should be discussed by committees of parliament -- like the Budget Committee, Public Accounts Committee, and Local Government Accounts Committee -- as public procurement constitutes a key financial activity of the mandates of these committees. In African countries, reforms were modeled on similar pillars of having regulatory authorities that report through ministries of finance. In most of these cases, the annual procurement reports are expected to be submitted as part of the appendices to Auditor General's reports to the legislature. However, in most countries, such practices have not been made. This is a weakness that has relegated procurement matters and this trend needs to be reversed fundamentally. Rarely do legislatures actually receive procurement system performance reports. Each country ought to have an annual public procurement status report as a mechanism for judging the direction of the public procurement systems.

Fourthly, politicians need strong involvement in establishing effective public procurement systems through budgeting. They need to allocate appropriate funding to improve procurement efficiency, as well as approving procurement plans which they understand. Once these approvals are done, they need to ensure accountability. It is one of the traditional roles of politicians to approve budgets of government and demand accountability. This mainly concerns fiscal and administrative accountability by the technical officers of government; and political accountability by politicians. Citizens will also expect social accountability from the politicians.

The fifth strategy for involving politicians relates to professionalization of public procurement. It is the duty of the politicians to pass relevant professionalization guidelines and such bodies that will steer this young profession. Some African countries

have seen their legislatures boldly pass procurement professional bids; but a uniform system needs to cut across the countries as public procurement matters have a regional context. Regional projects are delayed due to lack of professionalism -- an area that needs to be strengthened.

6. CONCLUSIONS

There is a bit of a contradiction that has not been resolved in the existing literature and practical applications of the systems of public procurement. The contradictions center on two aspects which are conflicting to each other. On one hand politicians are depicted as involved in patronage and marring the procurement process. On the other hand they are depicted to be holding the magic bullet in cleaning up the procurement process which is all well and good but certain provisions/transformations would have to be made. It is the duty of researchers in public procurement to devote efforts at resolving these contradictions through providing a detailed analytical framework. This paper has been an attempt to partially filling that knowledge gap. It has demonstrated areas where politicians need to be involved and how they can actually be involved. These proposals are hinged on the caveat that some more reform efforts have to be specifically modeled around the need to involve these important actors in public procurement.

Sound public procurement management is a key milestone of good governance and national progress in any country since the function consumes a substantial portion of the national budget. Its significance in social and economic development is reflected in the fact that it constitutes a sizeable proportion of the national economy. Within this context, legislatures, like it has been argued, are critical institutions in making a democratic system function (Saiegh, 2005:1). Legislators are inexperienced and unaccustomed to their roles and responsibilities but this trend needs to be reversed through deliberate policy interventions. The dividends of proactively involving the politicians in public procurement are great. The legislative branch of government is

responsible for law making, exercising oversight over the executive, facilitating public participation and promoting cooperative governance. Legislatures are mandated to ensure that laws passed are properly implemented to address the needs of the citizens (Madue, 2012:431). Their role, however, has to go beyond legislation to proactively getting interested in project initiation and how best the processes of public procurement work.

A legislature that is representative and participatory is characterized by: citizens having access to, and contributing to the policy making process through the legislature; there being high degree of interaction between members and citizens; issues being addressed or legislation amended because of public input or pressure; and civil society organizations, advocacy organizations, and/or interest groups being active participants in the legislative process (Saiegh, 2005:9). Politicians in most African countries are at least responsible for bloated public administration expenditure through their approving numerous appointments, many of which are for political supporters. The unnecessary expenditures on these appointments have diverted public resources that could have been used for service delivery and improving the implementation of the economic transformation agenda. It is easy for politicians to divert money for a road project to payment of salaries of political appointees as long as the latter can increase the political hegemony of those in the ruling regimes. However, if politicians decide to work for progress and transformation of their society, they can achieve it with high dividends.

References

- Albano Glan Lugi and Dae-in-Kim (2010). "Special Issue International Public Procurement: Introduction". Journal of Public Procurement -Vol. 10 Nbr. 3. PrAcademics Press
- Allen, R and Tommasi, D. (2001). *Managing Public Expenditure A Reference Book for Transition Countries*, SIGMA, OECD.

Ambe, I.M. & Badenhorst-Weiss, J.A (2012) Procurement Challenges In The South African Public Sector, *Journal of Transport and Supply Chain Management*, Volume 6, NO.1, pp.242-261.

Anitha, V. (2007). *Efficiency and bureaucracy*. Working paper, No. 181, Institute for Social and economic change: Available online at: <http://www.isec.ac.in/WP%20-%20181.pdf>

Arrowsmith, S. & Trybus, M. (2003). *Public procurement: The continuing revolution*. The Hague: Kluwer Law International.

Ball, A.R and Peters, G.B. (2005). *Modern Politics and Government*, 7th Edition Revised and Updated. New York: Plagrave Macmillan.

Bartle, J. R., & Korosec, R. L. (2003). A Review of State Procurement and Contracting. *Journal of Public Procurement*, 3(2): 192-214

Batley, R, McCourt, W. and Mcloughlin, C. (2011, April) 'The Politics and Governance of Public Services in Developing Countries' at the annual conference of the International Research Society for Public Management in Dublin in April

Basheka, B.C. (2009). 'Public procurement corruption and its implications on effective service delivery in Uganda: an empirical study', *International Journal Procurement Management*, Vol. 2, No. 4, pp.415-440

Basheka, B.C. (2008). Procurement Planning and accountability of local government procurement systems in developing countries: Evidence from Uganda, *Journal of Public Procurement*, Volume 8, Number 3, pp. 379-406.

Basu, R. (1994), *Public Administration: Concepts and Theories*, fifth revised edition, New Dehli. Sterling Publishers PVT Ltd

Bolton, P. (2006). *Government procurement as a policy tool in South Africa*. *Journal of Public Procurement* 6(3):193-217.

- Brulhart, M., & Trionfetti, F. (2004). "Public Expenditure and International Specialization." *European Economic Review*, 48: 851–991
- Bryner, C.G. (2003). Public Organizations and Public Policies. In B. Guy Peters and John Pierre (Eds), *The Handbook of Public Administration*, Sage, Chapter 15, pp 189-198.
- Caiden (1982). Public Administration. Cape Town: Palisades Publishers.
- Chanie, P. (2013), The Trajectory of Public Administration in Africa: Background, In P.Chanie and P.B.Mihyo (2013), Thirty Years of Public sector reforms in Africa: Selected country experiences, Fountain Publishers: Kampala
- Cogburn, J.D. (2003). Exploring differences in the American states' procurement practices, *Journal of Public Procurement*, 3(1), 3-28.
- Cox, W.R.; Burk, S.J. and Morgan, B.N. (2011). *Public Administration in Theory and Practice*. New York: Longman Pearson Inc.
- Currstine, Teresa, Lonti, Zsuzsanna and Joumard Isabelle. (2007). Improving Public Sector Efficiency: Challenges and Opportunities. *OECD Journal on Budgeting*, Volume 7 , No. 1
- Dimitri, N. (2013), Best Value For Money" In Procurement, *Journal Of Public Procurement*, Volume 13, Issue 2, 149-175
- Dorasamy N (2010). Enhancing an ethical culture through purpose directed leadership for improved service delivery: The case for South Africa. *Afr. J. Bus. Manage.* 4(1): 56-54
- Edwards, J., & Wolfe, S. (2005). Compliance: A Review. *Journal of Financial Regulation and Compliance*, 13 (1): 48-59.
- Greenstein, S. (1993). Procedural Rules and Procurement Regulations: Complexity Creates Trade-Offs. *The Journal of Law, Economics & Organization*, 9 (1): 159-180.

Henry, N. (2010). *Public Administration and Public Affairs* (11th ed.). New York:

Pearson.

Hughes, M. (2005). Evaluation of the Local Government Procurement Agenda – Baseline Survey Report. The Office of the Deputy Prime Minister, London. [On-line]. Available at www.odpm.gov.uk. [Last retrieved April 20, 2006].

Hunja, R.R. (2003). Obstacles to public procurement reform in developing countries. In

S. Arrowsmith & M. Trybus (eds.). *Public procurement: The continuing revolution*.

The Hague: Kluwer Law International.

Jadranka Djurović-Todorović, Marina Djordjević. (2009). The Importance Of Public Expenditure Management In Modern Budget Systems, *Economics and Organization* Vol. 6, No 3, 2009. UDC 336.1. pp. 281 – 294.

Jensen, M.C., & Meckling, W.H. (1976). Theory of Firm: Managerial Behavior, Agency Costs, and Ownership Structure. *Journal of Financial Economics*, 3(4): 305-360.

Joseph, R. A. Ayee. (2005). Public Sector Management in Africa, Economic Research Working Paper No 82 (November). African Development Bank.

Kardasis, P. & Loucopoulos, P. (2005). A Roadmap for the Elicitation of Business Rules in Information Systems Projects. *Business Process Management Journal*, 11(4): 316-348.

Laffont, J., & Martimort, D. (2002). *The Theory of Incentives: the Principal-Agent Model*. Princeton, NJ: Princeton University Press.

Larmour, P. (2006). Administrative theory, interpersonal relations and anti-corruption practice in Papua New Guinea. Policy and Governance discussion paper presented at Workshop on Collaborative Relations, Personal Aims and the Work of Organizations, National Research Institute, Boroko. Available at:

www.crawford.anu.edu.au/degrees/pogo/discussion.

Lars-Erik Borge, Torberg Falch and Per Tovmo. (2004). Efficiency in Public Service Production: The Impact Of Political And Budgetary Institutions

Luigi, A. G. Sinder, F.K. and Thai, K.V. (2013) Charting a course in public procurement innovation and knowledge sharing. In L. G. Albano, F.K. Sinder, and K.V. Thai, (Eds). *Charting a course in public procurement innovation and knowledge sharing*, PrAcademic press, Chapter 1, pp.1-27.

Luigi, A.G.& Kim, D. (2010). Special Issue on International Public Procurement: An Introduction. *Journal of Public Administration*, Volume 10, Issue 3, pp. 290-30.

Mafunisa MJ (2008). Public service ethics. Kenwyn: Juta and Co.Ltd.

Madue, S.M. (2012). Complexities of the oversight role of legislatures. *Journal of public administration*, Volume 47, Number 2, pp. 431-442.

Matthee, C.A. (2006). The potential of internal audit to enhance supply chain management outcomes. Master's dissertation, University of Stellenbosch, Stellenbosch.

McCue, C.P., & Pitzer, J.T. (2000). Centralized vs. decentralized purchasing: Current trends in governmental procurement practices. *Journal of Public Budgeting, Accounting, & Financial Management*, 12(3), 400-420.

Mle, T.R. (2012). Professional and ethical conduct in the public sector, Africa's public service delivery and performance review (APSDPR), *Volume 1, Issue 1, pp 21-31*

Mill, S. J. (1861). Considerations on representative government. London: Parker, Son and Bourn

Ng, I., & Dastmalchian, A. (2001). Organizational Flexibility in Western Asian Firms: An Examination of Control and Safeguard Rules in Five Countries. *Canadian Journal of Administrative Science-Revue Canadienne de l' Administration* 18 (1): 17-24.

Ngowi H.P. (2007). *Privatization and Agentification of Public Service Delivery in Africa extent and managerial leadership implications in Tanzania* a paper presented at 29 AAPAM Annual Roundtable Conference at Mbabane Swaziland 3 - 7 September, 21007.

Odhiambo, W., and Kamau, P. (2003). *Public Procurement: Lessons from Kenya, Tanzania and Uganda*. OECD Development Centre Working Paper No. 208.

OECD. (2007). *Integrity in Public Procurement: Good practice from A to Z*. Paris, France.

Peters, G.B. (2004). Governance and Public Bureaucracy: New Forms of Democracy or New Forms of Control?, *The Asia Pacific Journal Of Public Administration* VOL 26, NO 1 pp- 3-15.

Prier, E and Csaki, C. (2011). A Decision making framework to analyse the impact of public procurement regulatory policy. In K.V. Thai(Ed.) *Towards new horizons in Public Procurement* . PRacademic Press, Chapter 18, pp. 412-440.

Schapper, P.R., Malta, V.N.J. and Gilbert, G.L. (2006). An analytical framework for the

- management and reform of public procurement. *Journal of Public Procurement*, Vol. 6, pp.15–17.
- Schoeman, L. & Fourie, D.J. (2008). Making restitution work: The challenge of building sustainable governance and institutional structures in public administration. *Journal of Public Administration*, Vol 43 (41):798-819
- Saiegh, S.M. (2005). The Role of Legislatures in the Policymaking Process, Prepared for delivery at the Workshop on State Reform, Public Policies and Policymaking Processes. Washington D.C.:Inter-American Development Bank, 28 February. - 2 March 2005.
- Sementelli, A. (2011). Public Procurement: Political Spectacles and Ritual. In K. V.Thai, (Ed.) *Towards new horizons in Public Procurement*, PRacademic Press, Chapter 3, pp. 42-59.
- Shah, Anwar and Jürgen, Von Hagen. (2007). *Budgeting and Budgetary Institutions* Herndon, VA, USA: World Bank.
- Shaw, F.N. (2010). The Power to Procure: A Look inside the City of Austin Procurement Program. Applied Research Projects. Texas State University.
- Telgen, J and Thai, K.V. (2008), Symposium Introduction. *Journal of Public Procurement*, Volume 8, Number 3, pp. 303-309.
- Thai, K.V. (2008). Measuring losses to public procurement corruption: the Uganda case. *3rd International Public Procurement Conference Proceedings*, 28-30 August. Available at <http://www.ippa.ws>
- Thai, K.V., & Grimm, R. (2000). Government Procurement: Past and Current Developments. *Journal of Public Budgeting, Accounting & Financial Management*, 12(2): 231-247.

- Verba et al. (1995). *Voice and Equality. Civic Voluntarism in American Politics*. London: Harvard UP.
- Wilson, R.A. (2004). Employee dishonesty: national survey of risk managers on crime. *Journal of Economic Crime Management*, 2 (1):1-25.
- Wittig, W.A. (1998). *Report of the Conference on Public Procurement Reform Conference in Africa*, Côte d'Ivoire, 30 November-4 December, International Trade Centre, Geneva.

Procurement conspiracies and procurement governance: some lessons from Thailand

Sirilaksana Khoman

National Anti-Corruption Commission, Thailand

**Paper presented at the International Public Procurement Conference (IPPC) on
14th-16th August 2014 at Helix Conference Centre, Dublin City University, Dublin,
Ireland.**

Procurement conspiracies and procurement governance: some lessons from Thailand

Sirilaksana Khoman¹

Abstract

This paper addresses public procurement governance focusing on the problem of procurement conspiracies and connected dealings. The term 'connected dealings' is used to refer to situations involving conflicts of interest where at least one party to a contractual arrangement is in a position of authority to (legally) make decisions regarding the use of public funds regarding that contractual arrangement and at least one other party in a position to benefit from the use of those public funds, are connected through business relations, family ties, school or institutional affiliation, or other previous dealings. When contracts result from connected dealings, these are deemed to be part of a procurement conspiracy, where contracts are won because of undisclosed network relationships rather than objective criteria. Public procurement provides fertile grounds for connected dealings and conspiracies. This paper argues that although procurement regulations may be clear and strict, loopholes can be found that allow conspirators within patron-client networks to engage in wrongdoing with impunity, to the detriment of a country's development. In some instances, laws and regulations are blatantly violated because of perceived 'protection' within the network. A particular case of procurement corruption and connected dealings in Thailand is presented and lessons gleaned. The paper also discusses Thailand's pre-emptive, pro-active approaches to combating these procurement conspiracies and connected dealings.

Keywords: public procurement, conspiracies, connected dealings, case study, Thailand

1. Introduction

Network relationships are nothing new. Worldwide social networking has indeed exploded within the last decade. Network relationships facilitate efficient interaction by reducing the three components of transactions costs: information and search costs, negotiating and contracting costs, and policing and enforcement costs. Whether in business or politics, or any other area of interaction, network relationships play an important role and help to create efficiency. Indeed investment into creating trust, brand loyalty, recognition and reputation, whether in personal or business relationships, are part of the process of networking. Trust implies confidence that some person or institution will behave in an expected way. But there are also built-in dangers when networking turns into conspiracy aimed at siphoning public funds into private coffers, particularly through connected dealings in public procurement. Often the status quo is preserved and situations of monopoly are created to facilitate transactions with corrupt intent.

This paper focuses on a public project as fertile ground for both petty corruption and 'grand state capture', and examines the role of network relationships in facilitating corrupt activity. The characteristics of network relationships are examined to ascertain the aspects of group or network relationships that are conducive to corrupt activity. The case of Klong Darn wastewater treatment is used to illustrate the pattern of patron-client networks that can affect a government project. The institutional and legal framework in Thailand is also briefly explored, and possible measures to alleviate current problems are considered. The paper argues that although procurement regulations are clear and seemingly strict, loopholes can be found that allow patron-client networks to engage in wrongdoing with impunity, to the detriment of Thailand's development. Blatant violations also occurred as network members believed that they were 'protected' by their network relationships.

¹ Dr. Sirilaksana Khoman is currently Chair, Economic Sector Corruption Prevention, National Anti-Corruption Commission, Thailand. She was formerly Dean of the Faculty of Economics, Thammasat University.

2. The Nature of Network Relationships

A network may be regarded as a set of contracts, which can be loose or tight, formal or informal, that establishes internal rules of exchange and cooperation. In some cases, the set of contracts gives the group a collective identity vis-a-vis others and replaces individual identity in transactions. An organization, or clan, is thus a set of contracts and rules defining roles and establishing their relationships within the network. Individuals play defined roles, perhaps negotiate mobility within the network, or leave them. Investment in identity takes place in the selection for roles, and in the process by which individuals select the organization/clan that they join. This network may start out from being an innocuous social network where members assist each other with some kind of reciprocity established as the norm. However, it can be transformed into a patron-client relationship, paving the way to formation of more pernicious networks, whereby the patron provides resources and protection to the clients who, in return, provide services, rent collection, and other forms of support to the patron, including facilitating corrupt acts.

Since there are many competing networks of patrons and clients, each patron needs to accumulate resources to feed the needs of the clan. Corruption then becomes a method to accomplish this task and allows the network to accumulate funds and attract numbers to compete successfully against other clans. Members recruited into the corruption ring may actually not be aware of the ring in the beginning. But the cost of leaving the network becomes prohibitive and the option of moving to another network may not be available due to the mutual distrust and possible hostility between clans/networks. According to Rose-Ackermann [1], trust may imply confidence, but not certainty and therefore network members also need to constantly 'prove themselves' to remain a member as well.

In the broadest sense, a transaction consists of activities or transfers of property rights by or between at least two individuals or groups. All individuals engage in two kinds of transactions: personal (where identity dominates) and impersonal (where identity is subsumed). In petty corruption, such as extortion of motorists by traffic police, or bribery for queue-skipping, identity is not important, and suppression of identity may even be desirable. But in certain forms of illegal transactions, especially corrupt transactions that take on the nature of conspiracies, the identity of the people engaged in a transaction is vital. Some transactions can take place only between mutually or unilaterally identified parties, and many corrupt practices of significance fall under this category. Parties in an identified relationship invest resources that are specific to that relationship in order to save transactions costs. And there are economies of scale related to these 'set-up' costs. This facilitates activity between them and leads to a concentration of exchange between the same parties. Ben-Porath [2] calls this 'specialization by identity', and patron-client relationships are repeated relationships of exchange between specific patrons and their clients.

Where do network members come from? In order to set up a successful corruption ring, several dimensions in terms of member characteristics are important. There is a built-in bias in favor of homogeneity in terms of some dimensions but heterogeneity in terms of others. Family and close friends may be the first choice for recruitment due to existing ties. This first ring of relationships will then recruit others. Routine actions that do not require a great deal of expertise, such as hiding documents or engaging in protest rallies, favors homogeneity – working with the same people. However, when purchasing sophisticated equipment, trust in friends or relatives cannot compete with the technical know-how of a specialist. Thus it becomes necessary to recruit technical expertise and business associates as well.

With differences in the importance of identity in various transactions and in the specificity of investment in identity to certain activities, people will be organized in small clusters for some purposes and large ones for others, and these groupings may intersect for different purposes (Ben-Porath [2]). Parties who have already invested specifically in each other are in a short-run position of bilateral monopoly. If the self-enforcement mechanism is imperfect, trust, or fear, or violence and intimidation, or the threat thereof, becomes more important.

The returns to corrupt acts also depend on how diffused corruption is in society, that is, how much corruption is inherited from the past. The larger the share of corrupt agents, the higher the returns to corruption, because of several reasons. First, with widespread corruption in society, the task of auditing corrupt officials is not easy. Second the expected profitability of corruption from an individual point of view is a positive function

of the degree to which a society as a whole is corrupt (Andvig and Moene [3]). Thirdly, corrupt officials have an incentive to establish communication or networking among themselves and will fuel the corruption ring (Sah [4]). In addition, in societies where rent-seeking and bribery abound, the return to rent-seeking relative to entrepreneurship is high (Murphy et al.[5]-[6]; Acemoglu [7]). Lastly, when corruption is widespread, individuals may be discouraged from trying to fight it, even if everybody would be better off if corruption were eliminated.

In Thailand, there is a common saying that defines six different groups of people that comprise a network (especially a corrupt network): family members, school friends or disciples, financial contributors, obsequious followers, marriage ties, and competent specialists. These clan or group members therefore cut across the usual socio-economic dimensions such as income class or occupation. Understanding group membership allows us to see that not all conflict situations are ‘class struggles’. References to ‘Arab Spring’ and inequalities (that exist and persist in most societies) completely miss the mark in analyzing Thailand’s current political situation.

Political networks are defined by their head in Thailand. The head of the network serves as director for communication, trust, and redistribution, and reduces the transaction costs within the network by reducing the need for bilateral relationships. The pairwise investment of each member with the center links him to all the others. In his theory of social interaction, Becker [8] shows why a central figure who cares, or appears to care, can generate optimal behavior for the group from the others, even if the head is an egoist. When the head is absent, miscommunication often occurs, or miscommunication can be blamed for unpopular deeds by the network. The difficulty is to distinguish between the truly benevolent head and the self-serving one (Khomeini [9]).

A corruption ring can be represented in Figure 2.1 where layers of patrons and clients direct the flow of resources.

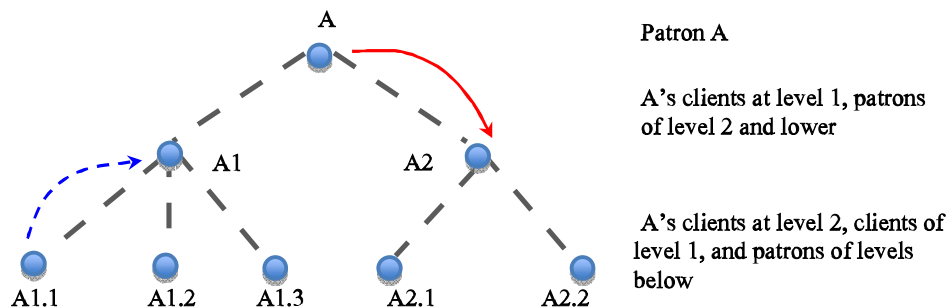


Figure 2.1: Typical Patron-Client structure
Source: Sirilaksana, et. al. [9]

From Figure 2.1, Patron A is the ultimate power of the clan. Below Patron A are the clients shown by nodes connected to Patron A with dashed lines. For simplicity, this patron is shown to have two clients at level 1, labeled A1 and A2. Below each level-1 client, there may be many layers of clients that propagate downward. The patron in this clan could also serve as a client of yet another larger patron-client structure located higher up.

Members in the same clan relate to each other in two ways, vertically and horizontally, the former in cooperative exchange and the latter sometimes in the form of rivalry. The patron is expected to provide vital resources that the client needs. In Thailand, the patron may provide land to the client for cultivation, give loans for emergency use, settle conflicts with other clients within the clan, provide protection against threats from other clans, promote the client to a higher position in the clan, and/or ensure that clients receive government procurement contracts. The solid arrow in Figure 2.1 represents the flow of resources or protection provided by the patron.

In return for the patron's support, the client has the duty to serve the immediate patron, and those located in higher positions, in whatever tasks the patron may assign. If procurement contracts are obtained, usually at inflated prices, then kickbacks are paid up the hierarchy. The dashed arrow in Figure 2.1 shows the flow of returns from the client to the patron. The returns could take the form of simple labor (such as pouring drinks, carrying suitcases), or bodyguards. Or it could be a supporting role against other clans, beating up the patron's enemies, rallying people to support the patron's political ambitions, protesting against unfavorable court decisions, and extracting economic rent from awarded contracts for the patron. The resources could consist of monetary support or member count. Thai political parties always consist of many factions, or sub-clans, in which the leader of that faction acts as the patron. If the leader of the faction manages to bring in sufficiently large numbers of elected MPs under his wing, he is entitled to become a minister in a grade A ministry, such as the Ministry of Transportation, which commands a large government budget. He would also have the right to nominate members under his wing to be appointed as ministers in grade B or C ministries, or as deputy ministers in grade A ministries.

Because of this quid pro quo, members of the group evaluate actions or policies as being beneficial or detrimental to the group or sub-group's interests, and to a large extent, political loyalties are based on the identity of the leader. Therefore, for the most part, it is not ideological persuasion, but the identity of individual politicians that determine political structures.

Although members of a clan tend to work cooperatively in the vertical hierarchy, there is often rivalry when they deal with members at the same client level. Many examples can be found in Thai political parties where leaders of factions try to outperform each other in terms of getting more members of parliament under his or her wing. The leader of that faction is then entitled to a cabinet position. And there is of course rivalry between clans, which accounts for why some long-running projects do not get implemented. The plans for a new international airport, for example, were laid down 30 years before construction finally commenced. And a large number of procurement cases connected with the new international airport are currently being investigated.

The patron-client network in Thailand can be represented by Figure 2.2. The bureaucracy (B) is represented on the left, while the network of politicians (P) is depicted on the right. The capitalists (C) refer to big businesses, while the non-politicians (N) include small businesses as well as non-governmental organisations (NGOs), and other social or lobbying groups. Solid arrows show the flows of the benefits from C1 to B1 and C2 to B2. The capitalists who act as the patrons of the sub-clans, kick back some of their corrupt benefits to the bureaucracy who originally facilitated the special licenses, concessions, and procurement projects. The patrons of the sub-clan and the non-politician capitalists also need to provide the political and financial support to the highest patron who is either a politician or a capitalist turned politician. Thus government procurement is a vehicle for corrupt enrichment.

A large number of businessmen made fortunes by receiving favored subsidies, licenses, and concessions from the patron-client network 3-way interaction among politicians, the bureaucracy and business, shown by the solid arrows pointing from B1 and B2 to C3 and C4.

One somewhat unique point about the patron-client network in Thailand is that capitalists often place themselves in the politician's network. In fact, the share of businessmen in Thailand's parliament is the highest in the region (Sidel [10]). A recent trend was the movement of many capitalists, formerly located at high client levels, to become the highest patron of the political party or the faction leader. Many leaders of Thai political parties are businessmen and tycoons.

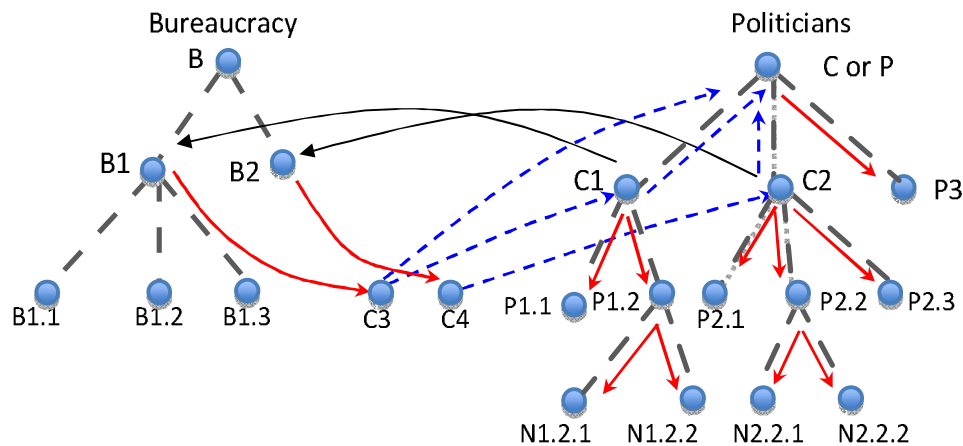


Figure 2.2: Flows within Patron-Client Networks in Thailand

Notes: B = bureaucracy, C = capitalists, P = politicians, N = non-politicians
Source: Khoman et.al. (2010)

3. The Case: the Klong Darn wastewater treatment project

The Klong Darn wastewater treatment project illustrates how strategically-placed parties can allow wrongdoing to occur with impunity.

In November 1995, the Asian Development Bank (ADB) approved a 150 million USD loan to support the Thai government's Pollution Control Department (PCD) in establishing systems to manage wastewater discharged by factories and residents in the Bangkok metropolitan area, including the adjacent Samut Prakarn Province. The initial plan was to build two separate treatment plants close to the main pollution sources, consisting of about 5,000 factories. However, by the time the ADB approved an additional loan of 80 million USD, the project site had been relocated some 20 kilometers away to Klong Darn, situated towards the eastern edge of Samut Prakarn Province. A new plan was devised to build a single very centralized plant, one of the largest wastewater treatment plants in Southeast Asia at the time, to process 525,000 cm³ a day of wastewater with heavy metals and hazardous waste. The rationale that was offered to the Cabinet was that a single plant would be more economical than two separate plants. It turned out, however, that even though the rationale for re-location was to save cost, the Cabinet approved an increase in the budget for the project. Japan's International Cooperation Agency (JICA) co-financed the project with an additional 50 million USD loan. After the site change, the total cost of the project more than doubled to 687 million USD.

Klong Darn villagers came to know about the project after the construction had started. In late 1998, they saw a sign put up by a joint venture (JV) construction company, in front of the wastewater management facility. They were surprised to learn that a huge wastewater treatment plant was already under construction in their neighborhood. Apart from the total lack of information disclosure to and meaningful participation of the local community, stakeholders were able to point out the following major flaws with the project:

- 1) The plant was not equipped to properly treat heavy metals and hazardous waste. They would be discharged into the sea and would destroy local fishing activities;
- 2) The plant was built on soft soil along the coast and would be impacted by flooding and erosion;
- 3) An Environmental Impact Assessment (EIA) was not conducted in Klong Darn; and
- 4) The project site included public land, such as canals, which could not be for sale. The land for the plant, approximately 1,900 "rai" (1 "rai" is equal to 1,600 m²), was sold at a price much higher than the official price.

The land for this new site belonged to a local politician, and suspicions were raised about whether this could account for the sudden change in the project site. In addition, the transport of waste from the source or pollution, through a long and winding pipeline for some 20 kilometers, was not technically sound.

On January 13, 2004, PCD filed charges against 19 private firms and individuals in the Thai criminal court, including Vatana Asavahame, a former Deputy Minister of Interior for having illegally obtained title deeds to the project site land and sold it to PCD at an inflated price. In March 2004, the Land Department revoked the deeds to the land of 1,358 “rais”. This invalidated the government’s contract with the JV. On 14 June 2007, the NACC concluded that 9 government officials, including Vatana, had been involved in illegal land deed acquisition and forwarded the case to the Supreme Court’s Criminal Division for Holders of Political Positions. By that time Vatana had fled Thailand, but the court ruled that he was guilty of bribing and/or coercing officials in the land grab connected with the project and sentenced him in absentia to 10 years in prison.² This part of the case shows the connection between the Minister and collaborators in the Land Department who were involved in issuing the illegal land deeds.

But the case is far from over. The laws in place at the time of project include:

1. OPM Regulations B.E.2535 (1992) (for procurement)
2. Environmental Protection Law B.E. 2537 (1994)
3. Public land designations.

Other laws that were enacted include the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999). In addition, there are various Cabinet Resolutions that authorize certain actions. An interesting question is whether these laws, regulations and resolutions were violated, or whether there are loopholes that need to be examined.

The issues involved in this case are illustrated in Figure 3.1. The case can be broken down into the following main issues:

- 1) Project approval
- 2) Cabinet decision
- 3) Award of contract
- 4) Land purchase and acquisition

Figure 3.1 shows that in each of the four issues, connected individuals played a key role in defrauding the government.

First, the project approval issue. Other similar projects were being launched, such as the wastewater treatment system proposed by the Department of Industrial Factories in 1991 and the wastewater and garbage treatment project by the Department of Public Works and City Planning (1992-94). In addition, there is the question of why it was necessary to submit the project as a ‘turnkey’ project. Turnkey projects are supposed to be those that are technologically sophisticated beyond the ability of the technicians in the proposing department to design, and thus the design phase is incorporated into the project, in the form of “design-build” projects. Questions have arisen regarding the relative simplicity and standardized technology that could have been handled by the government department, rather than left in the hands of the contractor, who was then responsible not only for construction, but also design and land acquisition.

Then the Cabinet resolution was distorted to allow the relocation of the project. The resolution was for the agencies to co-ordinate with each other, but when the project was re-submitted, it was on the agenda under items to inform, not items for consideration.

² [http://www.mekongwatch.org/english/country/thailand/MW_SMBrief\(2010.02.27\).pdf](http://www.mekongwatch.org/english/country/thailand/MW_SMBrief(2010.02.27).pdf). Another case involving land is that of Somchai Khunpleum, a Chon Buri godfather with powerful political connections, wanted in a local land-conflict case. He has since been arrested.

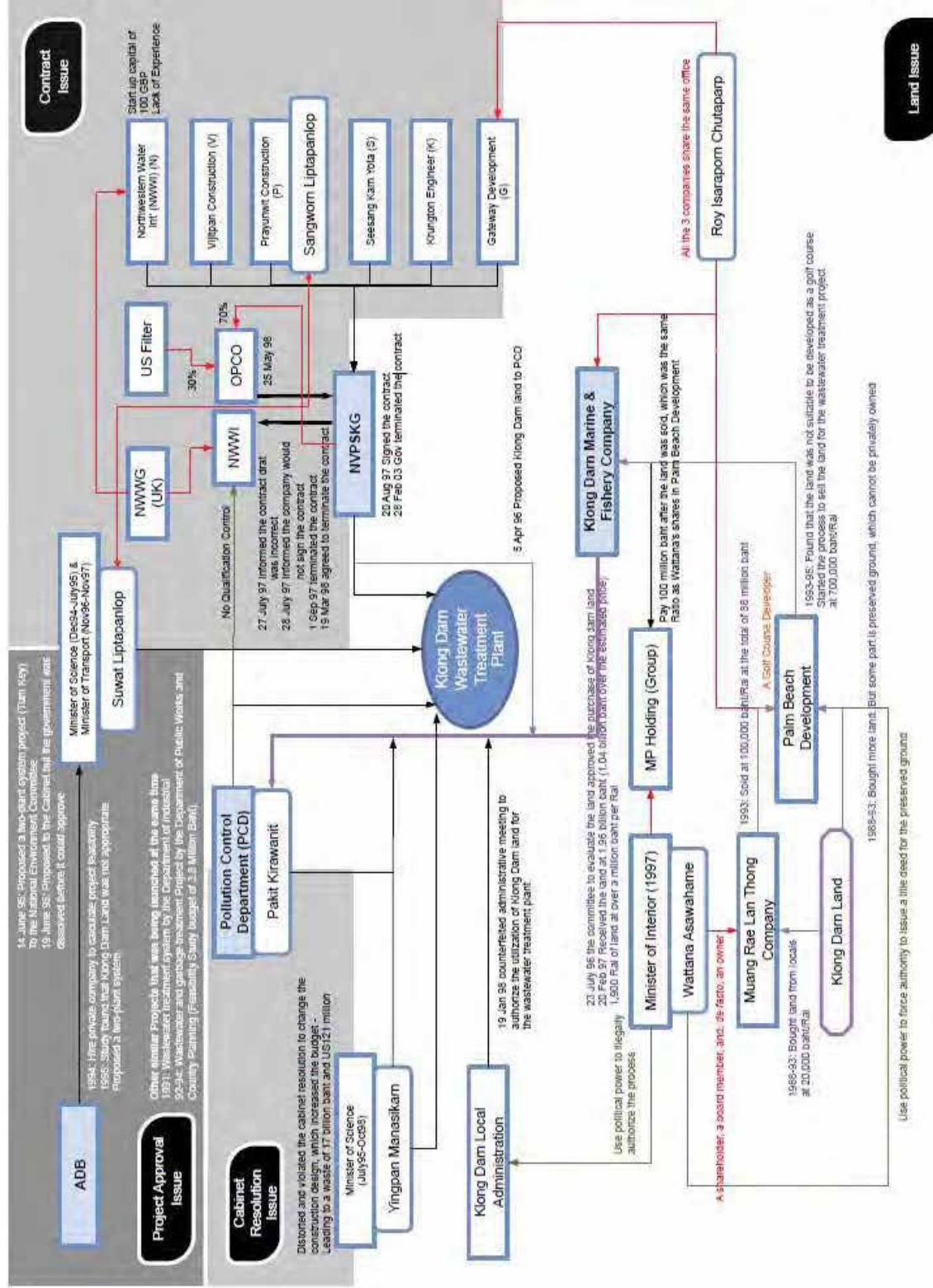


Figure 3.1: Network relationships and corrupt dealings.
Source: Torplus Yonnak, unpublished worksheet.

Irregularities were also found in the bidding process. Once the project was changed to a single wastewater treatment plant, the second bidder withdrew because of inability to acquire the necessary land. According to regulations, the tender process should have been restarted, but this was not done. In addition, when the main partner in the winning consortium withdrew, this was not reported, leading to annulment of the contract.

In the case of the land purchase, Land Department officials who courageously refused to issue falsified land deeds were transferred to the southernmost volatile provinces. The Minister who ordered the transfer, Wattana Asawahame, was convicted of administrative misconduct, and the officials transferred back to Bangkok. Thus integrity played a key role in convicting the Minister.

Brief Chronology

- 1986 Asian Development Bank (ADB) provides funds to the Office of National Environment Board³ to survey options to manage industrial waste water (treatment and control) in Samutprakarn Province
- 1991 Department of Industrial Works started to implement the project to build waste water treatment plants, as authorized by the Cabinet Resolution on July 2, 1991 in Prapradaeng District and Pra Samut District on the west bank of the Chao Praya River. The budget was approved for purchase of land in 1994.
- 1993 ADB approves another US\$350,000 to develop a waste water treatment system in Samutprakarn Province and undertake a feasibility study under the Environment Rehabilitation Project (ERP)
- 1993 ADB approves another grant of US\$600,000 to the Pollution Control Department (PCD), Ministry of Natural Resources and Environment, to conduct a feasibility study and preliminary design for waste water treatment under the project "Wastewater Management and Pollution Control in Samut Prakarn" to manage wastewater in the Pollution Control Zone of Samutprakarn. ADB also assisted the PCD in preparing bidding documents and selection of contractor in the design of wastewater treatment.
- 1993 The National Environment Board (NEB), at a meeting on December 15 (#6/2536), designated Samutprakarn Province as a 'Pollution Control' province, directing the provincial authority of Samutprakarn (under the Ministry of Internal Affairs) to coordinate with the Pollution Control Department (PCD) in drawing up an Action Plan to manage environmental quality at the provincial level (including an action plan to reduce and eliminate pollution in the Pollution Control Area), designating the Pollution Control Department as the agency to carry out the action plan. Later NEB announcement No. 9 B.E. 2537 (1994) officially declared Samutprakarn as a Pollution Control Province, with effect from December 15, 1993. This declaration is significant in that regulations regarding pollution control and pollution-control projects would now apply.
- 1994 ADB hired Montgomery-Watson Asia together with a local engineering consulting company, Southeast Asia Technology Company (SEATEC) to conduct the feasibility and design. A seminar was convened on December 16 involving the Ministry of Science and Technology and Environment, the Pollution Control Department, the ADB, and representatives from provincial agencies in Samutprakarn.

³ The National Environment Board is a high-level body set up under the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992), consisting of the Prime Minister as the Chair, a designated Deputy Prime Minister as the First Vice Chair, the Minister of Natural Resources and Environment as the Second Vice Chair, and 8 committee members consisting of Ministers in related Ministries including qualified specialists, with the Permanent Secretary of the Ministry of Natural Resources and Environment as Secretary. The duties are to consider policies, plans, and measures regarding the management of the nation's natural resources and the environment.

- 1995 February 28: Towards the final stages of the feasibility study, a seminar was convened to discuss the findings.

March: Montgomery-Watson Asia et.al. submitted their final report detailing 13 options for wastewater treatment, proposing two plants (aerated lagoon) as the best long-run option in terms of cost-saving and minimal risks: one on the east bank emitting treated water into the sea, and one on the west bank, emitting into a canal. The proposed plants were at Bangpu-mai on 1,550rai of land⁴ on the east bank, and at Klong Bangplakod on 350rai on the west bank. The report also found that the soft soil conditions in Klong Dam would be an obstacle to engineering and construction. In addition, the lowland nature at Klong Dam was subject to flooding of seawater, and therefore the site was not appropriate.

It was also recommended that one of the causes of delay in construction projects in Thailand, was the problem related to land acquisition. Thus during the feasibility study, it was recommended that a committee should be set up to deal with land acquisition, and that the consulting company should assist this committee in acquiring the land, studying its suitability, negotiating its price, and purchasing the land for the project.

Eight contracts were to be executed, complying with the procurement guidelines of the ADB: 4 construction contracts and 4 materials and equipment contracts. The cost estimates for construction were 9.14 billion Baht and 2.185 billion Baht for the east and west banks respectively, totaling 11.325 billion Baht.

- 1995 June 14: the Pollution Control Department submitted the report to the NEB meeting (#2538/6). The Board concluded that there was an urgent need to address the wastewater problem in Samutprakarn, but there needs to be control on land use so that the wastewater problem does not spread beyond the project site. The Board also made the following observations: (1) the running cost of 580 million Baht should be checked; (2) the project needs to be discussed with the public through community leaders, to promote understanding regarding the benefits of the project, and to ensure willingness to pay, since this is the first project that involves fees for wastewater treatment; (3) before submitting to the Cabinet, a Projected Cash Flow should be undertaken, with input from the Budget Bureau and the Ministry of Finance, as loans from OECF⁵ will have to be considered.

At this meeting, Suwat Liptapanlop (Minister of Science, Technology and Environment) as second Vice-Chair of the Board, Pakit Kiravanich (Director-General of Pollution Control Department) and Sirithan Pairojboribul (Deputy Director-General of Pollution Control Department) were in attendance.

1992-1994

The Department of Public Works (DPW) under the Ministry of Interior studies the wastewater treatment system in Samutprakarn. Cabinet Resolution on June 28, 1994 authorizes the DPW to tackle the wastewater problem, and is allocated 3.8 million Baht for the study. In 1994 the DPW's study recommends construction of 3 wastewater treatment plants at Samrong, Poojaosamingprai and Klong Plakod.

- 1994 November 8, a Cabinet Resolution approves DPW's project to deal with wastewater and garbage in Samutprakarn.
- 1995 June 19: Suwat Liptapanlop (Minister of Science, Technology and Environment: MOSTE) sends a letter (WW/03029228) proposing the project to the Cabinet with 5 contracts, namely:
- (1) A turnkey contract to design and build a wastewater treatment plant on the east bank, with a budget of 10.148billion Baht through international competitive bidding. The turnkey nature was alleged to reduce the implementation time by 1.5–2 years as the need for re-bidding to construct would be avoided. This turnkey contract would include land acquisition as well;
 - (2) A turnkey contract to design and build a wastewater treatment plant on the west bank, with a budget of 2.724billion Baht under the same conditions as the east bank;

⁴ 1 rai = 0.40 acres or 0.16 hectares or 1600 sq. m.

⁵ Overseas Economic Cooperation Fund (OECF) is the implementing agency for loan aid furnished by the Japanese government.

- (3) A project monitoring contract for both systems with a budget of 269 million Baht, with selection of engineering firm through international competitive bidding;
- (4) Contract for procurement of equipment to monitor the quality of treated water, both permanent and mobile systems, with a budget of 148 million Baht;
- (5) Knowledge transfer contract regarding prevention of industrial waste and environmentally-friendly technology, with a budget of 323 million Baht, to be awarded to skilled architectural or engineering consultants. Total budget: 13.612 billion Baht. The Cabinet wanted greater coordination among the agencies; asked the Public Works Department, Ministry of Industry, and the Department of Pollution Control to coordinate, and the Budget Bureau for an opinion.
- 1995 Change of government on July 13. Banharn Silpa-archa becomes Prime Minister. Yingphan Manasikarn becomes Minister of MOSTE, Pakit Kirawanit is Director-General of DPC and resubmits the project for Cabinet consideration on October 17, 1995. Opinions sought from 5 agencies (National Economic and Social Planning Board (NESDB), Ministry of Industry, Ministry of Interior, Ministry of Finance and Budget Bureau) caused the Cabinet to issue instructions to the Pollution Control Department on October 17 to take into account of these considerations and approved the project in principle.
- 1995 Pollution Control Department hires Sinthu-Montgomery-Watson to prepare an implementation plan, taking into account the Cabinet's instructions, and prepare pre-qualification documents and short listing criteria, bid documents, and terms of reference.
- 1996 January: Tender Committee appointed, tender period announced, closing date being January 15. Submissions were received from 13 companies, including NVPSKG group consisting of Northwest Water International (NWWI), Vichiphan Construction (V), Prayoonwit Engineering (P), Sisang Construction (S), Krungthon Engineering (K) and Gateway Development (D). The tender document of NVPSKG submitted financial data of the UK company, North West Water Group (NWWG), together with qualifications and experience record of NWWG of over 100 years.
- May 15: 4 submissions selected out of 13.
- June 7: sale of bidding documents
- August 30: Pakit (Director-General of PCD) informs bidders that the treatment plants can be collapsed into one plant.
- October 7: only 2 bidders remain: NVPSKG and Marubeni
- December 6: AMS Consulting Company proposed one combined plant. Pakit informs bidders to collapse the plants into one and submits request to increase the budget.
- December 9: Contract to hire AMS signed.
- 1997 January 20: NVPSKG alone submits bid.
- February 17: NEB approves increase in budget and one site.
- March 25: submitted to Cabinet for acknowledgement. Cabinet acknowledged the proposal to change the location from the six areas on the east and west banks, and have wastewater pumped by tunnel to Kong Darn, and an increase in the budget. With only one bidder remaining, the DPC was to negotiate the cost down from 26.52 to 22.955 billion Baht.
- July 28: NWWI informs NVPSKG of unwillingness to sign the contract, and cancels power of attorney to NVPSKG.
- August 20: Pollution Control Department (PCD) signs contract with NVPSKG (including NWWI), and 1.9566 billion Baht paid to NVPSKG. NEB informs PCD that documents from the local administration allowing use of land for 50 years and public hearing are missing. False documents are then submitted to NEB.
- September 1: NWWI cancels contract with NVPSKG.
- 1998 May 25: Sirithan approves replacement of NWWI with OPCO, a company set up by NVPSKG, without Cabinet approval.
- 2002 Government inquiry into the project

- 2003 February 24: Government orders cessation of construction due to invalidity of contract.
- September 5: NPVSKG appeals to Arbitration Tribunal, claiming 6.2 million Baht plus interest, in damages.
- 2008 August 18: Court orders the invalidation of land deeds to 5 plots of land due to falsification, and sentences Wattana Asawahame to prison according to Article 148 of the Criminal Code.
- 2009 Case 254/2547 Department of Pollution Control against NPVSKG, Dusit Court rules against 18 defendants (including Wattana Asawahame) and sentences them to 3 years imprisonment according to Article 341 and fine of 6,000 Baht for each company involved.
- 2011 December 6: National Anti-Corruption Commission finds 19 accused persons (including Wattana Asawahame and Yingphan Manasikan) culpable.

Chronology of the Klong Darn Land Purchase

- 1960 Contract for land SK.1 Number 180/98 sale of 37.3 rai for 200 Baht per rai
- 1974 Sale contract for 6,578 Baht per rai
- 1988 Lanthong Mining Company with Wattana Asawahame as the major shareholder buys land at Moo 11, Klong Darn at 20,000 Baht per rai, and sold it to Palm Beach Development (owned by Wattana Asawahame, Somsak Thepsuthin and Preecha Laohapongchana) at 100,000 Baht per rai. In addition SK.1 and NS.3 land was acquired, totalling 20,000 rai was acquired, including a public waterway.
- 1994 Palm Beach Development sells the land to Klong Darn Marine and Fishery (connected company)
- 1998 Pollution Control Department buys 1,900 rai of land from Klong Darn Marine and Fishery for 1.9566 billion Baht (or more than 1 million Baht per rai), significantly higher than appraised price.

4. Lessons learned

It can be seen from the above case that some corrupt acts were in direct violation of rules and regulations, but others take advantage of legal and administrative loopholes, and also the judicial process. The question is: what can be done to reduce connected dealings and improve procurement in Thailand?

To counter corruption networks, it is important to note that certain types of social action, even if effective, change the types of connections created, but do not necessarily reduce their number or importance. The threat of punitive social action on certain transactions induces connections of mutual dependence within the network at different stages. High penalties on crimes in general increase the mutual dependence of the criminals, but not necessarily their number, if the network is strong.

The difficulty with network relationships and social capital is that it can benefit or harm society. Close-knit, trusting criminal groups may create networks based on a mixture of empathy, threats, and shared goals that negate law enforcement efforts (Gambetta [11]). On the other hand trust among law enforcers facilitates processing of cases. But trust motivated by moral values, such as respect, even when extended altruistically, can mitigate against effective law enforcement. Both kinds of organizations can exhibit interpersonal solidarity, reinforced as in a repeated prisoners dilemma game, and can create benefit or harm. Thus a critical mass of desirable networks needs to be created because people are affected by their perception of what others are doing (Gächter and Fehr [12]).

What is perhaps alarming in Thailand is that harmful networks are stronger, more cohesive and are being perpetuated than beneficial networks. Massive proceeds of corruption can be used to mobilize supporters to protest court verdicts, indictments, and anti-corruption efforts. Network members show solidarity with the group or network leader, whatever the issue, by their readiness to protest, block roads, put up barricades, and even openly

threaten the lives of judges and their families. The creation of networks is grafted onto the 'democratic' machinery, and right and wrong becomes a popularity contest. (In 2013 the 'beneficial networks' struck back for the first time in massive anti-government, anti-corruption protests).

What complicates the situation further is that sometimes assistance given to particular persons or failure to act against certain persons does not have any corrupt intent or even expectation of reciprocity. A person's good reputation, or affiliation, or being sons or daughters of a respected person can cause people to act in their favor without any personal gain. In addition deference to an 'institution' can assume priority. For example, Thais often advise children to respect 'the monk's cloth' and ignore the individual monk's behavior.

Accusations of 'double standards' float around everyday. The question on many people's minds though is whether 'good' people should allow their children to be punished, knowing that the 'bad' people would get off scot free because of their connections? There are a few examples of 'good people' resigning when faced with corruption charges; the really corrupt however cling on to their positions tenaciously. Both good and bad people have connections. 'Everybody knows everybody' and are related to everybody, and this is the key to Thailand's political turmoil. Even among un-corrupt academics, when suspicions arise concerning 'someone known for a long time' they would refuse cooperation even when they know the facts. Both the Thai word 'khon gun eng' and Chinese word 'kaki nung' are often evoked. It can be seen that interpersonal relationships play an important role in every aspect of life, including securing procurement contracts.

To tackle corruption in procurement, reform or measures are needed in the following areas: (i) legal infrastructure, (ii) corrupt-friendly economic policies, (iii) clarification of remedies, (iv) upgrading of the database, and (v) social mobilization for enhanced transparency. This paper also argues that membership in international conventions, such as the World Trade Organisation's Government Procurement Agreement (WTO-GPA) could serve as a tool to help alleviate current problems.

(i) Improving the Legal Infrastructure

The legal infrastructure needs to be reformed in many ways, and only a few key points are made here.

First, even though Thai procurement regulations emphasize openness and transparency as the main principles, many improvements can be made. In terms of openness and transparency, announcements and dissemination of information through the Public Relations Department, Mass Communication Organisation of Thailand, the G-Procurement website, etc. are required. Procurement committees have to be formed, often with citizen participation. Contracts worth more than one million baht have to be sent to Office of the Auditor-General and Revenue Department within 30 days of signing. Regulations for e-procurement also include additional criteria: value for money, transparency, efficiency and effectiveness, and accountability and responsibility for completion. At least three tenderers (in the case of standards license or meeting quality control systems) are required. However, Cabinet decisions are only placed on the OPM website in very brief form. Many cases that have led to corruption cases were approved by Cabinet decisions, and more detailed disclosure should be required.

Second, the technical specifications allow what is called 'locking of specifications', in order to favor certain suppliers. The dilemma is how to specify enough detail so as to verify suitability and at the same time avoid such specificity that includes/excludes suppliers, particularly for complex, sophisticated procurement that needs customized designs. Often the suppliers themselves are consulted for the expert knowledge. Under the WTO-GPA Article X Technical Specifications and Tender Documentation, it is required that:

"A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement."

There are similar provisions in Thailand, but enforcement is a problem, especially with projects involving very advanced technology, where the suppliers themselves are often informally invited to write the specifications.

GPA's Article X is particularly interesting in stating that:

“In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:

- (a) specify the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics;”

The *functional requirements* are not specified in Thai regulations, and technical specifications are invariably related to physical characteristics. This is an area that could be the focus of reform in Thailand, and would require nationwide training of procurement officers.

In terms of the legal infrastructure, it is also necessary to coordinate various law-proposing channels. The ‘Cleansing Act’ of 2007, for example, allowed criminal proceedings against defendants indicted for procurement corruption to be dropped.

The NACC recently amended the Anti-Corruption Law that allows it to closely monitor large procurement projects, and requires procuring agencies to publish and explain how the reference prices are calculated. Whistle-blowing protection has also been introduced. In addition a new Integrity Index has been constructed to evaluate all government agencies at the departmental level. The index features a procurement component that gives marks for proper procedure and transparency in procurement.

(ii) Clarification of Remedies

A lesson learned from the Klong Darn case in Thailand is that legal remedies need to be clarified and economic considerations also taken into account. Because the contract between NWWI and the Pollution Control Department was found to be fraudulent, the courts ordered the project stopped, even though 95 per cent of the payment had been made, and the construction was about 95 per cent completed.

Perhaps the costs and benefits of continuation should also be included in judicial rulings. In this case, Thailand ended up with a useless, almost completed structure, no wastewater treatment in that area, billions already paid up, and a prolonged legal battle with no end in sight.

(iii) Targeting corruption-friendly economic policies

At the present time, the National Anti-Corruption Commission is playing an increasingly pro-active role in scrutinizing economic policies and measures that open up opportunities for corruption. Several pre-emptive interventions have been made, such as in the case of the scheme to procure 4,000 natural-gas operated city buses, and the auction of 3-G telecommunications licenses, that have had the effect of subjecting the projects to greater scrutiny. The Cabinet, for example, asked the proposers of the bus scheme to withdraw the project in order to conduct further studies in the areas indicated by the NACC technical committee, when the project was submitted for Cabinet approval in 2009 and 2010.

Reform is also needed in areas such as the intervention schemes in the agricultural sector. At the behest of the NACC, reform in this area had been beginning. But the new government in 2011 seems to be bringing back some of the old risky policies.

(iv) Upgrading of the database

Pro-active approaches to countering corrupt networks requires knowing the identity of the network members. Efforts are currently underway to improve the anti-corruption database, with linkages to information from financial institutions, the Land Department, vehicle registry, business ownership, and tax returns.

Non-government groups are also collecting information and analyzing the behavior of elected officials. For the election in 2011, a civil society group collected information on members of parliament who were absent from Parliamentary meetings, and distributed copies of each member’s ‘report card’. However in spite of the dismal scores given to the MPs that failed to attend any Parliamentary sessions or were absent for more than 50 per cent of the time, they were all re-elected.

(v) Increased social mobilization for enhanced transparency

Transparency of procurement information is vital to prevent wrongdoing. The Thai OPM regulations actually does require publication of information. For complaint and appeal procedures, the OPM regulations state that aggrieved suppliers or contractors may lodge complaints directly with the procuring agency, the PMO's Committee in Charge of Procurement, or the Petition Council. In the case of the Petition Council, the petitioner must lodge the complaint within 90 days of knowledge of wrongdoing. The Council will then consider the petition 'without delay', and remedial measure(s) (if any) will be recommended within seven days to the Prime Minister. Remedy might include overturning the act that is inconsistent with the law, or that cannot be supported by 'justifiable reason'. It is also possible for an interim remedy to be issued by the Council itself when appropriate.

However, transparency remains a problem, and efforts are needed to mobilize stakeholders in society. This sounds like a broken record, but the means of mobilization itself has to be overhauled, so that some benefit can be obtained from citizen involvement that would make it worth their while. The Klong Dan case of citizen involvement is a rare 'success story'. With network connections and the possibility of retaliation, Thailand is still grappling with the means to mobilize and incentivize citizens in the fight against procurement corruption.

Sirilaksana Khoman et.al. [13] and Somkiat Tangkitvanich et.al. [14] propose that the GPA could be a tool to increase transparency in Thailand's government procurement. Membership could possibly lead to greater transparency, more efficient use of government budget as it would stimulate fair competition, help honest and efficient suppliers, and may foster industrial growth and development. Greater foreign involvement and competition can thus help to uncover wrongdoing. However there is some apprehension about becoming a member of the GPA. First opportunities for Thai suppliers to access GPA member procurement markets remain limited, while domestic suppliers will face stiffer competition. On the other hand, foreign competition may result in difficulties for domestic suppliers in certain sectors. This is the familiar 'infant industry' argument that has both pros and cons. If long-run efficiency is the goal, then gradual expansion of competition may help to attain that objective. Second, there is some concern that opening up may or may not lead to greater competition and efficiency, if it leads to international collusion. Finally, if foreign governments subsidise their service sectors, particularly construction, the GPA does not have any provision for countervailing action or remedy, unlike the case of subsidies under World Trade Organisation's General Agreement on Tariffs and Trade.

5. Conclusion

In a society dominated by interpersonal relationships, for social, business, as well as other activity, understanding these relationships is the key to understanding corrupt activity. Networks cut across the usual socio-economic characteristics because members of different skills and characteristics are required for a corrupt network to be effective. There are also the various difficulties involved in designing a procurement system. First, government procurement usually involves multiple objectives, with efficiency being just one of them. Often procurement is used as a means to effect a geographical redistribution of income, or to favor underprivileged groups such as the disabled. It is also difficult to design a system that aligns with personal incentives with public benefit, as the same observed behavior could be motivated by opposite motives. Strict conformity to rules sometimes results in less efficiency; the "special method" could reflect a sinister motive or a desire to be efficient; the lowest price may involve sacrifice of quality, and detailed specifications could limit competition.

At the societal level, social enforcement of private contracts, ready access to adjudication, morality, and religious pressure for generalized honesty (in contrast to "contextual morality") cannot be overlooked. These elements all tend to reduce the importance of identity, to facilitate transactions between strangers, and to reduce the need for specific mutual investment by connected parties. But procurement also needs to be accompanied by effective monitoring systems (e.g., corruption report, witness protection, etc.) and sufficiently stringent penalties for the wrongdoers and conspirators. The larger the network of corruption rings, the larger the returns to corrupt acts. The creation of networks of clean officials up to a certain critical mass is absolutely vital to counter the corrupt networks. Hence the need for integrity education.

Integrity plays a key role in fighting corruption. The fight corruption is most effective when preventive, punitive, and educational measures are combined, and public involvement encouraged, as the case of Klong Dan

shows. Most will agree that education is central to preventing corruption. And one way is to illustrate through cases and engagement of external stakeholders, so that value-driven reforms will be based on actual vulnerabilities.

References

- [1] S. Rose-Ackerman. (2001). "Trust, Honesty, and Corruption: Reflection on the State-Building Process" *John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers*. Paper 255. http://digitalcommons.law.yale.edu/lepp_papers/255 (accessed November 23, 2012)
- [2] Y. Ben-Porath. (1980). "The F-Connection: Families, Friends, and Firms and the Organization of Exchange", *Population and Development Review*, 6(1):1-30.
- [3] J. C. Andvig & K. O. Moene. (1990). How corruption may corrupt. *Journal of Economic Behaviour and Organization*, 13(1), 63-76.
- [4] R. K. Sah. (1988). Persistence and pervasiveness of corruption: new perspectives. Yale Economic Papers.
- [5] K. M. Murphy, A. Shleifer & R. W. Vishny (1991). The allocation of talent: implications for growth. *Quarterly Journal of Economics*, 106, 503-530.
- [6] K. M. Murphy, A. Shleifer & R. W. Vishny. (1993). Why is rent seeking so costly to growth? *American Economic Review Paper and Proceedings*, 83, 409-414.
- [7] D. Acemoglu. (1995). Reward structures and the allocation of talent. *European Economic Review*, 39, 17-33.
- [8] G.S. Becker. (1974). "A theory of social interactions." *Journal of Political Economy*, 82 (November/December): 1063-1093.
- [9] S. Khoman (2012) Corruption and Network Relationships: Theory and Evidence from Thailand Paper presented at the First OBEGEF conference, "Interdisciplinary Insights on Fraud and Corruption", at the Faculdade de Economia da Universidade do Porto (FEP), Portugal, September 14-15.
- [10] J. Sidel. (1996) "Siam and its twin?: democratisation and bossism in contemporary Thailand and the Philippines" *IDS Bulletin*, 27 (2). 36-52.
- [11] D. Gambetta. (1988). "Can we trust trust?" in Diego Gambetta (ed.) *Trust: Making and Breaking Cooperative Relations* (Oxford, Basil Blackwell).
- [12] S. Gächter & E. Fehr. (2000). "Cooperation and Punishment in Public Goods Experiments," *American Economic Review*, American Economic Association. Vol. 90 (4); 980-994
- [13] S. Khoman, W. Mingmaninakin, V. Thosanguan, C. Tantivasadakarn, C. Chetsumon, S. Suntharanurak, S. Nippaya, and N. Suksai (2009) "The World Trade Organisation's Government Procurement Agreement: A Study of Thailand's Preparation for Accession", research report submitted to the Comptroller-General's Department, Ministry of Finance. (in Thai).
- [14] S. Tangkitvanich et. al. (2009). "Costs and Benefits for Thailand of Joining the GPA", research report submitted to the Comptroller-General's Department, Ministry of Finance. (in Thai).

Laws and Regulations

Thailand. Regulation of the Office of the Prime Minister on Procurement 1992, amendment No. 6, 2002

Thailand. Act on Offences Relating to the Submission of Bids to State Agencies (1999).

<http://www.moj.go.th/Law/MojLaw/EngLaw/Act%20Con>.

www.ect.go.th

www.gprocurement.go.th/

http://www.nacc.go.th/cul_search.php (accessed on March 5, 2013) (in Thai)