

Transparency issues in government procurement

Ron Watermeyer (F), SAICE President, reports from South Africa on the case for rethinking World Trade Organisation government procurement agreements, developed at a series of international meetings

The CUTS Centre for International Trade, Economics and Environment embarked on a research project on two of the so-called Singapore issues, namely transparency in government procurement (TGP) and trade facilitation (TF) called IWOGDA (International Working Group on the Doha Agenda). The first part of this programme dealt with investment and competition policy and resulted in the publication of the report *Putting our fears on the table* (CUTS, 2003). The second part of the project, IWOGDA II, brought together experts on TGP and TF, to inform about the issues and stimulate debate.

CUTS-CITEE researchers identified international experts and invited them to develop papers on a range of topics and case studies based on the hypothesis 'Increased transparency in government procurement will reduce corruption'. A brainstorming session was held in Jaipur in June of 2004 to allow international experts to discuss the working papers and explore the issues raised.

Ron Watermeyer (President, South African Institution of Civil Engineering, SAICE) developed the project synthesis report, based on the IWOGDA II project, the brainstorming meeting, the expert papers and his previous papers published in the *Public Sector Procurement Law Review*. The synthesis report was thereafter reviewed by a number of international experts and was presented in draft form at a Symposium on the WTO's July Package, Palace of the Nations, Geneva in November 2004. This article presents a summary of the final project synthesis report. (The full report can be downloaded from www.cuts-international.org/tgp.htm)



Ron Watermeyer

Introduction

Government procurement (GP) in developing countries is estimated to account for 9% – 20% of gross domestic product (GDP). GP covers purchases of goods and services made by the national, provincial or municipal governments and its various agencies out of their budgetary resources. GP can also be financed from aid received through bilateral or international aid programmes. The share of GP in national public finances is significant.

Transparency in government procurement was one of the four 'new issues', included in the World Trade Organisation (WTO) at the 1996 Singapore Ministerial Conference. CUTS-CITEE embarked on a research project on Transparency in Government Procurement (TGP) to address an urgent need to promote understanding and an awareness of TGP issues, particularly in developing countries, not only among the civil society but also among policy-makers and trade negotiators. A group of experts was brought together to probe a number of issues surrounding transparency in government procurement in Jaipur in June 2004. During the discussion of the expert papers at a brainstorming meeting, it became apparent that there were more fundamental issues relating to government procurement in the context of the WTO's GPA than the issue of transparency and a fresh look at several aspects of government procurement was warranted.

In particular, it was recognised that:

- procurement reform is not about corruption, but rather about good governance and achieving national development objectives;
- although there may be considerable agreement on the ends (efficient, non-corrupt, and transparent procurement systems), remarkably little has been published about the means to attain them; and
- there is little publicly available literature on effective and replicable strategies that developing countries have adopted, or could adopt, to improve their public procurement systems.

Procurement fundamentals

Procurement is the process which creates, manages and fulfils contracts. This being the case, it can be documented as a succession of logically related actions occurring or performed in a definite manner which culminates in the completion of a major deliverable or the attainment of a milestone. Processes in turn are underpinned by methods (i.e. a documented, systematically-ordered collection of rules or approaches) and procedures (i.e. the formal steps to be taken in the performance of a specific task, which may be evoked in the course of a process), which are informed and shaped by the policy of an organisation. Methods and procedures can likewise be documented and linked to processes.

Procurement activities commence once the need for procurement is identified and end when the transaction is completed.

There are six principal activities associated with the procurement process, namely establish what is to be procured; decide on procurement strategies in terms of contract, pricing and targeting strategy and procurement procedure; solicit tender offers; evaluate tender offers; award contract and administer contracts and confirm compliance with requirements.

Methods, procedures and operational policies are required to implement these principal activities.

Goals for procurement

Goals associated with government procurement systems relate either to good governance (primary goals) or to the use of procurement to promote social, national agendas and sustainable development objectives (secondary or non-commercial objectives). The most commonly encountered goals include competition, integrity (rules of conduct for those engaged in procurement), transparency, efficiency (administrative and transactional efficiency), customer satisfaction, best value (value for money), wealth distribution (support of small business), increased usage of risk avoidance and uniformity. Procurement systems are increasingly being challenged to address sustainable development objectives i.e. reduce negative impacts on the environment and contribute to the alleviation of poverty.

Governments establish their procurement systems and policies either explicitly or implicitly around goals. Such goals may be used as the point of departure for the development of regulations or form part of the legislation itself. For example, the Constitution of the Republic of South Africa requires the government procurement system to be fair, equitable, transparent, competitive and cost effective.

Generic procurement procedures and methods

A recent analysis of the World Bank procurement procedures, WTO's Government Procurement Agreement, the UNCITRAL Model Law on the Procurement of Goods, Construction and Services, the current European Union directives and other national procurement systems has revealed that there are eight generic procurement procedures associated with procurements other than those relating to disposals and e-procurement; there are four generic evaluation methods, and eligibility criteria can form part of a procurement procedure.

Most international procurement procedures can be readily simulated by combining one of the eight identified generic procurement procedures with one of the four generic evaluation methods in the presence or absence of eligibility criteria.

Secondary objectives in a procurement system

Secondary or non-commercial objectives can be categorised in terms of obligations placed on tenderers or successful contractors. Several models for public sector

procurement interventions, based largely on country specific procurement regimes and requirements, have evolved. These can be broadly categorised as falling into one of four generic schemes, which in turn can be subdivided into one of the nine implementation methods identified by the Public Procurement Research Group to promote non-commercial objectives.

Concerns regarding the undermining of primary procurement (good governance) objectives are invariably expressed whenever procurement is used as an instrument of socio-economic policy.

A risk assessment on good governance concerns being compromised in the implementation of a preferential procurement policy which has objectives that can be realised by creating a demand for services and supplies from, or to secure the participation of, targeted enterprises and targeted labour has recently been performed. This assessment indicates that the methods which relate to preferencing at the short listing stage and award (tender evaluation) criteria, whilst not guaranteeing that socio-economic objectives will be met, are the methods that are most likely not to compromise the objectives of a procurement system framed around fair, equitable, transparent, competitive and cost effective good governance goals.

Transparency

A procurement system is considered to be transparent if:

- 1) The terms upon which the procurement process are to be conducted and the criteria upon which any decisions are to be made are properly documented and made widely available.
- 2) The eventual procurement award decision, and where appropriate, any intermediate decisions, is made publicly available as are the reasons given for these decisions.
- 3) It is possible to verify that the documented procedures and criteria were indeed applied.

A transparent procurement system is characterised by the documentation of clear rules and the means to verify that those rules were followed. A transparent procurement system allows challenges to be made and ruled on in terms of an adjudication procedure which, if upheld, can be readily translated into compensation in the form of reasonable costs associated with the preparation and submission of a tender.

Transparency in procurement can be improved upon through:

- the capturing of key information in an electronic data base and the use of web-based information technology to publish information on procurement opportunities and awards of contracts;
- the harmonising of procurement processes, procedures and methods within a country;
- standardisation of procurement documentation;
- the introduction of challenge procedures

in the form of adjudication where procurement processes, procedures and methods are comprehensively documented.

Standardising processes, procedures and methods

Given that procurement is a process comprising methods and procedures, it is surprising that there are no international or national standards for procurement other than those recently published by Standards South Africa. Standard procurement procedures and methods cannot be developed in isolation from the goals (objectives) that are established for a procurement system. For example, SANS 294, *Construction procurement processes, procedures and methods* (2004), provides rules for a procurement system that are fair, equitable, transparent, competitive and cost effective. Implicit in the formulation of these rules are the qualitative system performance requirements as summarised below:

- *Fair*: The process of offer and acceptance is conducted impartially without bias, providing timeous access to the same information. The system provides for challenge procedures. Terms and conditions for performing the work do not unfairly prejudice the interests of the parties.
- *Equitable*: The only grounds for not awarding a contract to a tenderer who satisfies all requirements are 'blacklisting', lack of capability or capacity, legal impediments and conflicts of interest.
- *Transparent*: The procurement process and criteria upon which decisions are to be made are publicised. Decisions (award and intermediate) are made publicly available together with the reasons for those decisions. It is possible to verify that criteria were applied.
- *Competitive*: The system provides for appropriate levels of competition to ensure cost effective and best value outcomes.
- *Cost effective*: The system is standardised with sufficient flexibility to attain best value outcomes in respect of quality, timing and price, and least resources to effectively manage and control procurement processes.
- *Attainment of secondary (non-commercial) objectives*. The system may incorporate measure to promote objectives associated with a preferential procurement policy subject to qualified tenderers not being excluded and deliverables of preferencing criteria being measurable, quantifiable and monitored for compliance.

The above mentioned goals and associated qualitative performance requirements apply to both the public and private sectors. International and national standards developed in terms of annex 3 of the WTO Technical Barriers to Trade Agreement, such as SANS 294, are developed in a transparent manner by both the

private and public sectors. Accordingly, international and national procurement standards developed in terms of this Agreement can be adopted by both public and private sectors.

Standardisation, apart from removing technical barriers to trade, enables:

- those engaged in procurement activities to perform their duties, within the confines of their organisation's procurement policy, in a uniform and generic manner;
- procurement documents to be readily compiled in a uniform and generic manner;
- curricula to be developed to capacitate those engaged in a range of procurement activities.

It furthermore allows governments to readily develop an internal procurement skills base, which is not lost when staff moves between different departments or levels of government.

Developing country concerns relating to WTO procurement agreements

The reluctance of developing countries to accede to WTO procurement agreements include the negligible benefits of membership; GPA membership is unnecessary for development of regional trade; developed countries are likely to be the main beneficiaries of developing country membership; and policy changes are required by GPA membership, particularly those relating to price preference.

Models for government procurement systems

The country papers prepared for the brainstorming session indicate that there are several models available to developing countries to regulate their procurement systems. These may be broadly categorised as follows:

- 1) Centralised approach in terms of which central tender boards or similar organisations oversee the process, evaluate tenders and award contracts.
- 2) Prescriptive approach in terms of which legislation and associated regulations detail procedures to be followed on a decentralised basis.
- 3) Financial instructions, which establish minimum requirements relating to expenditure and auditing and provide no specific instructions regarding the manner in which institutions are to conduct their procurement.
- 4) Framework approach in terms of which legislation establishes high level requirements and leaves it to institutions to provide the detail.

The authors of each country paper cited a range of measures put in place to deal with corruption. These included:

- 1) The provision of an independent judicial systems, the auditing of supervision/management systems, and the establishment of standard civil servant systems.
- 2) Laws relating to access to information.

'a fresh look at several aspects of government procurement was warranted'

- 3) The conducting of ex-post audits of government expenditure, including procurement by the office of the auditor general and the establishment of commissions to investigate offences alleged under an act designed to prevent corruption.
- 4) An array of laws relating to corruption, reporting on corrupt practices, establishing the office of a public protector to investigate complaints, promoting access to information, promoting just administration, and the protection of those disclosing information relating to corrupt practices.

It was observed that the success or otherwise of all these initiatives is dependent on there being in place comprehensive, well formulated and documented procurement procedures that are free of undue discretion and subjectivity. The success rate for prosecutions is low in the absence of such procedures.

Replicable model

The current practice has been to encourage countries to develop their procurement systems along the lines of the UNCITRAL Model Law on Procurement of Goods, Construction and Services and the World Bank's procurement guidelines (Procurement under IBRD Loans and IDA credits and Selection and Employment of Consultants by World Bank Borrowers). The alignment of a country's procurement system to these models and to superimpose financial and risk management require-

ments on top of these is very difficult.

A model to overcome these difficulties has been identified. In terms of this model:

- 1) A national legislative framework should be established to provide the procurement ends i.e. the system's objectives, and to link the procurement framework to anti-corruption measures and monitoring and auditing requirements.
- 2) Procurement directives should establish implementation policy, which allocates responsibilities and identifies which of the options provided for, in terms of 3 below, are to be used and under what circumstances.
- 3) Standard operating procedures are put in place through the adoption of a national standard for procurement such as SANS 294, or an equivalent international standard, which provides procedures and methods that are consistent with the system's stated objectives.

The model may also be adopted by international organisations, donor agencies and private sector organisations.

Implications of recent research and developments

The stalemate on launching negotiations on the Singapore Issues at Cancún provides an opportunity to rethink government procurement agreements. In rethinking such agreements, it should be noted that procurement is not just about obtain-

ing goods and services of an acceptable quality at the lowest price. Value for money from a government's perspective is not necessarily the lowest price that satisfies requirements. Cost effectiveness needs to be weighed up with other social considerations and development interventions. At the same time, transparency is but one aspect of the procurement system and should not be dealt with in isolation from the others.

The IWOGDA report has explored new trends in procurement and expanded the knowledge base on aspects of government procurement. The report poses a number of questions that need to be answered which include:

- Is GPA or TGPA an effective reform/development tool for developing countries?
- Are current procurement guidelines appropriate for low and middle income countries?
- Is procurement not a barrier to trade and if so, should it rather be governed by an ISO standard?
- Should procurement be harmonised?
- Is there role for WTO to play to promote ethical procurement practices?
- What form of technical assistance and capacity building should be provided to developing countries?

The answers to these questions could mean that the WTO's procurement agenda may have to fundamentally change. se