

The Public Procurement Bill: A lot of good, some significant bad, but certainly not ugly

By Frederico Links

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In mid-September 2015, Namibian Finance Minister Calle Schlettwein tabled before parliament a significant piece of legislation that has been long in coming – the Public Procurement Bill, 2015.

The Bill has much to commend it. Indeed, it marks the long overdue introduction of a much more robust and secure public procurement dispensation than the one set up by the Tender Board of Namibia Act, No. 16 of 1996.

The aim of this paper is to throw a spotlight on significant positive elements and evident weaknesses in the envisaged institutional and regulatory framework. Attention is drawn to the following salient features, both positive and less positive, of the Public Procurement Bill:

With regard to oversight and institutional arrangements:

- The envisaged public procurement dispensation is much more appropriately structured than the dispensation which was installed by the Tender Board Act of 1996;
- The proposed legal framework will apply to all public entities, which are basically defined as all government ministries, departments and agencies, regional and local authorities, and state-owned enterprises (SOEs), as well as all other state-funded entities;
- At the same time, levels of oversight have been improved and increased substantially and the checks in the procurement pipeline are in line with many aspects of international procurement best practice and general principles of good governance;
- However, the structure of procurement decision-making does not appear to allow for active public scrutiny along the procurement pipeline.

With regard to personnel and personal professionalism and ethical regulatory conduct:

- The proposed dispensation is explicitly aimed at installing a more professional personnel cadre – in terms of qualifications, expertise and experience;
- The law, once passed, will set out the procedures and the methods to be followed in the public procurement system;
- The proposed dispensation specifically articulates anti-corruption considerations as having informed its design;
- In this regard, the proposed dispensation comes with measures and standards that speak to the maintenance of ethical conduct by both procuring entities and officials as well as bidders;
- However, of concern are the relatively watered-down provisions, compared to those proposed in international mechanisms, dealing with conflict/disclosure of interest. These measures fall short of international requirements and best practices.

With regard to information and data management:

- In the proposed dispensation information and data is seen as important for generating assessments of performance throughout the system;
- The preoccupation with records management and information sharing indicates that public procurement authorities will be pressed to be much more accountable than at present;
- However, it is clear that much of this information and data generated within the public procurement system will largely not be for public scrutiny, which belies the claim of the proposed dispensation being significantly transparent;

With regard to procurement methods and procedures:

- The proposed dispensation allows for greater flexibility in the choice of procurement methods and clearly articulates these choices;
- Similarly, procurement procedures are clearly laid down;
- Of major concern though is the continued positioning of the tender exemption practice as an acceptable procurement method;
- In order to ensure greater objectivity and minimise human influence and interaction in procurement processes, authorities should endeavour to roll out an e-procurement system as a matter of urgency.

While the positives are many, there are also certain glaring weaknesses evident and in this regard the following needs emphasis:

- The standards of transparency set by the United Nations Convention Against Corruption (UNCAC) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services, both of which informed the design of the envisaged public procurement dispensation, are substantially not met;
- The scope for public oversight or scrutiny of the public procurement system as articulated in international mechanisms is severely under-provisioned, meaning the public will still not have nearly sufficient access to information and insights concerning the decision-making, operations and activities of public procurement authorities;
- Confidentiality and secrecy provisions along the decision-making pipeline militate against the notion of openness in public procurement and undermines transparent and accountable, and by extension efficient, governance.

With regard to preferences:

- While preferential procurement provisions are included, such provisions are non-core considerations in the design and installation of a public procurement system and should appropriately be dealt with in supplementary legislation;
- Given the paucity of data on small and medium enterprises and the already tainted image of 'empowerment' initiatives, it is proposed that authorities urgently clarify the empowerment landscape before burdening public procurement and other governance systems with such measures.

1. Introduction

It is by now abundantly clear, to anyone who reads newspapers and is concerned with the issue of good governance within the public sector, that public sector procurement has become a source of ever escalating worry. Almost daily and weekly now reports emerge of how the public sector procurement

system – as well as various critical natural resource licensing regimes, from fisheries to oil and gas exploration – has been and is being mismanaged and/or manipulated to either questionably or corruptly facilitate the channelling of economic benefits to politically and commercially connected parties and their associates or fall woefully short of achieving envisaged and stated service delivery aims and outcomes.

As it stands, at the time of writing, one could basically point to any sector falling within the ambit of the public procurement dispensation, and where the state has a self-appointed mandatory role in stimulating, growing, supporting, transforming, uplifting or guiding identified participants and/or stakeholders towards the achievement of some defined public good, whether immediate, recurring or stretching over the long term, where the intervention of the state has fallen significantly short and even become embarrassingly problematic.

To be clear, the public sector procurement dispensation has become the confluence point of malaise in the state's service delivery obligations.

It is arguably in light of this recognition that the Namibian government has long since initiated efforts to transform the public procurement system – currently running through the Tender Board of Namibia – purportedly towards achieving greater efficiency and better developmental outcomes.

However, it has to be noted that reform initiatives were first mooted more than 10 years ago, shortly after the turn of the century, and have now dragged on in one form or another for almost a decade and a half, with various amendments to the Tender Board Act¹ and a number of draft bills having done the rounds for consultation, without the process ever seeming to have an end-point or even a sense of urgency. The slow and meandering pace of the reform process appeared to demonstrate a lack of political will on the part of the Executive to decisively get to grips with the issues surrounding public sector procurement, even as it has increasingly become clear that dysfunction has beset a system which has long since become out-dated.

In its most recent attempt at demonstrating the seriousness of its intent to transform the public procurement sector, the government in the form of the recently installed administration of President Hage Geingob has introduced the latest version of a bill – simply titled Public Procurement Bill – touted to replace the Tender Board Act, and tabled in the National Assembly on Tuesday, 15 September 2015, by Finance Minister Calle Schlettwein, which has been long in the coming and has seen at least three drafts making an appearance in public over the last few years. This latest version of the Public Procurement Bill portrays the current administration as seized with the issue and determined to push through this draft legislation, in order to finally introduce a new procurement dispensation in the public sector, following the withdrawal from parliament at the end of 2013 of an earlier version of the same Bill by then Prime Minister and current President Hage Geingob.

The sense of urgency to get this Bill passed was evident on the day it was tabled – Tuesday, 15 September 2015 – when Attorney General Sackey Shanghala half beseechingly called on MPs to allow the Bill to pass even though it was not “perfect”.²

It is against the backdrop of this statement – not “perfect” – that this assessment of the Public Procurement Bill³ is positioned – analysing, questioning and critiquing the adequacy and appropriateness of this draft legislation at this juncture in the developmental trajectory of Namibia.

¹ Tender Board Act No.16 of 1996.

² “Don’t be too strict on tenders – Nujoma”, Shinovene Immanuel, in *The Namibian*, 18 September 2015.

³ Public Procurement Bill B8-2015, tabled in the National Assembly on 15 September 2015.

On the surface, the Public Procurement Bill appears to indicate that all the right moves have been made and seemingly all the bases considered and covered. However, a closer look reveals that while this overwhelmingly appears to be the case, in critical areas some of these moves do not go far enough and that some bases are not all that securely covered to address the significant concerns that have arisen around the public sector procurement dispensation over the last decade or so and even longer. In light of this, the first, immediate and unequivocal conclusion that can be drawn straight off the bat is that this Bill, once passed, will be subjected to some amendment, maybe not substantially, but certainly in significant areas, over the coming years and decade(s). This paper will explore the areas where such amendment initiatives will and should probably be focused in future.

That said, and kicking off this discussion on a positive note, the Namibian government under President Hage Geingob – who has adopted efficient government as his mantra since taking office on 21 March 2015 – has to be commended for finally bringing this process to a head.

2. “Tender business in Namibia, is good business”⁴

Before launching into a proper discussion of the salient components of the Public Procurement Bill, a little context is in order.

That the Tender Board of Namibia, situated within the Ministry of Finance, has become an increasingly problematic and worrisome institution is beyond doubt at this stage. A big part of the reason for the agency’s evolution to problem status over the years has been the fact that as the state’s procurement needs have surged in volume, complexity and sophistication, the Tender Board’s legislative, institutional and operational frameworks have been exposed as substantially inadequate and the workings of the edifice has been placed under enormous strain due to the out-dated nature of its crumbling foundational pillars.

This has led to a situation over the years where the agency has become tainted by a lack of confidence and trust and suspicions of corruption. To be clear, poor institutional performance, misunderstanding of placement in state priorities, agendas and activities, cronyism and nepotism, political interference, and bad decision-making have all become attached to the workings of the Tender Board over the almost two decades since the enacting of its establishing legislation in 1996.

All this has happened against the backdrop of Namibia arguably having experienced an up-tick in corruption or borderline corrupt activities, much of which has probably flowed from, around and through the existing public procurement dispensation. At this stage it should be recognized that levels of corruption in Namibia are highly debatable – given as the scourge is still hard to quantify and many in government would argue it is not that big a deal – but that the perceived levels of corruption in the public sector are an ever-escalating concern, with the public procurement system a core source and focus of this concern.

In this regard, an Institute for Public Policy Research (IPPR) paper from 2011 stated the following: “The picture painted in the media is that, for now, the Public Procurement process is fraught with conflict of

⁴ Readers comment by Freedom Fighter in response to “Don’t be too strict on tenders – Nujoma”, Shinovene Immanuel, in *The Namibian*, 18 September 2015

interest, delays, favouritism, abuse of office and outright corruption. These are among the situations that the loopholes in the legislation have perpetuated.”⁵

As illustration of the disturbing happenings in the public sector, in mid-2015 Prosecutor-General Martha Imlwa announced at an anti-corruption conference in Windhoek that nearly two-thirds, or 61 percent, of corruption cases referred to her office for consideration for prosecution between 2007 and 2014 involved civil servants. The Prosecutor-General stated that out of the 462 corruption cases – which basically is more than one new prosecutable corruption case every week for seven years straight – 344 involved civil servants and combined with another 40 cases having involved state-owned enterprises’ employees, then it is clear that actually well over two-thirds of cases involved public sector workers. The remaining 82 cases involved private individuals. Of the 462 cases, 167 had been finalized since 2007, while most of the cases involving public sector workers, or 244 cases, had yet to be completed at the time she released these figures.

What this points to is that while the weaknesses of the existing procurement system have increasingly been visible and exploited from the outside, the same is also true from the inside, as the above quoted figures could be drawn to indicate, since probably a fair number of those corruption cases have something to do with contracting. The point is that corruption is rife in the civil service and is present at all state levels and structures. The case of Alfred Ilukena is testimony of this, as Ilukena is just the latest senior government executive to be linked to corrupt contracting practice. Corruption allegations were levelled against long serving Tender Board member and current Youth Ministry Permanent Secretary Alfred Ilukena in 2014 over the award of a N\$47 million schools catering contract to a company co-owned by his wife. The Anti-Corruption Commission (ACC) has not yet charged Ilukena under anti-corruption laws. However, before the allegedly corrupt contract could be implemented, then Prime Minister Hage Geingob stepped in and cancelled the tender in late 2014.

In view of all this, it should be noted that successive Afrobarometer surveys, since 2008, have consistently found that Namibians perceive public sector workers and officials as the highly corrupt. However, in 2014, for the first time, business people were perceived as the most corrupt in the country.⁶ And it is easy to see what informs this perception. For consider that over the years there have been scores of reports of Ministry of Finance inland revenue officials being investigated over the issuance of fake certificates of good standing from tax authorities which were used to tender for government contracts⁷. This indicates that corruption inducing systemic weakness factors go well beyond the Tender Board and that all these factors conflate to create an environment ripe for corruption. This should be borne in mind as it is becoming evident that, especially over the last few years, there appears to have been a dramatic surge in the number of business people and entities seeking entry into the public procurement system.⁸

This apparent growth in procurement players is probably largely a consequence of the public procurement bill having ballooned over especially the last decade, creating room for ever more individuals and entities to become involved in mostly tendering for government construction and infrastructure jobs and supply and service contracts. While this has happened, the award of government contracts has become ever less transparent and the dealings of the Tender Board increasingly opaque, as tender exemptions – an unquestionably ‘grey’ practice – appeared to become

⁵ See Tjirera, E (2011) Public procurement in Namibia – The roles of codes of conduct in reducing corruption, IPPR Anti-Corruption Research Programme

⁶ See Tjirera, E. (2015) Namibians see increased corruption; business executives now top list of ‘most corrupt’, Afrobarometer Dispatch No. 7.

⁷ As an example see: http://namibian.com.na/index.php?archive_id=130371&page_type=archive_story_detail&page=1

⁸ See Public Procurement Reforms 2012/13-2013/14 – Challenges and Achievements, The Tender Board of Namibia (2014).

the norm in public contracting.

In this regard, consider the following excerpt from another IPPR paper from 2011: “In the 2005-06 financial year the Tender Board approved tenders worth N\$619 million and tender exemptions worth N\$170.4 million. In the 2006-07 financial year, exemptions spiralled to N\$1.6 billion in value while awarded tenders amounted to N\$868.3 million. This trend continued through the 2007-08 financial year, when the value of government procurement soared to over N\$4 billion, and the value of tender awards amounted to N\$624.3 million, compared to N\$3.4 billion spent on tender exempted procurement. If this trend is followed through to the present and beyond, then a disturbing picture becomes starkly clear, in that tender exemptions appear to have become the rule and have long since ceased to be the exception.”⁹

Just to add to this, in 2010-11 central government procurement amounted to about N\$6.2 billion, with exemptions hitting N\$4.3 billion, and in 2012-13 government procurement spiked to an astronomical N\$14 billion, with a staggering N\$9.2 billion exempted from competitive tendering. It is probably reasonable to suggest that 2015-16 public sector procurement, budgeted at over N\$13 billion, will see this trend continuing.

The surge in spending over the last few years can arguably be attributed to the state’s spending on such grand schemes as the Targeted Intervention Programme for Employment and Economic Growth (TIPEEG), from 2011, and the stalled mass housing scheme, from late 2013, both of which have seemingly been afflicted by and faltered as a result of poor planning, poor budgeting, poor implementation and poor contracting. It is still largely unclear what happened under TIPEEG, as all the contracting sidestepped the Tender Board, but anecdotally it appears that despite all the spending the objectives of the programme were not and will not be reached.

With this said, consider the following extract from the same IPPR paper referenced earlier: “At the same time, and parallel to the lethargy with which the revamping exercise has been approached and conducted, the Tender Board has conceivably suffered severe reputational damage. For it can be argued that the Tender Board, as evidenced by the numerous High Court challenges and public castigations of the institution from various quarters, including by the Minister of Finance, Saara Kuugongelwa-Amadhila, has become burdened by a loss of public and stakeholder confidence in the integrity of public procurement processes, which in turn has led to a negative corporate image for the Tender Board, and by extension diminished its credibility. This negative perception of the workings and practices of the Tender Board is compounded by the incidence of corruption within the Tender Board Secretariat.”

Ultimately it can be said and needs reiteration, that as things stand – lest we forget: “loss of public and stakeholder confidence” and “diminished credibility” – the public sector procurement system, with the Tender Board at its apex, is/was riddled with bad practices and altogether questionable governance and thus reform is inevitable and has been long overdue.

Which is where the Public Procurement Bill, 2015 comes in.

Key considerations:

- The state’s procurement needs have dramatically surged in volume, complexity and sophistication over the last two decades;

⁹ See Links, F and C. Daniels (2011) The Tender Board – Need for root and branch reform, IPPR Anti-Corruption Research Programme.

- The Tender Board Act of 1996 has become out-dated;
- Systemic weaknesses have led to “loss of public and stakeholder confidence in the integrity of public procurement processes, which in turn has led to a negative corporate image for the Tender Board, and by extension diminished its credibility”;
- Corruption and mismanagement are present at all state levels and structures;
- “The Public Procurement process is fraught with conflict of interest, delays, favouritism, abuse of office and outright corruption”.

3. Adapting to evolving circumstances

As far as the Public Procurement Bill, 2015 goes, it comes across as a good attempt at changing negative sentiment and the lost confidence tone around public procurement. Whereas the existing/old system had increasingly come to undermine trust in the state’s procurement sector the proposed law very much seems an earnest endeavour aimed at rebuilding and preserving the trust lost in public procurement systems and processes over the last two decades. And it is clearly and broadly crafted and envisaged to adhere to principles of good governance that underpin modern and efficient procurement practices.

Considering this, it is immediately evident that the envisaged public procurement system is being constructed to be inline with both the recommendations of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services¹⁰ and the principles of the United Nations Convention Against Corruption (UNCAC)¹¹, which incidentally informs much of the 2011 revisions of the UNCITRAL Model Law.

In fact a Tender Board report from mid-2014 explicitly grounds the proposed law in the UNCITRAL Model Law: “The Bill is based on the UNCITRAL Model Law for public procurement, which has been customized to meet the specific needs of Namibia. The aim of the UNCITRAL Model Law is to provide a template to countries to craft their procurement legislation in such a way so that their processes are in harmony and meet international standards. However, it is worth pointing out that the UNCITRAL Model Law does not contain any model structure for the national institutional setup for the management of the procurement system.”¹²

In its final section the report states: “The need for a new legislation is motivated by the determination of the Government to introduce a modern law that would better facilitate the implementation of Government’s policy to empower Namibian Enterprises, SMEs and previously disadvantaged groups as well as promote Namibian products, for a better impact on the economy of the country. There is also need to align our system to international best practices and improve Namibia’s rating in good governance.”

It has to be pointed out that while anti-corruption is not explicitly articulated as having significantly influenced this reform initiative, it must surely also have informed the design of the proposed law, as is implied by “improve Namibia’s rating in good governance” and evidenced by the strive to broadly adhere to UNCAC requirements.

¹⁰ The UNCITRAL Model Law on Procurement of Goods and Construction was adopted in 1993 and the Model Law on Procurement of Goods, Construction and Services in 1994. The Model Law was revised in 2011 to be in line with the requirements of the United Nations Convention Against Corruption (UNCAC).

¹¹ The United Nations Convention Against Corruption (UNCAC) was adopted in 2004.

¹² See Public Procurement Reforms 2012/13-2013/14 – Challenges and Achievements, The Tender Board of Namibia (2014).

That said, according to varied sources on the issue of best practices in public procurement, good governance is founded on a system that basically ensures and upholds conditions of optimum competition and is transparent.

In light of this, the following should be borne in mind throughout this discussion:

“Common elements of a strong procurement system are, however, shared by developing and developed countries alike. These include:

- A clear legal framework;
- Consistent policies;
- Transparency, and
- A review of awards.”¹³

Against this backdrop, it is the purpose of this section to assess to what extent the proposed public procurement dispensation is in line with these standards. For this reason, the ensuing discussion will be portioned off to evaluate the Public Procurement Bill’s eye-catching features under the following categories:

1. Institutional and oversight framework;
2. Competence and professionalism;
3. Procurement methods and procedures;
4. Integrity and anti-corruption;
5. Records and data management.

3.1 Institutional and oversight framework

First off, it must be said that as far as a “clear legal framework” goes, the proposed and envisaged dispensation certainly appears to meet that criteria. The text of the draft law indicates a considerable modernisation of the public procurement landscape.

As concerns institutional and oversight arrangements, the following needs to be kept front-of-mind:

“Components of a procurement system

- Legislative framework
- Remedies or challenge mechanism
- Sanctions regime
- Supporting institutional infrastructure
- Resources”¹⁴

Firstly, it should be noted that the proposed law does not provide for the creation of an autonomous or independent decision-making entity or structure, but that the entities to be created will fall within and under the supervisory and administrative ambit of the Ministry of Finance.

As per the Public Procurement Bill, the procurement sector of the state will have a much-expanded administrative and bureaucratic structure involving the Ministry of Finance, Procurement Policy Unit,

¹³ See Kaspar, L and A. Puddephat (2012) Benefits of transparency in public procurement for SMEs, Global Partners & Associates.

¹⁴ See Nicholas, C (2010) Fraud and corruption in public procurement, a UNCITRAL presentation from December 2010 posted online.

Central Procurement Board, Review Panel, public entity level procurement committees, procurement management units and bid evaluation committees.

What is striking about this envisaged decision-making and governance structure is that it centralises the procurement function. The proposed legal framework will apply to all public entities, which are basically defined as all government ministries, departments and agencies, regional and local authorities, and state-owned enterprises (SOEs), as well as all other state-funded entities. The Bill seeks to install a procurement dispensation that is harmonised and standardised. This is quite significant given the extensive concerns about regional council, local authority, and SOE tender corruption.

Considering this centralised structure, and leaving aside autonomy and independence, it comes across as a much improved institutional and oversight decision-making and monitoring arrangement to the one established by the Tender Board Act.

Procurement Policy Unit

According to Part 2 of the Public Procurement Bill, the Procurement Policy Unit will be situated within the Ministry of Finance with the role of advising the Minister of Finance on issues related to procurement.

In short, the Procurement Policy Unit will primarily be seized with monitoring and evaluation of the public procurement system and its attendant processes. In this regard, according to the proposed law, it will be a depository of information and data concerning procurement practices up and down the state's procurement pipeline. It is ultimately positioned as having oversight over the activities and practices of the Central Procurement Board.

This is a significant improvement in oversight when compared to the Tender Board Act of 1996, which is substantially under-provisioned in this area, given that no specific entity has ever been legally tasked with oversight functions over the Tender Board.

Central Procurement Board

The Central Procurement Board is primarily where procurement decision-making will be situated and is established by Part 3 of the draft law.

Briefly, according to the Public Procurement Bill, the Procurement Committees, Procurement Management Units and the Bid Evaluation Committees, which are to be created within public entities, as well as within the Board's structure, resort under the decision-making of the Central Procurement Board and inform the Board's decision-making when awarding procurement contracts.

The functions of the Procurement Committee, which resides in public entities, is to design the specific procurement parameters for the state's various needs and to call for bids, while the Bid Evaluation Committees are tasked with, as their title indicates, evaluating the bids received, and are established at both public entity and Board levels, as required. Unlike these two bodies, the role of the Procurement Management Unit is slightly opaque, but it appears to be the administrative side of the procurement function in public entities tasked with the instrumental role of monitoring implementation and producing the information and data – record keeping – that will be passed up the chain and ultimately inform the activities of the Procurement Policy Unit.

The draft text is slightly confusing about the reporting hierarchy when it comes to these various bodies – which diminishes the “clear legal framework” notion very slightly – for according to Part 4 – Accounting Officers, Internal Structure And Bid Evaluation Committees – Accounting Officers appear to be empowered to do a lot of what Procurement Committees do and seem to be burdened with rather a lot. It would be interesting to see how this will actually manifest.

Review Panel

The Review Panel will be a first for Namibia and is undoubtedly one of the significant and welcome aspects of the proposed public procurement institutional framework.

According to Part 7 of the Bill, the Minister may “constitute a Review Panel to adjudicate on application for -

- (a) review;
- (b) suspension, debarment and disqualification of bidders and suppliers; or
- (c) any other matter that the Minister may refer to the Review Panel for its consideration.”

Importantly, the review panel does not resort under the Central Procurement Board, but appears to be situated at Procurement Policy Unit level. The review panel is established as a non-judicial ad hoc tribunal which does not preclude applicants from resorting to the courts, but is rather positioned, in the interests of efficiency, as the reviewer of first-instance, probably partly in recognition that the Namibian courts system is perennially plagued by bottlenecks which can see cases dragged out indefinitely.

“An effective remedy system requires that an application for review be heard by an independent body. The notion of independence with respect to the review body usually means independence from the procuring entity rather than independence from the government. For instance, a body that merely has the competence to approve or disapprove of certain actions of the procuring entity probably will not qualify as truly independent. The same will be true if this body advises a procuring entity on public procurement procedures.”¹⁵

Looking at the issue of ‘independence’ of the Review Panel from another angle, the notion of independence certainly seems undermined by the fact that the members of the panel will be appointed by the line Minister. This speaks to the concern that the members of the Review Panel will not have the necessary independence to make sound decisions, despite the appearance of a supposedly well structured and functioning systems.

That said, it is heartening to see that the drafters of the latest Public Procurement Bill have seen it fit to align with the advice of the IPPR from 2011, which was:

“7) With regard to dispute resolution, that:

- The creation of a review panel, to deal with the mediation of tender disputes, be given explicit mention in the provisions of the proposed law.”¹⁶

The creation of this panel is in line with both the recommendations of the UNCITRAL Model Law and UNCAC. In short, the UNCITRAL Model Law and UNCAC (Article 9) requirements for a challenge mechanism are as follows:

¹⁵ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

¹⁶ See Links, F and C. Daniels (2011) The Tender Board – Need for root and branch reform, IPPR Anti-Corruption Research Programme.

- All steps in process can be challenged
- By any potential supplier
- Optional peer review mechanism
- Independent administrative review mechanism
- Court procedures
- Supported by “standstill” provisions
- Default rule: public hearings¹⁷

When considering this list, in two important aspects the Bill falls short of the UNCITRAL and UNCAC requirements, namely:

- Supported by “standstill” provisions
- Default rule: public hearings

The proposed legislation, in subsection 60 (c) of Part 7, states:

“60. Upon receipt of the application for review referred to in section 59, the Review Panel may –

(c) set aside in whole or in part a decision or an action of the Board or public entity that is not in compliance with this Act, **other than any decision or action bringing the procurement contract or the framework agreement into force**, and refer the matter back to the Board or public entity for reconsideration with specific instructions;”

The bolded section seems to suggest that “standstill” provisions – allowing for a particular procurement process to be halted in its entirety until the panel has had an opportunity to express itself – are under-catered for in the envisaged dispensation. There appears to be a need for clarification on this particular point, as it seems that once a procurement contract or framework agreement has come into force, there does not appear to be anything that can be done to halt such a contract even if the particular contract or agreement is credibly alleged, and can be proven, to have been substantially wrongfully awarded.

In this regard the following: “The possibility of suspension of a procurement procedure as an interim measure while the challenge is pending is essential, because this prohibits the procuring entity from entering into the contract before the review body has decided on an application for review. A suspension will allow the reviewing body to verify whether the challenged decision was made in accordance with the rules and the solicitation materials.”¹⁸

The above statement seems to suggest that once a procurement decision has been made, there is no exception to the “standstill” provision – the process is automatically suspended to allow time for potential challenges of the contract award decision to run their course. However, both the above statement and the provisional text seem to suggest that in the event a procurement contract is concluded and brought into force immediately subsequent to the awarding of that contract, there really is nothing anyone can do to stop the implementation of such a contract. This comes across as a flawed provision, as no contract award or framework agreement should be beyond being halted if it is substantially alleged to have been wrongfully awarded.

¹⁷ See Nicholas, C (2010) Fraud and corruption in public procurement, a UNCITRAL presentation from December 2010 posted online.

¹⁸ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

This aside, and as to public hearings being the default, the issue is also a bit confusing as it is unclear whether hearings are actually open to the public or not, but the text seems to suggest that some hearings would be public hearings while others would not be, but what the distinction would be is unclear. In fact, there is a rather disturbing sense that review panel hearings would mostly be closed-door gatherings shrouded in secrecy (this will be discussed in more detail in the transparency section of this paper).

This concern aside, the notion of a review panel in the Namibian public procurement system is a welcome precedent and a major departure from the Tender Board Act, which has no such provisional feature.

3.2 Competence and professionalism

When looking at the institutional structure of the proposed public procurement dispensation – and especially considering the roles and functions of the various entities and committees – it could be argued that in and of itself, the structure embodies a much more professionalized set-up than what has been in existence to date.

The issues of competence and professionalism should be viewed against the following:

“Both the public sector and the private sector must ensure that only professional, honest, reliable and skilled staff who demonstrate integrity are involved in public procurement activities. Staff must be appropriately informed and trained on how to navigate through complex legal frameworks, such as public procurement and anti-corruption laws.”¹⁹

To emphasise, professionalism has long-term payoffs:

“Professionalism in public procurement allows for functionality, transparency and significant savings in public expenditure ...”²⁰

In this regard, one of the “Objects of the Act” is to:

“(iv) build procurement capacity in Namibia;”

Furthermore, in Part 2, the Procurement Policy Unit is established as a “specialized” unit, with the function:

“(f) to prepare and conduct training programmes and approve training curriculum on public procurement as proposed by training institutions for staff members, contractors and suppliers concerning procurement ;

(g) to set mandatory training standards, capacity building and competence levels, certification requirements and professional development paths for procurement practitioners in Namibia with the consent of the Minister;”

This is explicit indication that the Unit will be significantly seized with the issue of the maintenance of a professional procurement environment and that only those meeting the appropriate standards – in

¹⁹ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

²⁰ See Radovic, K (?) Professionalism in public procurement, an undated presentation sourced online

experience and qualifications – will be allowed to operate significantly within the dispensation, as far as it is possible to achieve the desired level of specialisation.

When considering the Central Procurement Board (Part 3), the following stands out:

“Constitution of Board

11. (1) The Board consists of nine members -

(b) who are suitably qualified fit and proper persons having knowledge and experience relevant to the functions of the Board;”

Concerning this provision, commenting on an earlier version of the Bill, the IPPR opined:

“In the new Bill, members are appointed on the basis of their relevant skills and experience and are not necessarily to be drawn from the public service. This removes the inefficiencies of the existing system and helps to ensure decisions are based on expert opinion and the need for cost efficiency rather than political or other extraneous considerations.”²¹

As regards the Review Panel (Part 7), attention is drawn to the following:

“Review Panel

58. (1) When the Minister thinks it necessary on account of any of the grounds mentioned in subsection (3), the Minister may, subject to subsection (7), appoint five persons, from a list of persons referred to in subsection (4) -

(a) having qualifications, wide knowledge and experience in legal, administrative, economic, financial, trade, engineering, scientific or technical matters; and”

Bid Evaluation Committees

Taking this further down the decision-making chain, as regards bid evaluation committees in Part 4 the following is provisioned:

“(6) The members of a bid evaluation committee must possess skills, knowledge and experience relevant to the procurement requirements which may include –

- (a) technical skills;
- (b) procurement and contracting skills;
- (c) knowledge in financial management and analytical skills;
- (d) or legal knowledge and expertise.”

When considering all this, something that should be borne in mind is that objectivity is the other side of the coin with professionalism, and in this way, by focusing on building out a more professional public procurement dispensation and environment, authorities are also laying down a system that will not be undermined by the vagaries of human interaction and decision-making.

Composition and size

²¹ See Hopwood, G. (2012) Comments on the Public Procurement Bill, IPPR.

Something else that should be brought in here for discussion that has an impact on the professional conduct and operations of the various entities is their membership numbers.

In 2011, the IPPR made the following recommendations²²:

“With regard to the composition of the Tender Board, that:

- The authorities reassess the provisions of the existing and proposed legislation concerning the size of the Tender Board, and give serious consideration to reducing the size of the board in the pursuit of efficiency;
- At the same time, authorities investigate the issue of including for Tender Board membership individuals, not in the employ of the state, beyond those independents and their alternatives already provided for, who are considerably experienced in financial matters and commensurately qualified and/or technically skilled, and who are representative of a cross-section of socio-economic sectors.”

One of the criticisms levelled over the years against the Tender Board was that it was bloated (having ±30 members) and had become a cozy “exclusive club” of long-serving Permanent Secretaries (all PSs served on the Tender Board), regardless of their qualifications, knowledge levels and experience. The Permanent Secretary in the Ministry of Finance has always served as the chairperson of the Tender Board. In some respects this setup has led to a conflict of interest environment as the Tender Board members were also the accounting officers at the various government ministries initiating procurement drives and who would ultimately be responsible for implementation and execution of procurement contracts.

The same IPPR report from 2011 states in this regard:

“This composition is a good recipe for conflict of interest – since those who should be supervising and monitoring the operations of the Tender Board are on the Board. Representatives from Ministries are mainly Permanent Secretaries who are both political employees and civil servants. This link in itself also constitutes a degree of conflict of interest.”

In stark contrast, as already pointed out, the Central Procurement Board will have only nine (9) members, of which the Chairperson and Deputy Chairperson will be permanent and exclusive staff members of the Board, all the members will be appointed with due consideration of their qualifications, knowledge and experience, as well as their perceived levels of personal integrity. On top of that, membership of the Central Procurement Board and the Review Panel must comply with very specific gender representation requirements – three in the case of the nine member Central Procurement Board and two in the case of the five member Review Panel.

As with the appointment of the members of the Review Panel, caution also has to be expressed regarding the fact that ultimately Board members will be appointed by the relevant Minister. This speaks to the concern that the members of the Board will not have the necessary independence to make sound decisions, despite the appearance of a supposedly well structured and functioning systems.

This concern is slightly mitigated by the appointment provision – keeping in mind that automatic membership by virtue of being a Permanent Secretary is being done away with – the language of which states that Board members are:

²² See Links, F and C. Daniels (2011) The Tender Board – Need for root and branch reform, IPPR Anti-Corruption Research Programme.

“(c) appointed by the Minister after an open, fair and transparent prescribed process of invitation, interview and recommendation by a recruitment committee.”

In this regard, as the earlier quoted IPPR recommendations articulate, it would be preferable if the Board also included representatives of civil society, the private sector and the labour movement to prevent the creation of cabals who will steer contracts to a favoured few.

Appointment of suitably qualified individuals at all levels of the procurement system would be strengthened by the establishment and maintenance of integrity ensuring provisions, such as those speaking to conflict of interest, the application of undue influence and generally corrupt behaviour. Such provisions will be discussed a little later on.

3.3 Flexibility and process security

Part 5 (Methods of Procurement) is quite clear and certainly, once again, a wholesale improvement on the Tender Board Act.

When considering the issues of flexibility and process security there are two considerations that need evaluation, namely:

1. Procurement method(s);
2. The tendering process.

Part 5 states:

“Choice of procurement methods 27. (1) Subject to subsection (2), the choice of procurement methods available to the Board or a public entity is -

(a) for the procurement of goods, works and non-consultancy services, by -

- (i) open advertised bidding;
- (ii) restricted bidding;
- (iii) request for sealed quotations;
- (iv) direct procurement;
- (v) execution by public entities;
- (vi) emergency procurement;
- (vii) small value procurement;
- (viii) request for proposals; and
- (ix) electronic reversed auction.

(b) for the procurement of consultancy services, by request for proposals on the basis of -

- (i) quality and cost;
- (ii) quality alone;
- (iii) quality and fixed budget; or
- (iv) least cost and acceptable quality.

(2) Procurement of goods or services may be made by means of open advertised bidding to which equal access is provided to all eligible and qualified bidders, except in the cases referred to in subsection (4).”

Firstly, the Tender Board Act is decidedly primitive in comparison to the Public Procurement Bill on procurement methods. Secondly, it has to be said that UNCAC has nothing to say about appropriate procurement methods to combat corruption. On the other hand, the UNCITRAL Model Law encourages flexibility and recognizes that different procurement needs might require different methods. However, the UNCITRAL Model Law makes it clear that open, competitive tendering should be the default and another method should be used only when really well justified – such as in the case of emergencies or under conditions of urgency or in the case of complex procurement. Considering this, the draft law is clear under what conditions each of the listed procurement methods will be employed. In this sense the envisaged public procurement dispensation appears in-line with the UNCITRAL Model Law.

The choice of procurement method goes hand-in-hand with the bidding process used, and in this, Part 6 (Bidding Process) is very clear. Once again, the draft law seems intent on meeting the standards of both UNCAC and the UNCITRAL Model Law, which both strongly advocate for clear and concise ‘rules of the game’, in that it will set down a process that appears to have as departure point the fair and equitable treatment of bidders and is grounded in the principle of objectivity. In fact, the whole draft text is mostly very clear on the issue of objectivity in practices and decision-making.

Another element in this equation is of course the nature of documents. The draft text appoints the Procurement Policy Unit as being responsible for the standardisation of procurement documents in order to harmonise the dealings of procurement authorities with standards of procurement best practice. The creation of standard documents appears to already have started well before the text of this latest draft law was finalized, for consider the following Tender Board statement from 2014: “The Government intends to strengthen accountability and transparency in the conduct of tender exercises and also to minimize the risk of corruption and conflict of interest. Thus, the Tender Board will shortly introduce Standard Bidding Documents which meet international standards. The drafts are ready and consultations are on-going.”²³

In this regard, the following appropriately throws light on the provisions of the proposed law: “Criteria for participating must be designed so as to avoid bias, be objective and relate to the capacity to perform. They must be pre-disclosed, relevant and appropriate with regard to the subject matter of the procurement and are essential to ensure that the bidder has the legal, financial and technical capacity to perform.”²⁴

A concern needs spotlighting here though, for despite the flexibility afforded in having various procurement methods to hand, these could be abused, as appears to have become the case with exemptions. The worry is that direct procurement and emergency procurement and possibly other classifications would basically allow the use of exemptions to continue much as before.

Against the backdrop of all this, the questionable practice of exemptions from tender procedures needs proper consideration, as the envisaged dispensation will allow state procuring authorities to engage in this practice, which goes against the principles of both UNCAC and the UNCITRAL Model Law. In this regard, section 4 of the Bill states:

²³ See Public Procurement Reforms 2012/13-2013/14 – Challenges and Achievements, The Tender Board of Namibia (2014)

²⁴ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

“Exemptions

4. (1) The Minister may for a specified or unspecified period issue a general or specific exemption from the application of certain provisions that are not practical or appropriate for the procurement, letting, hiring or disposal of security related goods, works, services and property by the -

- (a) Namibian Defence Force;
- (b) Namibian Police Force;
- (c) Namibia Correctional Services; and
- (d) Namibia Central Intelligence Service.

(2) The Minister may, with or without condition, as the Minister may determine, grant a general or specific exemption by way of a directive for specific types of procurement from the application of certain provisions of this Act that are not practical or appropriate for the purpose for which such goods are let, hired or disposed of, including goods, works and services being procured.

(3) Any information, document or record relating to the procurement of security related goods, works, services or property contemplated in subsection (1) are strictly confidential and secret.”

These provisions make it clear that this troubling practice will be a fixture on the future procurement landscape, as the provisions from the Tender Board Act have simply been copied and pasted into the Public Procurement Bill. It is worth noting that the areas earmarked for exclusion from good procurement practice are also ones – defence and police – receiving some of the biggest allocations from the state’s annual budget.

In 2011 the IPPR recommended the following:

“5) With regard to exempting of tenders, that:

- The use of the tender exemption be urgently and critically reassessed as a viable tender and public procurement practice;
- And the practice be investigated, through initiating extensive quantitative and qualitative research programmes, so as to evaluate the impact of exemptions on the image of the Tender Board and the Secretariat as well as general government contracting and economic activity, in the context of anti-corruption;
- The introduction of alternative procurement practices be explored with an eye towards minimising the use of exemptions within the public sector procurement dispensation.”

And in 2012, commenting on an earlier version of the Public Procurement Bill, stated:

“The Bill’s attempt to define in some detail when public bodies may be allowed to deviate from the open, advertised bidding approach is welcomed. However, the current widespread use of tender exemptions by ministries should be reviewed to ensure that the sections on emergency and direct procurement cannot be abused by government departments seeking to avoid scrutiny for potentially corrupt reasons. The Public Procurement Office should be specifically empowered to investigate and take action against any officials or bodies that avoid open, competitive procurement practices for reasons of corruption.” ²⁵

²⁵ See Hopwood, G. (2012) Comments on the Public Procurement Bill, IPPR.

Overall, the following is worth bearing in mind when considering methods and procedures:

“Not only do badly managed public procurement practices open room for misallocation of resources, inadequate infrastructure, and inefficient services, but they also make local businesses miss out on growth opportunities that public procurement offers. Indeed, the methodologies and policies that governments adopt for procurement for their service can influence significantly the prosperity of many local businesses and industries.”²⁶

3.4 Integrity and anti-corruption

That the Public Procurement Bill and thus the envisaged procurement dispensation is by appearances geared to be a significant anti-corruption tool is probably the most significant broad feature of the draft law.

In this regard, the proposed dispensation is explicitly seized with the scourge of corruption and minimizing its impacts on state activities. This is in line with both the provisions of UNCAC and the UNCITRAL Model law, both of which are at core concerned with the issue of corruption on the landscape of one of the state’s most important core functions, in other words procurement.

When considering the integrity of officials and bidders, the following: “A robust compliance programme that includes a code of conduct is considered important, to provide contractors and potentially public agencies a framework for following the law. Article 8 of UNCAC also calls for the implementation of codes of conduct for public officials.”²⁷

As regards the recognition of corruption as a threat, the inclusion of the following provisions makes this point sufficiently clear:

Part 2 (Procurement Policy Unit), under Functions of the Policy Unit section 7 (4) states:

“(4) If, in the discharge of its functions, the Procurement Policy Unit finds that there has been a non-compliance with any provision of this Act, directives, code of procedures or guidelines made under this Act, the Minister may -

(b) refer any matter of non-compliance to the Namibian Police, Anti- Corruption Commission or any other competent authority for investigation, when it thinks appropriate, and must inform the public entity concerned.”

In Part 3 (Central Procurement Board) the following provisions are included:

“(2) A member of the Board may not –

(a) make improper use of information acquired by virtue of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the Board;

(b) make use of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person or cause detriment to the Board; or

²⁶ See Kaspar, L and A. Puddephat (2012) Benefits of transparency in public procurement for SMEs, Global Partners & Associates.

²⁷ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

(c) divulge confidential information entrusted to the member or obtained by the member during his or her exercise or performing of powers or functions under or in terms of this Act or any other law.”

The above indicates to what extent the proposed law is seized with personal and personnel integrity, and is a marked departure with and improvement on the Tender Board Act.

Furthermore, when comes to tendering for government contracts, amongst others, the bidding process can be cancelled in the event:

“(d) it has been established that there has been collusion among the bidders as contemplated in subsection (5);”

A closely following section describes what collusion is.²⁸

And then there is Part 10 (Procurement Integrity) which is entirely given with laying out anti-corruption measures within the proposed public procurement sector. Part 10 outlines “Conduct of staff members of public entities; Conduct of bidders and suppliers” and “ Suspension, debarment and disqualification of bidders and suppliers”.

On the issue of debarment, the following should stand as qualification:

“As anti-corruption initiatives around the world gain momentum, one device for fighting corruption—debarment, or blacklisting, of corrupt or unqualified contractors and individuals—has emerged as an especially noteworthy tool. Governments and international institutions have developed their own debarment systems, to exclude contractors that have committed certain types of wrongs such as bribery or fraud or, more broadly, to exclude contractors that pose unacceptable performance or reputational risks because of bad acts or broken internal controls.”

Suspension or debarment from public contracts has proven to be an effective tool in the fight against corruption. Depriving private companies of the opportunity to do business with the government is likely to be one of the strongest deterrents for future wrongdoers, and it ensures that the government does not contract with those contractors that lack effective internal controls.”²⁹

On this issue, in 2011 the IPPR recommended the following:

“6) With regard to penalties and punitive measures, that:

- The existing blacklist, as a public sector document of great value, be made more descriptive and comprehensive in its composition and such a list be made publicly available, as a means of discouraging non-performance and potential corrupt activity;
- A copy of such a blacklist be kept by the Anti-Corruption Commission (ACC);
- Penalties, fines and imprisonment provisions be firmed up, strengthened and increased in order to convey a strong message and discourage fraudulent and corrupt activities within public procurement processes.”³⁰

²⁸ In Part 6 (Bidding Process) under “Cancellation of Bidding Process”.

²⁹ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

³⁰ See Links, F and C. Daniels (2011) The Tender Board – Need for root and branch reform, IPPR Anti-Corruption Research Programme.

In Part 12 (General Provisions) “Disclosure of Interest” and “Undue Influence” are dealt with. In every sense these provisions are considerable modernisations on what has been in place since 1996 under the Tender Board Act.

Given all these provisions, which are all great interventions, the important aspects bear spotlighting for clarity’s sake. These are:

1. The envisaged legislative, institutional and operational dispensation goes a long way in actively approaching and mitigating the issue of corruption within public procurement. The proposed dispensation is far more proactively geared to challenging corruption head on than what the Tender Board Act installed;
2. But while this is considerably true, it seems as if the law does not go substantially far enough in dealing with corruption. This assessment will be discussed in greater detail in part 4.

3.5 Records management and data collection

To start off, consider the ensuing discussion against this:

“Article 9 (3) of UNCAC requires each State party to “take such civil and administrative measures as may be necessary [...] to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.” The integrity of records helps to provide accurate information for fiscal forecasting and establishes an audit trail to deter corruption.”³¹

Consider also the following, from the Tender Board’s procurement reforms report of 2014:

“During the preparation of this report, there was no proper Information Management System (IMS). This is a major weakness as reconciliation of assumptions to facts becomes a very tedious work. Without a proper IMS, performance monitoring and improvement initiatives cannot be done. This discrepancy further results in the absence of monitoring the results of empowerment policies and job creation through Government procurement. Thus, there is no monitoring mechanism in place to keep track of the impact of public procurement in this regard.”³²

That information and data management have been so evidently and substantially lacking over the last two decades under the Tender Board Act dispensation could be posited as significantly contributory to the weakening of the public procurement system to date. The proposed law intends to fix this.

Here the following sections attempt this improvement:

Part 2 (Procurement Policy Unit) states under Functions of Policy Unit states:

“7. (1) In executing any general or specific policy directives issued by the Minister to achieve the objects of this Act, the functions of the Procurement Policy Unit, include amongst others -
(c) to prepare guidelines regarding procurement matters, including e-procurement, the letting or hiring of anything or the acquisition or granting of any right for or on behalf of public entities, and the disposal of assets;”

³¹ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

³² See Public Procurement Reforms 2012/13-2013/14 – Challenges and Achievements, The Tender Board of Namibia (2014)

And:

“(j) to develop and implement procurement performance assessment system;

(k) to facilitate the use of information and communications technology in procurement;”

In Part 3 (Central Procurement Board), the Board is required to produce audited financial statements (sections 23 (1), (2) and (3)) and an annual report (section 24 (1), (2) and (3)).

In Part 4 (Accounting Officers, Internal Structure And Bid Evaluation Committees):

“(4) An accounting officer must –

(c) ensure that the proceedings of the internal structures are properly recorded and kept in a safe and secure place in the prescribed manner.

(5) The accounting officer must keep and maintain proper record of minutes and other related documentation for a period prescribed by the Archives Act, 1992 (Act No. 12 of 1992).”

It is clear that these measures inherently speak to the need for greatly improved information and data management in order to be properly informed on what is going on within the public procurement system at all times and ultimately to ensure the “integrity of records helps to provide accurate information for fiscal forecasting and establishes an audit trail to deter corruption.”

4. Blunt ends – Not going far enough on anti-corruption provisions

In part three of this paper the various positive features of the envisaged public procurement system were spotlighted and for the most part the provisions of the new legislative framework are markedly better than what has existed up till now, while also being in tune with international best practice.

However, while for the most part the proposed dispensation should get the thumbs-up, there are two areas that have to be flagged as not being sufficiently robustly catered for or even seemingly substantially under-provisioned.

These two areas are:

1. Transparency and accountability;
2. Disclosure/conflict of interest and assets.

4.1 Transparency and accountability

Stepping back to the beginning, as mentioned: “Common elements of a strong procurement system are, however, shared by developing and developed countries alike. These include:

- A clear legal framework;
- Consistent policies;
- Transparency, and
- A review of awards.”

While on the other three points Namibia seems to be making significant headway, on the issue of transparency in public procurement there appears to be considerable shortfall in the new dispensation.

To be clear, the proposed law starts off by stating:

“The objects of this Act are –

(a) to promote integrity, **accountability, transparency**, competitive supply, effectiveness, efficiency, fair-dealing, responsiveness, informed decision-making, consistency, legality and integration in the procurement of assets, works and services...”

And Part 2 (Procurement Policy Unit) states in subsection 1(d):

“(d) promote the fundamental principles of procurement governing the administration of procurement.”

This is immediately followed by section 2, which states:

“(2) The fundamental principles of procurement referred to in subsection (1)(d), include as a minimum, **the principle of transparency**, integrity, competitive supply, effectiveness, efficiency, fair-dealing, responsiveness, informed decision- making, consistency, legality, integration, **and accountability** and such other aspects as the Minister may determine.”

It is the bolded text that is pertinent here, because it appears that transparency and accountability are not well catered for in the envisaged procurement dispensation.

In fact, the proposed dispensation falls well short of the transparency and accountability standards of both UNCAC and the UNCITRAL Model Law, which combined call for much more transparency and accountability throughout the procurement pipeline than what is visible in the draft Public Procurement Bill.

Of course, it has to be borne in mind that there are instances, which should ideally be well and narrowly defined, where confidentiality and secrecy are necessary in public procurement practices, but the default should not be confidentiality and secrecy. This is stated against the backdrop of there being an argument that increased transparency actually leads to collusion amongst bidders³³, while the counter arguments posits that while that could be the case, increased transparency also makes it easier to spot such collusive behaviour and thus disincentivises such activities³⁴.

Given this, the proposed law is somewhat hazy on transparency and seems to be counter to the implied access to information requirements encapsulated in the UNCAC and UNCITRAL Model Law texts. In a way the proposed law mis-defines the concepts of transparency and accountability by narrowly confining these to mean the transparency and accountability attached to principles of good governance within the institutional and operational structures of the procurement system, while largely excluding the public from such processes.

In 2011 the IPPR had the following to recommend on the issue:

³³ “Two questions for the Open Contracting Partnership”, Rick Messick, The Global Anticorruption Blog, 17 June 2015.

³⁴ “Shedding sunlight on procurement”, Chris Crawford, The Global Anticorruption Blog, 8 June 2015.

- Relevant authorities subscribe to the notion of openness by giving full force to the principles of transparency and accountability, by amongst others giving consideration to making every step of the tender and procurement process as open to scrutiny as possible, by regularly publishing updates of the performance and delivery process, including the decision-making of the Tender Board itself;
- In keeping with these principles, greater effort be made to make Tender Board deliberations more accessible, in that more should be done to disseminate particulars of bids and awards, through a web portal and in hardcopy, which would be readily available for public scrutiny;
- Accountability be engendered through a culture of periodical and critical review of systems and processes in an effort to continuously look to improving and strengthening these systems and processes and closing procedural and other loopholes as they might arise;
- In ensuring the maintenance of the principles of transparency and accountability, access to information provisions be included amongst the proposed legislative provisions, while access to information legislation should be prioritised and passed as a matter of urgency.”

Especially the first and last recommendation points appear to have not been heeded, for as it stands, the general public or citizenry will still have very little oversight of the public procurement landscape.

In this context, consider the following:

“While narrower transparency efforts, focused on public procurement only, help SMEs by improving access and simplifying procedures, broad efforts to improve transparency have a far-reaching impact in deterring a culture of secrecy and under-the-table dealings. To this end, a combination of disclosure of documents related to public procurement, as well as information on assets of public officials, enables public scrutiny over the procurement processes. This, in turn, contributes to open competition and improves overall accountability.

“For this reason, we need to see efforts to improve transparency in public contracting as part of a broader transparency regime that includes:

- An enforceable and effective right to freedom of information;
- Regular and open publication of information;
- Effective audit and regulation bodies with real independence; and
- An active and engaged civil society and media capable of challenging corruption.”³⁵

Against this backdrop, the more disturbing features of the draft legislative framework concern confidentiality and secrecy around exemptions, the conduct of Central Procurement Board members and staff, and the activities of the review panel.

As regards exemptions, the draft law states:

“(3) Any information, document or record relating to the procurement of security-related goods, works, services or property contemplated in subsection (1) are strictly confidential and secret.”

Concerning Central Procurement Board Members, the following:

“Fiduciary duties of members of Board and improper conduct by members

10. (1) A member of the Board must at all times –

³⁵ See Kaspar, L and A. Puddephat (2012) Benefits of transparency in public procurement for SMEs, Global Partners & Associates.

(c) strive to achieve the highest standard of **transparency, accountability** and the need to obtain best value for money; and

(2) A member of the Board may not -

(c) divulge confidential information entrusted to the member or obtained by the member during his or her exercise or performing of powers or functions under or in terms of this Act or any other law.”

Taking the secrecy even further, still concerning Central Procurement Board members:

“Vacation of office

(2) The Minister, by notice in writing to a member, may remove a member from office before the expiry of his or her term, if the Minister is satisfied, after giving such member a reasonable opportunity to be heard, that the member –“

(c) divulge confidential information entrusted to the member or obtained by the member during his or her exercise or performing of powers or functions under or in terms of this Act or any other law”

These provisions are quite clearly contradictory when it comes to transparency.

With regard to Central Procurement Board and public entity staff:

Conduct of staff members of public entities

“66. (1) A staff member of the Board or a public entity involved in planning or conducting procurement process or contract administration must undertake –“

(d) to keep confidential any information that comes into his or her possession relating to procurement proceedings and bids, including proprietary information of bidders; and”

With regard to the review panel, the following:

“Confidentiality in Review proceedings

61. (1) All information in proceedings at the Review Panel are confidential, and a person who discloses such information to a third person without the authorisation of Review Panel, commits an offence and is liable to a fine not exceeding N\$100,000 or imprisonment not exceeding a period of 10 years, or to both such fine and such imprisonment.”

(2) No public hearing under section 58 may take place, if so doing, would -

- (a) impair the protection of essential security interests of the State;
- (b) be contrary to law;
- (c) impede law enforcement;
- (d) prejudice the legitimate commercial interests of the bidder or supplier; or
- (e) impede fair competition.”

All of these provisions do seem to fall substantially short of the widely accepted understandings of transparency and accountability as advocated for in the realm of public procurement and with Namibia contemplating the drafting of access to information and whistle-blower legislation at some point over

coming years, it would be interesting to see how the above provisions would be reconciled with such legislation.

However, something which should not be forgotten is that the envisaged public procurement dispensation will see the rollout over coming years of an e-procurement platform which anti-corruption and open government advocates posit as being a boon for transparency in various government processes, including public procurement.

Accordingly, e-procurement is said to facilitate:

- "Greater transparency, at lower cost;
- Simplifying/clarifying processes;
- Removal of human interaction."³⁶

These points suggest a procurement system, as per especially the last point, of near complete objectivity in decision-making, which is what should optimally be the case in such a sensitive area as public procurement.

4.2 Disclosure/conflict of interest and assets

As already mentioned, the other issue of concern revolves around disclosure or conflict of interest and disclosure of assets of those mandated with decision-making powers in public procurement.

On this topic, in 2011 the IPPR recommended the following:

"With regard to the conduct of Tender Board members, Secretariat staff and tenderers, that:

- The disclosure of interest provisions be supplemented and strengthened by the introduction of a comprehensive code of ethical conduct for Tender Board members and Secretariat staff;
- Registers of Tender Board members' and Secretariat staff's assets and interests, which would be regularly audited and periodically updated, be introduced amongst the proposed regulations of the new legislation;
- Copies of the registers mentioned above be kept by the Anti-Corruption Commission (ACC);
- The creation of an oversight body, or the empowering of the ACC and/or Receiver of Revenue, to monitor the assets, incomes and spending habits of Tender Board members and Secretariat staff be initiated;
- Similarly, that a comprehensive integrity system, to which all tenderers and contractors have to subscribe, be introduced amongst the regulations of the legislative framework;"

Against this backdrop consider the following provisions of the draft Public Procurement Bill:

Part 3 (Central Procurement Board of Namibia)

Fiduciary duties of members of Board and improper conduct by members

10. (1) A member of the Board must at all times -

(a) act with fidelity, honesty, integrity and in the best interests of the Board and the procurement system;

³⁶ See Nicholas, C (2010) Fraud and corruption in public procurement, a UNCITRAL presentation from December 2010 posted online.

Part 10 (Procurement Integrity)

Conduct of staff members of public entities

(2) A staff member referred to in subsection (1) must -

(a) disclose his or her interest or the interest of his or her close relative, if any, in terms of section 76, and in this paragraph, “close relative” means parent, sibling, spouse, child or grandchild, having substantial financial interest in the bidding entity; and

Part 12 (General Provisions)

Disclosure of interest

76. (1) A member of the Board, Review Panel, a procurement committee or a bid evaluation committee, a procurement management unit and any staff member thereof having any direct or indirect interest in any matter brought before the Board, Review Panel, a procurement committee, bid evaluation committee or procurement management unit -

(a) must immediately inform, as appropriate, the Minister, chairperson or the accounting officer concerned of such interest; and

(b) may not participate in the deliberations or any part of the decision-making process in relation to that matter, unless the Board, Review Panel or public entity, directs otherwise after having considered the matter and found the conflict of interest to be of trivial nature or consequences.

First off, the inclusion of such provisions is wholly welcome and certainly do come across as an attempt to meet the requirements of UNCAC (Article 9). However, upon closer look, they do not go far enough in fighting corruption.

Take the provision of Part 10 that deals with a “close relative”. According to this provision, the interests of a cousin or the siblings of a spouse or long term close associates and family friends do not count as constituting a conflict of interest or necessitating a disclosure of such interest. This narrow defining of relational bonds is highly problematic in the interest of closing all avenues for corrupt insider dealing around public contracts.

Similarly, consider the disclosure of interest provisions relating to the conduct of key officials in Part 12, specifically the following paragraph:

“(b) may not participate in the deliberations or any part of the decision-making process in relation to that matter, unless the Board, Review Panel or public entity, directs otherwise after having considered the matter and found the conflict of interest to be of trivial nature or consequences.”

The section of interest is in bold: “unless the Board, Review Panel or public entity, directs otherwise after having considered the matter and found the conflict of interest to be of **trivial nature or consequences**”. It is unclear what would constitute “of trivial nature or consequence”. Furthermore, it would be interesting to see whether such a justification, whatever the circumstances may be, would hold up in a court of law. This particular wording just seems to complicate things unnecessarily and leaves room for discretionary rationalizing and decision-making.

Secondly, Namibian authorities continue to narrowly view the issue of conflict of interest in the context of participating in deliberations or decision-making and seem to believe that conflict disappears once someone is excused from such deliberations or decision-making processes. To be clear, it should be emphasized that such actions do not minimize or remove the conflict situation, merely make a pretence of having effectively dealt with the situation. Literature on the topic is clear that the spectre of conflict of interest is only removed with the immediate disqualification of the company of an associate, whether family or close friend, from participating in a particular procurement exercise.

On top of this, while disclosure/conflict of interest is dealt with in the proposed law in what can only be an utterly flawed and clumsy manner, the issue of declaration of assets, as well as audits of lifestyle and spending habits, is not catered for in the least.

In this regard, consider the following:

“Importantly, article 8 of UNCAC regarding codes of conduct for public officials has direct relevance to public procurement, including procurement personnel. In its paragraph 5, it refers in particular to “measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result”.³⁷

These shortcomings are all severe and militate against effectively countering corruption in the public procurement domain, which after all seems to be one of the primary aims of the envisaged dispensation.

5. The issue of preferences

A notable part of the envisaged public procurement dispensation will be concerned with preferential treatment of Namibian suppliers in procurement decision-making. Part 11 of the draft law is given to articulating this intention.

Part 11 starts off with:

“69. Despite anything to the contrary in this Act or any other law, the Minister may grant preferential treatment in procurement in pursuance of the developmental and empowerment policies of the Government.”

And the Bill starts off by stating:

“Objects of Act

2. The objects of this Act are -

(b) to promote, facilitate and strengthen measures to implement the empowerment and industrialisation policies of the Government including, amongst others -

(i) the job creation for Namibian citizens;

(ii) the empowerment of Namibian registered small and medium enterprises, women and youth by creating economic opportunity for them and enhancing their participation in the mainstream economy;

³⁷ See Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

- (iii) sourcing of goods manufactured, mined, extracted or grown in Namibia and local services and labour, including local entrepreneurial development; and
- (iv) preferential treatment in the allocation of procurement contracts to -
 - (aa) Namibian registered small and medium enterprises;
 - (bb) Namibian registered joint venture business;
 - (cc) categories of Namibian manufacturers, suppliers, contractors and service providers;
 - (dd) Namibian registered entities that promote the protection of the environment, maintain ecosystems and sustainable use of natural resources;
- (ee) Namibian natural persons or categories of persons, including persons who have been, economically or educationally disadvantaged by past racial discriminatory laws or practices,”

Considering these provisions, back in 2011 the IPPR proposed the following:

“4) With regard to ‘Namibianisation’ or indigenisation, that:

- The matter be reassessed in the interest of unburdening the legislative framework of provisions concerned with non-core issues, in an effort to focus proposed amendments on maximising institutional strength;
- Namibia consider the development, design and implementation of specific legislation, parallel and complementary to the proposed Tender Board law, aimed at ‘Namibianisation’ or indigenisation through statutorily introducing preferential procurement practices geared towards uplifting and empowering women, the disabled and all other previously disadvantaged and marginalised individuals and groups;
- Similarly, government finalise black economic empowerment (BEE) legislation and policies which have been more than a decade in the coming, and incorporate preferential procurement provisions into such legislation;
- The drafting and promulgation of such legislation, as with the Tender Board Bill, be prioritised as a matter of urgency.”

As is clear from all the above, Namibian authorities have for years been bent on including ‘empowerment’ measures in the public procurement legislative framework. It has to be noted, though, that the UNCITRAL Model Law does allow for governments to incorporate such development agendas into the construction of a procurement framework such as the draft Public Procurement Bill.

That said, already on 25 June 2013 the Namibian government officially introduced preferential measures into the public procurement domain, with the creation of contract value thresholds within which the procurement market is segregated.

The Tender Board’s reform report of 2014 states:

“With a view to support Government’s policies to empower Namibian enterprises and previously disadvantaged groups who suffered social injustices due to past racial discrimination laws, the regulations were amended to introduce the concept of ‘reservations’ with a view to promote the growth of Namibian enterprises.”

This initiative already seems to have born significant fruit in terms of growing numbers of enterprises entering and participating in the public procurement market. According to a recent Market Namibia Tender Bulletin, “Government’s ‘open door’ policy on public procurement participation by previously disadvantaged groups has unleashed a flood of wannabe tenderers, placing unprecedented strain on the Tender Board’s administrative capacity. The majority of the new entrants to central government’s

N\$15 billion procurement market have little or no business experience but perceive this sector as a cash cow for making quick profits without having to invest in more than a laptop and a smartphone.”³⁸

The concern voiced above speaks to the perception that preferential procurement has created nothing more than a ‘rent-seeking’ culture of front and middle-men who have no interest in building viable enterprises, in line with government’s ambitions of stimulating economic growth through uplifting local small businesses through preferential procurement, but are primarily interested in skimming the cream off the top of public procurement contracts and investing such in unproductive luxury consumption, which inevitably sees a lot of wealth flow out of the country.

Part of the problem is that government has over the years failed to codify empowerment and preferential practices. However, this seems to be at an end, as this proposed legislation indicates, as well as the move by the Namibian Cabinet, in late September 2015, to have the New Equitable Economic Empowerment Framework (NEEEF) set down in law.

While this is commendable, the issue is that despite all the intervention, the state continues to define and regulate ‘empowerment’ less than optimally and the concerns of pervasive corruption continue to dog this concept. Thus it remains the view of the IPPR that preferential procurement is a non-core issue in public procurement and burdens the legislative framework unnecessarily.

6. Key Observations

In light of everything spotlighted throughout this paper, the following key observations are made.

With regard to oversight and institutional arrangements:

- The envisaged public procurement dispensation is much more appropriately structured than the dispensation which was installed by the Tender Board Act of 1996;
- The proposed legal framework will apply to all public entities, which are basically defined as all government ministries, departments and agencies, regional and local authorities, and state-owned enterprises (SOEs), as well as all other state-funded entities;
- At the same time, levels of oversight have been improved and increased substantially and the checks in the procurement pipeline are in line with many aspects of international procurement best practice and general principles of good governance;
- However, the structure of procurement decision-making does not appear to allow for active public scrutiny along the procurement pipeline.

With regard to personnel and personal professionalism and ethical regulatory conduct:

- The proposed dispensation is explicitly aimed at installing a more professional personnel cadre – in terms of qualifications, expertise and experience;
- The law, once passed, will set out the procedures and the methods to be followed in the public procurement system;
- The proposed dispensation specifically articulates anti-corruption considerations as having informed its design;
- In this regard, the proposed dispensation comes with measures and standards that speak to the maintenance of ethical conduct by both procuring entities and officials as well as bidders;
- However, of concern are the relatively watered-down provisions, compared to those proposed in international mechanisms, dealing with conflict/disclosure of interest. These measures fall

³⁸ See “Kingdom of the wannabe contractors”, Market Namibia Tender Bulletin N0. 1113, 26 June – 2 July 2015.

short of international requirements and best practices.

With regard to information and data management:

- In the proposed dispensation information and data is seen as important for generating assessments of performance throughout the system;
- The preoccupation with records management and information sharing indicates that public procurement authorities will be pressed to be much more accountable than at present;
- However, it is clear that much of this information and data generated within the public procurement system will largely not be for public scrutiny, which belies the claim of the proposed dispensation being significantly transparent;

With regard to procurement methods and procedures:

- The proposed dispensation allows for greater flexibility in the choice of procurement methods and clearly articulates these choices;
- Similarly, procurement procedures are clearly laid down;
- Of major concern though is the continued positioning of the tender exemption practice as an acceptable procurement method;
- In order to ensure greater objectivity and minimise human influence and interaction in procurement processes, authorities should endeavour to roll out an e-procurement system as a matter of urgency.

While the positives are many, there are also certain glaring weaknesses evident and in this regard the following needs emphasis:

- The standards of transparency set by the United Nations Convention Against Corruption (UNCAC) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services, both of which informed the design of the envisaged public procurement dispensation, are substantially not met;
- The scope for public oversight or scrutiny of the public procurement system as articulated in international mechanisms is severely under-provisioned, meaning the public will still not have nearly sufficient access to information and insights concerning the decision-making, operations and activities of public procurement authorities;
- Confidentiality and secrecy provisions along the decision-making pipeline militate against the notion of openness in public procurement and undermines transparent and accountable, and by extension efficient, governance.

With regard to preferences:

- While preferential procurement provisions are included, such provisions are non-core considerations in the design and installation of a public procurement system and should appropriately be dealt with in supplementary legislation;
- Given the paucity of data on small and medium enterprises and the already tainted image of 'empowerment' initiatives, it is proposed that authorities urgently clarify the empowerment landscape before burdening public procurement and other governance systems with such measures.

About the Author

Frederico Links is the Editor of Insight Namibia magazine, which reports on business, economics and current affairs. He has been an IPPR Research Associate since 2009. His research work for the IPPR has focussed on governance issues, anti-corruption strategies, democracy and elections, party political finance, and skills gaps.

About Democracy Report

Democracy Report is a project of the IPPR which analyses and disseminates information relating to the legislative agenda of Namibia's Parliament. The project aims to promote public participation in debates concerning the work of Parliament by publishing regular analyses of legislation and other issues before the National Assembly and the National Council. Democracy Report is funded by the Embassy of Finland.

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Directors: M M C Koep, D Motinga, M Humavindu, N Nghipondoka-Robiati, J Ellis, G Hopwood

PO Box 6566, Windhoek, Namibia · Tel: +264 61 240514 Fax +264 61 240516
info@ippr.org.na · www.ippr.org.na