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PROMOTING INTEGRITY: THE NEW PUBLIC
PROCUREMENT FRAMEWORK



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IPPR ANTI-CORRUPTION RESEARCH PROGRAMME



INTRODUCTION

The first implementation steps of Namibia's Public Procurement Act (15 of 2015) commenced on 1 April 2017, with the inauguration of the Central Procurement Board of Namibia within the organisational structure of the Ministry of Finance.

The creation and implementation of this law and its regulations could rightly be considered an important milestone for good governance in the Namibian public sector, for it replaced an out-dated and increasingly problematic public procurement system, under the auspices of the Tender Board Act of 1996, which had become shrouded by a loss of public trust, suspicions of widespread and endemic corruption, and mismanagement of abuse of state resources. By 2010 it had become patently clear to many in the state and civil society sectors that the public procurement landscape was in need of complete transformation.

This transformation process was initiated after 2010, against the backdrop of Namibia being included in the first round of compliance assessments under some provisions of the United Nations Convention Against Corruption (UNCAC). Although an assessment of the country's procurement system did not form part of the initial assessment phase, the Public Procurement Act of 2015 was enacted on the eve of the commencement of the second round of assessments (running between 2016 and 2020) under which it would have come up for UNCAC compliance scrutiny.

In light of this, the Public Procurement Act of 2015 comes across as a very deliberate attempt to tick all the right boxes relating to UNCAC and its components appear to be in line, both in principle and provision, with Article 9 of Chapter 2 of the global framework. This is good, for it shows willingness on the part of relevant and significant political and administrative actors to be in compliance with universally accepted best practices.

Of course, to what extent this legal framework is ultimately practically applied is where the tyre hits the proverbial road. At the time of writing this paper it was not possible to make any sort of credible assessment of such practical application, as the law had only been operationalised for two months at that stage.

That said, the Public Procurement Act of 2015 could arguably be considered one of the most important pieces of legislation drafted and enacted in independent Namibia.

BACKGROUND: WHERE WE ARE NOW

Over the last two decades Namibian public procurement practices had become increasingly problematic, both politically and socio-economically. This was because the system created under the old Tender Board Act of 1996 appeared to be steadily declining in legitimacy as reports of maladministration, political influence peddling, flawed contracting, lack of transparency and accountability and outright corruption around procurement processes consistently piled up, giving rise to widespread impressions that the system was wholly dysfunctional and open to exploitation and abuse by corrupt elements within both the public and private sectors.

It thus became increasingly clear that thorough reform and overhaul of the Namibian public procurement system was both necessary and inevitable.

In short, reform efforts ultimately culminated with the enactment of the Public Procurement Act of 2015, which officially became operational on 1 April 2017.

However, what needs to be remembered when considering the evolution of the public procurement system in an independent Namibia is that reforms did not happen in a vacuum or were not solely or even primarily pushed by local circumstances, but were substantially influenced and guided by the country's obligations under



relevant international instruments to which Namibia had officially and voluntarily acceded to over the years.

Pertinent to this discussion is the United Nations Convention Against Corruption (UNCAC)¹, which came into effect in 2005, and has since come to serve as the framework within which global anti-corruption responses have been crafted and been measured against. Of critical relevance to the discussions around Namibia's public procurement system is the fact that the country's new public procurement dispensation has also been significantly influenced by UNCAC. And this is where the tyre hits the road in this paper, for ultimately the system installed under the provisions of the Public Procurement Act of 2015 has to be considered a consequence of UNCAC inspired anti-corruption efforts nationally, regionally and internationally. At the same time the Public Procurement Act also stands as an effort to conform to the redeveloped United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement². The UNCITRAL model law, which was initially launched in 1994, was revised and released in 2011 to bring it in line with UNCAC.

Thus on both fronts, Namibia was compelled to bring its own reform efforts, once they commenced, into sync primarily with these instruments, and overwhelmingly with UNCAC's requirements.

Against this backdrop, Namibia is currently in phase two of its assessment under the provisions of UNCAC, and between 2016 and 2020 the country will be assessed in terms of its compliance with chapter II (preventive measures) and chapter V (asset recovery) of UNCAC. It is under article 9 of chapter II that this discussion is situated.

Article 9 of chapter II explicitly encourages Namibia to "take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption".

It is from here that we shall proceed to assess to what extent Namibia's new Public Procurement Act and its regulations live up to the principles and standards set by UNCAC, with a view to spotlighting the areas still in need of consideration and subsequent intervention in order to call for the closing of all major openings and avenues still evident and along which corruption can infiltrate the new public procurement system.

UNCAC'S ARTICLE 9

The importance of transparency, competition and objective decision-making in public procurement cannot be emphasised enough, as an anti-corruption guidebook³ on public procurement states: "Implementing an effective public procurement system based on transparency, competition and integrity is not simple. A procurement system that lacks transparency and competition is the ideal breeding ground for corrupt behaviour and thus most important international codes on anti-corruption and public procurement rest heavily upon these fundamental principles, in order to discourage corruption."

The guidebook, developed to assist countries in understanding and crafting appropriate anti-corruption measures in and around public procurement systems and processes, succinctly defines what these concepts mean or refer to in the public procurement realm.

Transparency

"Transparency is a key feature of a sound procurement system and generally involves: (a) publicity of procurement opportunities and the disclosure of the rules to

"Namibia is currently in phase two of its assessment under the provisions of UNCAC, and between 2016 and 2020 the country will be assessed in terms of its compliance with chapter II (preventive measures) and chapter V (asset recovery) of UNCAC."

¹ Viewed at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

² Viewed at: <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>

³ Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf



be followed; (b) undertaking procurement processes publicly and visibly, according to prescribed rules and procedures that limit the discretion of officials; and (c) the provision of a system for monitoring and enforcing applicable rules.”

Competition

“Competition in public procurement usually means that two or more bidders act independently and engage in a contest for the opportunity to secure the procuring entity’s contract by offering the most favourable terms. Competition is a key factor for governments (and their citizens) to achieve best value-for-money. It leads, in particular, to lower prices and better quality of goods, services and works. Competition furthermore serves as an important driver of innovation.”

Objective decision-making

“Objectivity in decision-making in the context of public procurement refers to striving (as far as possible) to reduce or eliminate biases, prejudices and subjective evaluations. The principle of objective decision-making criteria in public procurement is closely linked with the principle of non-discrimination and equal treatment for providers. The latter means that no distinction should be made between providers of goods, services or works except where this is justified based on relevant objective considerations.”

In short, what is principally encouraged under UNCAC, is for a country’s procurement system to live up to the following broad requirements:

- “(a) the establishment of a sound procurement system;
- (b) transparency in procurement;
- (c) objective decision-making in procurement;
- (d) domestic review (or bid challenge) systems;
- (e) integrity of public officials; and
- (f) soundness of public records and finance.”⁴

Article 9. Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

- (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
- (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
- (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
- (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
- (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

⁴ Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf



- (a) Procedures for the adoption of the national budget;
- (b) Timely reporting on revenue and expenditure;
- (c) A system of accounting and auditing standards and related oversight;
- (d) Effective and efficient systems of risk management and internal control;
and
- (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, 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.

Source: UN Convention Against Corruption

The procurement cycle, procurement methods and associated corruption risks

To understand corruption in public procurement, it is important to understand the procurement process. Public contracting processes broadly follow the same general steps. There are generally three phases of the public procurement process: the pre-tender stage, the tender stage and the post-tender stage.

Corruption risks exist throughout the entire procurement cycle:

- **Pre-tender stage:** The pre-tender stage includes the decision on the scope of the governmental need, i.e., deciding which goods, services or works are to be purchased. The procurement officials need to identify the relevant technical requirements to determine what exactly will be sought from the private sector and when. The pre-tender stage also includes the structuring of the contracting process. In this regard, procurement personnel generally follow a pre-existing regulatory structure to determine how the process will work, including the timeframes for bidding, the stages in the process, the number of bidders who are eligible, any applicable restrictions or exceptions from normally applicable processes, and what transparent communications systems and opportunities are available between the procuring entity and the bidders. The pre-tender stage will also involve budgeting.
- **Tender stage:** The tender stage includes the invitation to tender, which is choosing which offer will become the contract partner by evaluating the actual tender and the tenderer, and the award of a contract based on established terms and conditions for how the goods, services or works are to be provided. It includes any conditions or limitations relating to the award, including agents and subcontractors that may have connections to government officials.
- **Post-tender stage:** The post-tender stage (often referred to as contract administration) refers to the administration of the contract to ensure effective performance. Further interactions of many kinds between the successful bidder and governmental authorities continue during the course of contract performance, e.g., regarding benchmarks, changing orders, payment schedules, licensing and permits.

Source: *Guidebook on anti-corruption in public procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*

“The fundamental principles 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.”

ASSESSING NAMIBIA'S COMPLIANCE WITH UNCAC'S ARTICLE 9

In order to assess and illustrate whether and to what extent Namibia's new public procurement legal dispensation meets, at least on paper, the principles and requirements of UNCAC's article 9, a framework of interpretation approach is adopted in this section.

In this approach, the six broad requirements, as presented in the last section are employed to interpret whether effort has been made to ensure UNCAC standards are largely met in law. Once again, the six broad requirements of article 9 are:

- (a) the establishment of a sound procurement system;
- (b) transparency in procurement;
- (c) objective decision-making in procurement;
- (d) domestic review (or bid challenge) systems;
- (e) integrity of public officials; and
- (f) soundness of public records and finance

The Public Procurement Act appears to speak to an intent to meet these requirements. Right up front the law states:

“2. 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 [...].”

The same statement is repeated, and slightly expanded, in Part 2 (Procurement Policy Unit) of the law, which states: “The fundamental principles 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 becomes necessary then to evaluate whether these decisive statements of purpose are captured in greater detail, and comprehensively so, in the provisions of the law. The following table is meant to illustrate to what extent our assessment has found that the Public Procurement Act complies with UNCAC's Article 9 as well as its own “fundamental principles” as quoted above.

Table 1: UNCAC requirements vs Public Procurement Act

UNCAC Art. 9 requirement	Public Procurement Act	IPPR assessment
The establishment of a sound procurement system	Creates a new institutional framework: <ul style="list-style-type: none"> • Procurement Policy Unit • Central Procurement Board • Review Panel • Procurement Committee • Bid Evaluation Committee • Procurement Management Unit • Inspection and acceptance committee 	While creating institutions does not in itself a sound system make, the law creates levels of oversight which are supposed to serve as checks on administrative malfeasance and to ensure the integrity of procurement systems and processes across the state sector. It thus appears that the institutions, systems and processes the law establishes, collectively come across as a “sound procurement system”.
Transparency in procurement	Part 3 Central Procurement Board of Namibia Powers and functions of Board (1)(h) receive and publicly open bids;	The law starts off by saying the new system was all about promoting “ integrity, accountability, transparency, competitive supply, effectiveness, efficiency, fair-dealing, responsiveness, informed decision-making, consistency,



	<p>Part 5 Methods of Procurement</p> <p>Choice of procurement methods</p> <p>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).</p> <p>Open advertised bidding</p> <p>28 (1) Where the open advertised bidding method is used, the invitation to bid, or the invitation to pre-qualify, is published - (a) in a newspaper with wide circulation; (b) in the case of international bidding, in selected international media with wide circulation; and (c) in the public procurement portal accompanied by a prescribed disclaimer.</p> <p>Request for proposals</p> <p>(2) Where the estimated value of the procurement is above the prescribed threshold, the public entity, in order to draw up a short-list of consultants, must seek expressions of interest by publishing a notice in a newspaper of wide circulation, and include in the list those who have expressed interest in the procurement.</p> <p>(6) After a public announcement of the results of the technical evaluation, the public entity must then consider and evaluate the financial proposals of bidders who have secured the minimum pass mark in the technical evaluation.</p> <p>(13) A public entity must notify the successful supplier of its selection for award and must simultaneously notify all other short-listed suppliers of the decision.</p> <p>Part 6 Bidding Process</p> <p>Opening of bids</p> <p>(4) At a bid opening session, the name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, if required, is read out and recorded, and a copy of the record is made available to any bidder on request.</p>	<p>legality and integration” and this is repeated at various places in both the law and its regulations. This sets the right tone.</p> <p>Scattered throughout the provisions of the law and regulations are measures geared towards enhancing transparency, including publicly calling for, accepting and opening of bids, and afterwards making public the award decisions and the reasons for awards.</p> <p>At the same time, the law and regulations explicitly refer to the creation of a “public procurement portal”, in other words a website, which would enable e-procurement, thereby allowing for real-time monitoring of the procurement system and its processes. At the same time, state agencies and entities are also obligated to publish/post all contract awards and summaries of decision-making on their own websites.</p> <p>In all, public procurement authorities, whether at national, regional or individual organisational levels, are now required by law to openly conduct most procurement initiatives.</p> <p>Of course, what practical application of these provisions will ultimately look like was still unclear at the time of writing this paper. Suffice to say, that on paper at least, Namibia’s new public procurement dispensation promises to be light years removed from the previous system.</p>
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	<p>Award of procurement contracts (8) The Board or public entity must promptly in a prescribed manner publish a notice of every procurement or disposal award together with the executive summary of the bid evaluation report.</p> <p>Briefing of unsuccessful bidders The accounting officer, on request of an unsuccessful bidder, must promptly brief the bidder of the reasons for which its bid or its application for pre-qualification was unsuccessful, if the request for such information was submitted within the prescribed period of the publication of the notice referred to in section 55(8).</p> <p>PUBLIC PROCUREMENT REGULATIONS</p> <p>Part 6 Bidding Process Notice of procurement award 39. (1) For the purposes of section 55(8) of the Act, a public entity must publish on its website and on any other print media widely circulated in Namibia a notice of every procurement together with the executive summary of the bid evaluation report within seven days of the procurement award. (2) The notice referred to in subregulation (1) must include the subject matter of the procurement or disposal, the name and address of the successful bidder and the contract price.</p> <p>Part 8 Review Proceedings Disclosure of suspension or debarment 50. A decision of the Review Panel in respect of a suspension or debarment of a bidder or supplier must be published on the website of the Policy Unit or in any manner as the Policy Unit may determine in order to inform other public entities that the bidder or supplier is suspended or debarred from participating in procurement.</p> <p>Register of suspension or debarment 51. (1) The Policy Unit must keep and maintain a register of bidders or suppliers suspended or debarred by the Review Panel in a manner that such register is accessible to any person who wishes to inspect that register.</p>	
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	<p>Part 10 Preferences Registration of bidders and suppliers</p> <p>(2) In addition to the registration referred to in subregulation (1) and for the purpose of understanding the procurement market, the Policy Unit must establish and maintain a register of bidders and suppliers and post particulars as contained in the register on its electronic database or portal which particulars include - ... reliable and up-to-date information on the competency of bidders and suppliers in the market and the structure of the market for various services, supplies or specialties; and a record of current or past contracts and performance by bidders and suppliers.</p>	
<p>Objective decision-making in procurement</p>	<p>PUBLIC PROCUREMENT ACT</p> <p>Part 4 Accounting Officers, Internal Structure and Bid Evaluation Committees Part 5 Methods of procurement Part 6 Bidding process Part 8 Procurement contracts</p> <p>PUBLIC PROCUREMENT REGULATIONS</p> <p>Part 4 Methods of Procurement Part 5 Qualifications concerning bidders and suppliers Part 6 Bidding process Part 7 Procurement contracts</p> <p>Part 4 Accounting Officers, Internal Structure and Bid Evaluation Committees</p> <p>(8) For the sake of an independent evaluation process and avoidance of conflict of interest, a member of the Board may not form part of a bid evaluation committee of the Board, and -</p> <ol style="list-style-type: none"> 1. (a) a member of a procurement committee; or 2. (b) an accounting officer of the same public entity may not form part of a bid evaluation committee of the same public entity. <p>(9) Where -</p> <ol style="list-style-type: none"> 1. (a) a public entity is small; 2. (b) a level of expertise in the subject matter of the procurement at a public entity is limited; or 3. (c) the subject matter is so complex that in-house resources irrespective of their other involvement in the procurement proceedings have to be party to the evaluation process, <p>the public entity may appoint persons, or co-opt staff members from other public entity, to serve as members of the bid evaluation committee.</p>	<p>These sections of the law and its regulations lay out a clear and detailed framework within which "objective decision-making" is to transpire towards ensuring the integrity of the public procurement system, at all levels.</p> <p>It can thus be concluded that, on paper, the new dispensation does appear to ensure that decisions throughout the procurement system are not based on or influenced by biased, self interested or corrupt intentions and/or considerations. And coupled with the quite considerable transparency inducing provisions, questionable or suspicious award decisions could be fairly easily recognised and flagged for review or investigation.</p> <p>For example, Part 4 of the law also, amongst others, lays out to what extent internal arrangements have to be made to ensure that organisational procurement structures ensure that decisions are above question and suspicion.</p>



<p>Domestic review (or bid challenge) systems</p>	<p>Part 7 Review 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) -</p> <ol style="list-style-type: none"> 1. (a) having qualifications, wide knowledge and experience in legal, administrative, economic, financial, trade, engineering, scientific or technical matters; and 2. (b) of whom not more than three are of the same sex, <p>to constitute a Review Panel to adjudicate on application for -</p> <ol style="list-style-type: none"> 1. (i) review; 2. (ii) suspension, debarment and disqualification of bidders and suppliers; or 3. (iii) any other matter that the Minister may refer to the Review Panel for its consideration. <p>Application for review 59. (4) A bidder or supplier who is aggrieved or claims to have suffered, or to be likely to suffer, loss under this Act must exhaust all available remedies under this Act before instituting any judicial action in the High Court.</p>	<p>The law establishes a domestic review panel within the procurement setup. This does not preclude aggrieved parties eventually turning to the courts for redress when/if they are dissatisfied with the findings/rulings of the review panel.</p> <p>This is a long overdue and extremely welcome addition to the public procurement landscape.</p>
<p>Integrity of public officials</p>	<p>Part 3: Central Procurement Board of Namibia</p> <p>Fiduciary duties of members of Board and improper conduct by members</p> <p>(a) act with fidelity, honesty, integrity and in the best interests of the Board and the procurement system;</p> <p>(c) strive to achieve the highest standard of transparency, accountability and the need to obtain best value for money; ...</p> <p>Part 10: Procurement Integrity Artificial division; Conduct of staff members of public entities; Conduct of bidders and suppliers; Suspension, debarment and disqualification of bidders and suppliers.</p> <p>Part 12: General Provisions Disclosure of interest; Undue influence</p>	<p>The law and regulations contain quite significant provisions to ensure the integrity of public officials involved in procurement.</p> <p>At both the national (Central Procurement Board) and organisational level (procurement management unit) the law and regulations call for the appointment of individuals of "proven integrity and sound decision-making abilities".</p> <p>The law and regulations also set certain broad conduct standards for bidders and others involved in the public procurement system.</p> <p>These measures should and could be strengthened or backed up substantially by imposing comprehensive conflict of interest measures and codes of ethical conduct across the state sector.</p>



<p>Soundness of public records and finance</p>	<p>PUBLIC PROCUREMENT ACT Part 2 Procurement Policy Unit Functions of Policy Unit (e) to monitor, report on the performance of the public procurement systems in Namibia, including preparing an annual report to be tabled in the National Assembly within six months after the end of each financial year, and advise on desirable changes;</p> <p>Part 3 Central Procurement Board of Namibia Auditing of accounts of Board Not later than five months after the end of each financial year the Board must submit audited accounting records and financial statements together with a report referred to in subsection (1) to the Auditor-General who must make a report to the Board.</p> <p>Annual report of Board Not later than six months after the end of each financial year the Board must prepare and submit to the Minister an annual report relating to such financial year. (2) The annual report referred to in subsection (1) must contain- (a) particulars of all activities of the Board during the financial year under review;</p> <p>Part 4: Accounting Officers, Internal Structure and Bid Evaluation Committees Powers and functions of accounting officers An 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).</p> <p>PUBLIC PROCUREMENT REGULATIONS Part 3: Internal Organisational Structures Procedures and processes for procurement management unit The procurement management unit must maintain and keep records of procurement of a public entity in accordance with the provisions of the Act.</p>	<p>The sections of the law and regulations spotlighted in this here speak to the various relevant and responsible bodies and officials having to ensure the “soundness of public records and finance”, at least as far as the procurement system is concerned.</p>
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CONCERNING ASPECTS

One of the concerning features of the Public Procurement Act is that it appears to allow for significant, if not blanket, exemption of security related procurement, whether such procurement is of a sensitive national security nature or not. Given that the military and security sector receives such a significant portion of state funds on an annual basis, the exempting of procurement in the sector creates a massive dark spot on an otherwise quite transparent and accountable public procurement landscape.

In this regard, the following provisions of Part 1 (Introductory Provisions) of the law need to be flagged:

“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 or disposal 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 or disposal of security related goods, works, services or property contemplated in subsection (1) are strictly confidential and secret.”

Another issue of significant concern is the insertion of confidentiality clauses in strategic sections of the document and at strategic points in the procurement system, such as around review procedures. The criminalising and severe punitive measures that could be brought to bear on anyone found to have violated such confidentiality seems rather excessive, and could discourage whistle-blowing, in the public interest, at critical junctures in the system.

Also worthy of flagging is the allowance for emergency procurement, which like exemptions, creates an avenue for undermining, sidestepping or abusing procurement practices and for corruption to infiltrate what in law and on paper comes across as an otherwise “sound procurement system”.

CONCLUSION

The Public Procurement Act of 2015 comes across as a very deliberate attempt to tick all the right boxes relating to UNCAC and its components appear to be in line, both in principle and provision, with Article 9 of Chapter 2 of the global framework. This shows willingness on the part of relevant and significant political and administrative actors to be in compliance with universally accepted best practices.

Of course, to what extent this legal framework is ultimately practically applied is where the tyre hits the proverbial road. At the time of writing this paper it was not possible to make any sort of credible assessment of such practical application, as the law had only been operationalised for two months at that stage.

On the whole, the Public Procurement Act of 2015 could arguably be considered one of the most important pieces of legislation drafted and enacted in independent Namibia.



Civil society procurement monitoring

Civil society plays an essential role in monitoring procurement processes to ensure that public procurement is conducted in a transparent, competitive and objective manner. Civil society—be it a single citizen, media, a company, an NGO, academia, etc.—may identify possible improper public official action which may be the result of collusion between a public official and a bidder. For instance, a journalist may discover that the number of computers contracted and purchased for a public school was not delivered or that a procurement official is providing incomplete information to selected bidders in order to favour a certain company, which repeatedly wins contracts from the same procuring entity.

Civil society, therefore, frequently generates pressure against corruption in public procurement, leading to the penalisation of corrupt actors.

In order to allow effective monitoring by civil society, access to government information is needed. Good practice in the area of public procurement suggests that information regarding awarded contracts, including the name of the contractor and the contract price, should be publically available, either through transparency measures or through access to information regimes.

Source: Guidebook on anti-corruption in public procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption

E-procurement

E-procurement became a key component in the reform and modernisation of public procurement frameworks in many countries worldwide. The use of electronic procurement can be very efficient in increasing competition and transparency, and can therefore greatly help in reducing corruption in public procurement.

E-procurement tools include the electronic publication of contract opportunities, the electronic distribution of tender documents and the electronic submission of bids. Importantly, all the tools of e-procurement (e.g. e-communication, e-submission, e-tendering, etc.) have one essential effect: they eliminate or minimise the direct human interactions between bidders and the procurement personnel, interactions which are one of the main sources of corrupt behaviour in public procurement.

E-procurement in the area of anti-corruption is also important for other reasons. In particular, e-procurement has the advantage of allowing for easy data generation and data management. It could in particular be helpful in the assessment of offered prices, to assess whether bid prices are reasonable and in line with market rates, such as by benchmarking collected data such as prices/price items in an electronic database with offered prices in a particular tender procedure in order to detect overpricing or bid rigging.

Electronic data collection and data management in the area of public procurement could also constitute an important tool in helping to comply with article 9 (3) of UNCAC, which requires its parties to preserve the integrity of its records, including accounting books or other documents related to public expenditure.

For all the reasons mentioned above, State parties to UNCAC adopted resolution 3/2 on preventative measures which invites State parties “to consider the use of computerised systems to govern public procurement”. The use of e-procurement is well suited to assisting countries to establish systems of public procurement based on the fundamental principles of transparency, competition and objective decision-making as required by article 9 of UNCAC.

Source: Guidebook on anti-corruption in public procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption



ANNEX 1

Responses to emailed questions by Mr Patrick Swartz (PS), chairperson of the Central Procurement Board of Namibia, in June 2017.

1. Can you give a run-down of CPB implementation activities since officially taking office on 1 April 2017?

PS: CPB consists of two distinct areas that are administrative support and central procurement. In the administrative support unit, CPB has four seconded staff from the Ministry of Finance, experienced in procurement administration, to assist with the administrative support functions of the Board. Since the beginning of April 2017, various planning sessions have been held, policies were drafted and a strategic plan for the organisation was started.

The central procurement was engaged in discussions with public entities on the matters that were started before 1 April 2017 and not concluded. The CPB has dealt with several queries and have entertained many meetings to ensure that the procurement processes in progress were not unnecessarily halted without good reason.

2. During our brief talk you said that you (CPB) were "ready", but you're "waiting". What did you mean by this? Waiting for what?

PS: CPB has been appointed and is ready to deal with new procurement initiatives in terms of the Public Procurement Act. Public entities must submit requests to the CPB to procure goods, services and works on their behalf and so far, no new procurement initiatives have been submitted to CPB to act upon.

3. There have been media reports recently of the slow setting up/implementation of the CPB compounding an already depressed economic climate, as state sector contracting has apparently been delayed because new procurement structures and systems are having to be put in place and operationalised. What is your response to this?

PS: CPB members were appointed before the 1st of April 2017 and were therefore ready to deal with any matter related to public procurement. CPB is mandated in terms of Section 8(a) "to conduct the bidding process on behalf of public entities for the award of contracts that exceed the threshold prescribed for public entities." We have not received any request for procure from any public entity other than queries related to transitional procurement matters.

With reference to the part of the question that dealt with "as state sector contracting has apparently been delayed because new procurement structures and systems are having to be put in place and operationalised", CPB is not in a position to respond to this as it is not directly involved with public entities and the setting up of internal structures.

4. Related to question 3 above, it does appear as if the state/MoF has done very little preparatory work over the last year (from early 2016 up to 1 April 2017) to ensure a smooth operational hand-over and mandate transfer from the old Tender Board to the new CPB. Please comment?

PS: CPB is not authorised to comment on behalf of the Ministry of Finance. The Act directs public entities and CPB how to deal with matters started prior to 1 April 2017 whether concluded or not. CPB members were appointed and ready since April 2017 and all queries referred to the CPB has been dealt with within reasonable times.

5. The Public Procurement Act 2015 is supposed to install a more professionalised state procurement system. Can you say something about processes (ongoing or planned) to recruit professional staff, with requisite procurement experience and qualifications, at the CPB?

PS: The Public Procurement Act makes provision for the appointment of staff conversant with skills, knowledge and experiences relevant to procurement. It is envisaged



that the recruitment process for administration support staff will be followed during the next quarter of the year. The Act makes further provision for the appointment of bid evaluation committee members to evaluate bids and make recommendation to the CPB. The CPB solicited CVs from public entities to be considered by the CPB for appointment as bid evaluation committee members subject to the requirements of Section 26(6). The CPB plans to extend the invitation and to formally invite the submission of CVs of professionals in Namibia for consideration as bid evaluation members in the last quarter of the year.

6. What are the timelines and targets for full implementation and operationalising of the provisions of the Public Procurement Act 2015?

PS: CPB has been ready to procure since April 2017. The support staff will be recruited during the third quarter of the year and as the needs are identified to ensure that the CPB is compliant and accountable for the resources and have sufficient staff members to oversee the implementation supervision.

7. What is your perspective on using the new procurement system to enhance integrity and combat corruption in public procurement?

PS: The Public Procurement Act allows for different role players with different roles and responsibilities. The Act further has a unit in both the Act as well as the Regulations which deals with "Procurement Integrity" which includes the CPB, Procurement Committee, the administrators of the procurement process as well as the bidders. The Regulations further makes provision for a standstill period after selection for award to allow bidders to request a public entity to reconsider its selection for award. This allows for greater levels of scrutiny and transparency which will enhance the integrity of the procurement system and combat corruption.

8. How do you see the CPB coping with the scale and volume of work, given that the CPB will be tasked with scrutinising and approving procurement by SOEs, local authorities, etc., and not just central government? And given that there already appears to be delays in procurement, does the spectre of state entities reverting to exempted contracting/procurement concern you?

PS: It is true that the scale of work and volume of work will increase under this Act, however, the threshold levels provided for in the Act allows for public entities to deal with the bulk of the volume of procurement. CPB mainly deals with procurement above the thresholds and there are mechanisms in place to deal with the volumes, but should it become a challenge, the CPB is empowered to request any professional or technical assistance from any appropriate person in Namibia or elsewhere.

9. If there's anything else you'd like to say or information you'd care to share that would add to the substance of the briefing paper, please do so?

To illustrate the responsibilities of the CPB, a table with the thresholds is depicted below

Procurement of				
Responsibility	Goods	Works	Consultancy	Non-consultancy
	Up to	Up to	Up to	Up to
Public Entity Category 1	N\$25 mil	N\$35 mil	N\$20 mil	N\$15 mil
Public Entity Category 2	N\$20 mil	N\$30 mil	N\$15 mil	N\$10 mil
Public Entity Category 3	N\$15 mil	N\$20 mil	N\$10 mil	N\$5 mil
Central Procurement Board of Namibia	In excess of the limits above			



ABOUT THE AUTHOR

Frederico Links has been an IPPR Research Associate since 2009. He has focussed on democracy and elections, party political finance, empowerment policies, internet governance, and public procurement. He has previously worked as a journalist for a range of Namibian newspapers and is a former editor of Insight Namibia magazine. He is the current Chairperson of the ACTION Coalition which campaigns for greater access to information in Namibia.

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