

APEC PROCUREMENT PRINCIPLES INFLUENCING THE LEGAL FRAMEWORK OF GOVERNMENT PROCUREMENT IN MALAYSIA

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Abstract

This paper discusses the application of Asia Pacific Economic Cooperation (APEC) procurement principles in the legal framework of government procurement (government contracting) in Malaysia. Each principle governing government procurement under the APEC non-binding scheme is analysed to determine whether these APEC standards have been adopted by the Malaysian government in its national procurement procedures and processes. The paper finds that there is a strong linkage between these APEC standards and the current principles and policy on government procurement in Malaysia. However, there are challenges faced by Malaysia in applying the said standards. The paper suggests that APEC standards are useful to strengthen Malaysia's effort to reform its national procurement system.

INTRODUCTION

This paper discusses the legal framework relating to government procurement as applied in Malaysia. The discussion shall analyse whether Malaysian government procurement is in line with the government procurement principles as enunciated by Asia Pacific Economic Cooperation (APEC). The analysis is important to determine whether the current procurement laws and policies in Malaysia comply with international standards as proposed by APEC.²

DEFINITION

Government procurement refers to an act of a government body purchasing goods and services from a commercial supplier for the consumption of the government itself. Such purchase must adhere to certain prescribed procedures and processes. One way of government purchasing is through contractual means. A government department enters into contract to install computer facilities at the department's branch offices from a computer supplier. This contractual transaction is governed by law of contract. The transaction looks simple enough. What could become complicated are the procedure and process that must take place before the said government body decides to award the procurement contract to the chosen computer supplier from a list of competing suppliers. The relevant issue here is the tendering procedure and process. The following section draws on the tendering laws in the Malaysian legal framework on government procurement.

LEGAL FRAMEWORK IN MALAYSIA

The focus of legal framework is on the laws applicable to govern the government bodies and their procurement activities.

The source of power to regulate government procurement in Malaysia can be found in the broad provisions of the *Financial Procedure Act 1957* (Malaysia). This particular statute lays down the general principles of law relating to the control and management of public finances in Malaysia including procedures for the collection, custody and payment of the public moneys of the Federation and of the States.³ The Federal Parliament delegates power to legislate in respect of public finance to the Finance Minister of Malaysia.

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² The paper opts to leave out procurement rules and standards of other international procurement regimes such as the Government Procurement Agreement of WTO, UNCITRAL Model Law on Procurement of Goods and Services or the Free Trade Agreements

³ See, Preamble of the *Financial Procedure Act 1957* (Malaysia).

The statute specifically gives power to the Finance Minister of Malaysia (federal Treasury) to issue Treasury Instructions that dictate the financial and accounting procedures to be applied by government departments and agencies both at Federal and State levels.⁴ According to the statute, state accounting officials first and foremost need to follow the instructions from the federal Treasury and in addition be subject to the State financial authority. If any inconsistency occurs between the two authorities the federal Treasury instruction will prevail. Specifically, s 4 of the above statute has become the source of power to regulate government procurement both at federal and states levels. The singular source of power creates uniformity of procurement rules and policies to be followed by the respective procuring agencies in Malaysia. It explains why state procuring agencies must follow the orders of the federal Treasury in respect of government procurement and also be subject to a consistent State financial authority.

Treasury Instructions spell out the detailed procurement procedures to be applied by procuring agencies at both the federal and state level. These include the requirement for creating procurement boards at federal and state procuring agencies,⁵ tender conditions,⁶ the process of tender and quotation,⁷ and tender publication.⁸ These documents are regarded as executive policy document relating to national procurement. It appears that no legal challenge against procurement decisions made by procuring agencies can be mounted by disgruntled suppliers. Furthermore, legal actions against procuring bodies can be frustrated by the provision in *Government Proceedings Act 1956* (Malaysia) which categorically prevents the court from granting any injunction or an order for specific performance against the government in any civil proceedings.⁹

It is argued that these Treasury Instructions relating to government procurement can be treated as 'quasi-legislation' subject to the general administrative power of the federal Treasury. Texts of these documents are formal in the sense that all procuring officials at federal and state governments are obliged to follow strictly. The purpose of having these documents is to control and guide procurement procedures and process undertaken by procuring agencies. These documents may trace their link-origin from a general finance statute. By nature of this link and the purpose of their creation, it appears that these documents receive statutory backing in their application.

Since there has been no legal challenge against either the creation of the Treasury documents relating to government procurement or the decisions made based on the said documents, therefore it is submitted that this field of law is still underdeveloped and received no legal analysis.¹⁰ However, upon scrutinizing the more general administrative law cases in Malaysia, it is found that the Malaysian courts, by referring to English cases have recognized the possibility of review of the legality of quasi-legislation and administrative decisions inconsistent with such quasi-legislation. Having said that, the strand of decided English cases which might be relevant to procurement can be hard to apply due to the diverse circumstances of the cases. For instance in the case of *Gillick v West Norfolk & Wisbech Area Health Authority*,¹¹ the document in question was a guidance circular issued by Health Authority to medical practitioners. Even the House of Lords was divided as to the legality of such document and whether it can be subject to judicial scrutiny. The ambit of discretionary decision of the government bodies in procurement can be

⁴ s 4 of the *Financial Procedure Act 1957* (Malaysia) states that "Every accounting officer shall be subject to this Act and shall perform such duties, keep such books and render such accounts as may be prescribed by or under this Act or by instructions issued by the Treasury in matters of financial and accounting procedures not inconsistent therewith: Provided that a State accounting officer shall in addition be subject to any instructions of the State financial authority not inconsistent with the foregoing."

⁵ See, Arahan 192, Arahan Perbendaharaan Malaysia (Hingga 20 April 2007) (Instruction 192, Malaysian Treasury Instructions (As at 20 April 2007)).

⁶ See, Arahan 174.2, Arahan Perbendaharaan Malaysia (Hingga 20 April 2007) (Instruction 192, Malaysian Treasury Instructions (As at 20 April 2007)).

⁷ See, Arahan 197.3, Arahan Perbendaharaan Malaysia (Hingga 20 April 2007) (Instruction 192, Malaysian Treasury Instructions (As at 20 April 2007)).

⁸ See, Arahan 172, Arahan Perbendaharaan Malaysia (Hingga 20 April 2007) (Instruction 192, Malaysian Treasury Instructions (As at 20 April 2007)).

⁹ See, s 29 of the *Government Proceedings Act 1956* (Malaysia).

¹⁰ See, Abdul Aziz Bari, 'Legal Aspects of Government Involvement in Commerce: Perspectives From Malaysia' (2002) 30(December) *Korean Journal of International and Comparative Law* 137

¹¹ [1986] AC 112.

confined by published quasi-legislation that set out the rules and procedures to be followed in awarding procurement contracts. Failure to follow quasi-legislation relating to government procurement, for instance by making non-complying decisions will result in possible challenge of the discretionary power of the government bodies under judicial review. Even though the Malaysian government has not created statutory rules governing government procurement, it has published quasi-legislation setting out clearly the stages of procurement and the rules governing each stage of the procurement.¹² Whilst these sources cannot form the basis for a direct public law challenge, but they may generate the suppliers' legitimate expectation as to the way the tenders or procurement are to be conducted.

Malaysian Treasury has put in place the tendering procedure and process applicable to all government bodies. There are 3 levels of procuring entities in Malaysia: Federal, State and local governments.¹³ The *federal level* consists of 22 Federal Ministries headed by the respective Ministers and the administrative heads, the Secretaries General. Within the federal ministries, there are more than 100 federal departments. At the *state level*, there are 13 State Governments with 240 state departments implementing state functions side by side with federal departments situated in the respective states. The *local authorities* are the City Councils, Municipalities and District Councils which adhere to the federal Treasury rules relating to government procurement. Statutory bodies set up under both Federal and State Governments are also subject to the procurement rules administered by the federal Treasury.¹⁴

The subject matter of government procurement in Malaysia can be categorised into works, supplies and services.¹⁵ Federal Treasury has worked out different thresholds for different types of procurement.¹⁶ The mode of procurement ranges from direct purchase¹⁷, quotation¹⁸ and open tender.¹⁹ Open tendering is divided into four types: open tender; open tender solely for Bumiputra suppliers; open tender based on pre-qualification of the suppliers; and restricted tender.²⁰ In the case of open tender, after deciding the type of open tender to use in a tendering process, a procuring entity needs to specify whether the chosen open tender is opened to local suppliers only, international suppliers, or restricted solely to Bumiputra suppliers. These classifications clearly indicate a strong preference system is applied in the Malaysian government procurement system. One of the underlying objectives of government procurement is to secure government contracts first and foremost to the Bumiputra suppliers and other domestic suppliers.²¹ Notably, the preferential treatment towards Bumiputra suppliers in government procurement has been stated in an explicit manner by the Treasury circulars. The notion of open tender in procurement as understood and practised in Malaysia is significantly different from one which is commonly applied elsewhere.²²

¹² See, *Prudential Assurance Malaysia Bhd v Kerajaan Malaysia* [2003] 6 CLJ 28 per Abdul Malik Ishak J: '...the power of the court to intervene on judicial review is certainly not confined to decisions by public bodies but it can be extended to guidance given by public bodies (*Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 and *R v DHSS, Ex p. Royal College of Nursing* [1981] AC 800)...'

¹³ See, <http://www.pmo.gov.my>

¹⁴ In the case of government companies (in which the Government of Malaysia is a stake holder) they are generally beyond the scrutiny of the federal Treasury in terms of procurement

¹⁵ *Works* contracts include the construction and engineering activities of infrastructure such as buildings, airports, road/highways, dams, and drainage systems. *Supplies* may include supply of raw, intermediate and finished goods and products, such as food products, uniforms, vehicles, equipment, spares and weaponry. The engagement of manpower, expertise and consultants constitutes procurement in *services*.

¹⁶ See, <http://www.treasury.gov.my>

¹⁷ Supplies and services valued at RM\$10,000 or less.

¹⁸ Quotation is divided into two specific types, the first quotation call is from a number of Bumiputra suppliers (supplies and services valued between RM\$50,000 to RM\$100,000) and the second quotation type is from registered suppliers (supplies and services valued between RM\$100,000 to RM\$200,000).

¹⁹ Purchase valued not more than RM\$30 million. Open tendering is divided into four types: open tender; open tender solely for Bumiputra suppliers; open tender based on pre-qualification of the suppliers; and restricted tender.

²⁰ See, Treasury Circular Letter No.11/2001; for restricted tender, the Agency Procurement Board has to choose from at least ten local Bumiputra contractors for works contract, and from at least five local Bumiputra contractors for supplies or services contract. The term local indicates the district/state where the procuring agency is situated. If the minimum number of contractors could not be satisfied, the tender could be opened to Bumiputra contractors from neighbouring district/states.

²¹ See, *Malaysia Trade Policies and Practices by Measure*<http://www.wto.org/WT/TPR/S/31>; see also McCrudden & Gross, WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study. *European Journal of International Law*, (2006) 17, 151-185.

²² See, In the United States, *sealed bidding* based on open competition is considered open tendering. Section 8.51 of Mandatory Procurement Procedure under the Australian Commonwealth Procurement Guidelines 2005 states that an *open tender* process involves publishing a request for tender and accepting all submissions received before the

The framework of government procurement policies in Malaysia is based on two main objectives, namely, to provide support for the achievement of the objectives and aspirations of the National Development Policy, and Vision 2020, which will establish a 'developed nation' status for Malaysia.²³ Specifically, the government procurement rules are formulated to reflect the following principal policies: to encourage the growth of local industries by intensifying the use of local materials and resources; to support and increase the participation of indigenous *Bumiputera* entrepreneurs through their involvement in procurement opportunities; to assist and improve the capabilities of local institutions and industries by way of transfer of foreign technologies and expertise; and to prepare and promote service-oriented local industries for international competition.²⁴

These principal procurement policies are inward-looking and domestic-oriented, mainly designed to benefit the local industries and those working in such industries, with a special focus on the economic development of the poorest group (*Malays/Bumiputera*) in the community.²⁵ The policies are also formulated to develop and promote selected local industries so that they can compete well in overseas markets. One of the underlying reasons for having procurement policies is to promote export markets for certain viable local industries. According to the published Treasury information documents, the underlying principles governing procurement policies in Malaysia are public accountability, transparency, value for money, open competition, and fair dealing.²⁶ The following section considers whether these principles form part of similar procurement principles found under the APEC regime.

APEC AND GOVERNMENT PROCUREMENT PRINCIPLES

Malaysia is a member of the Asia Pacific Economic Cooperation (APEC) is a non-binding economic forum for states within the Asia-Pacific region. This forum has the objective of bringing together and developing economic capacities of its member states to achieve free trade and investment in the Asia-Pacific region.²⁷ Government procurement is one of the areas identified in the objectives of APEC. The work on government procurement is carried out collectively by the APEC Government Procurement Expert Group (GPEG) comprising representatives of each member state in APEC. Under APEC's collective action plan on government procurement, a set of non-binding principles on government procurement has been developed for adoption by member states on a voluntary basis.

There are six non-binding principles: transparency; value for money; open and effective competition; fair dealing; accountability and due process; and non-discrimination. In 2004 the principle of transparency was given particular attention with the development of separate APEC Transparency Standards on Government Procurement. Even though the principles have no legal effect on the APEC states, voluntary adherence to these standards by the APEC states can offer flexibility in the implementation and improvement of the government procurement system in their respective states.

The following discussion will analyze each principle governing government procurement under the APEC non-binding scheme. This analysis will determine whether these APEC standards have been influential to Malaysia in order to come up with a coherent set of government procurement principles underlying the continuous reforms in the national procurement system. These

deadline for submission from any potential suppliers who satisfy the conditions for participation.' In Singapore Government Procurement Guide, an *open tender* is described as 'a tender notice will be posted on the GeBiZ website inviting any supplier who may be interested to bid based on the requirements specified.'

²³ See, APEC Government Procurement Survey: Member Economy Malaysia available at: <http://www.apec.org> (accessed on 1 January 2006)

²⁴ See, Government Procurement Division, Malaysian Treasury at <http://www.treasury.gov.my> (accessed on 1 January 2006)

²⁵ In the Ninth Malaysia Plan, one of the strategies to help the Bumiputera is by developing self-reliant and sustainable Bumiputera entrepreneurs and strong Bumiputera small and medium enterprises, available at <http://www.epu.gov.my/rm9/english/chapter1.pdf>

²⁶ See, 'The Procedure of Managing Government Procurement by way of Tender', Treasury Circular Letter No.5/2007(27 February 2007) available at: <http://www.treasury.gov.my> (accessed on 30 April 2008)

²⁷ Bogor Declaration 1994

principles, in turn, can be identified to represent public law doctrines of governmental powers and accountability in government procurement.

Government Procurement Principles

Transparency

The transparency standard in the government procurement context means that:

'Sufficient and relevant information should be made available to all interested parties consistently and in a timely manner through a readily accessible, widely available medium. This applies to all aspects of government procurement, including the general operational environment, procurement opportunities, purchase requirements, bid evaluation criteria and award of contracts'.²⁸

The above description of the transparency standard entails the availability, consistency and accessibility of adequate and clear rules relating to government procurement in the APEC states. Adequate and transparent rules and procedures governing government procurement are being implemented by the APEC states on a voluntary basis. Even though the standard of transparency has been defined, agreed and refined by the states themselves through APEC, the implementation of a transparency standard by individual states can vary greatly. The non-binding principles on government procurement in APEC have no model law or prescriptive version of what transparency should be for a national procurement system. APEC states have the independence to decide the level of sufficiency and relevancy of procurement information to be published in order to comply with the standard proposed by APEC.

Transparency under the Malaysian procurement policies demands compliance with procurement policies and regulations by the procuring agencies, and the availability of procurement information to the public. In response to this, all procurement regulations, conditions, procedures and processes are to be made known to and be understandable to those likely to tender for government contracts. The move towards e-procurement is one of the major initiatives by the government to provide clear and specific information regarding procurement opportunities and processes to interested suppliers.²⁹ E-procurement capabilities in Malaysia are in the second phase of development where registration of suppliers, tender advertisement, tender offer and acceptance, and also tender specifications are uploaded onto the Treasury website for the benefit of competing suppliers.³⁰

Other than e-procurement, transparency is also observed through the advertisement of all domestic tenders in at least one main local daily newspaper in the Malay language. For international tenders, the advertisement of the tenders must be done in at least one main local daily newspaper in the Malay language and in one main local daily newspaper in the English language.

Apart from the availability of sufficient and relevant information on procurement, transparency has also been linked to the availability of an adequate complaints mechanism for the review of a suppliers' challenge in procurement.³¹ Evidently, the policy of transparency in Malaysia does not recognize the requirement of domestic review procedure regarding the procurement process. The emphasis appears to be more on the implementation of formulated policies and rules on procurement rather than the ability to provide justification for such implementation by way of review mechanism. An express Treasury circular providing the availability of challenge by a

²⁸ See, APEC Leaders Transparency Standard Government Procurement available at <http://www.apec.org>

²⁹ Interested supplier here refers to domestic suppliers who are registered with the Ministry of Finance and enabled through e-procurement capabilities.

³⁰ See, <http://www.eperolehan.gov.my>, e-procurement unit was established at the Ministry of Finance in 1999 to carry out and monitor the implementation of e-procurement initiatives for governmental contracts in Malaysia. The 13-year project (1999-2012) establishes end-to-end e-procurement capabilities between the procuring agencies of the government and the registered suppliers.

³¹ See, Sue Arrowsmith, 'The APEC Document on Principles of Transparency in Government Procurement' (1998) 7(2) *Public Procurement Law Review* CS38

supplier is limited to a challenge against tender specification that is tailored to a specific brand.³² In this context, an aggrieved supplier who finds that a tender specification advertised by a procuring agency adopts a particular trademark or product has the capacity to complain and challenge such tender non-compliance. In the event that it is proved that such specification breached the tender rule, the procuring agency is responsible to amend the specification information to be in line with the tender rules. However, apart from the above reason there is no other indication within the same circular that suppliers can apply for a review of procurement procedure or decisions. For other types of complaints regarding procurement, a supplier in Malaysia has to seek help using other forum than the procuring agency.³³

The concept of transparency in the context of government procurement implies that the procurement should be conducted using clear rules, known to the interested parties and able to verify the application of the said rules. In Malaysia, it is a requirement for the unsuccessful bidders to be notified of their failure to secure the tender contract.³⁴ However, there appears to be no provision allowing them to request reasons as to why their bids have been rejected. Documentation relating to procurement is considered classified government documentation or official secrets, and cannot be freely or easily obtained. Unauthorised possession of such documents may render the possessor liable under the Official Secrets Act 1972.³⁵ Thus, in order to ensure transparency in government procurement, a balance has to be struck between the government's need for privacy and the public's need for information.

Accountability and due process

The principle of accountability and due process in the context of government procurement under APEC signifies that:

'Government procuring agencies and individual procuring personnel should be, and are seen to be, accountable to their governments, the end users, the public and suppliers for the efficient, cost-effective and fair conduct of their procurement; and that mechanisms for scrutiny of the procurement process and avenues/channels for review of complaint should be available'.³⁶

The above description of the accountability and due process principle recognizes three main aspects. First, the integrity of all parties involved in government procurement (procurement personnel and, tenders firms and their agents), second, the availability, consistency and accessibility of adequate and impartial domestic review procedures (internal or external to the procuring agency) and third, all these processes should be conducted according to national laws.

The application of accountability measures in respect of the procurement exercise by the procuring agencies is relevant to public law perspective. The accountability measures (by the personnel, procuring agencies, review body and government) have to be implemented by observing clear rules according to due process of law. In the context of procurement, the creation and publication of procurement rules is not enough to justify accountability. These procurement rules must be shown to work by establishing a review system together with its procedural and substantive laws. Such a review body monitors procurement activities (application of rules, decision making, awards, evaluation criteria and all other relevant conduct in procurement) to ensure that all parties are accountable and abiding by the law.

On the part of the members of the review body, they must be independent and act fairly in passing their rulings. Accountability not only affects the conduct of the procuring agencies and participating suppliers, but must also be expected from the review body itself. The rules

³² See, above n 26

³³ According to the Treasury website, an aggrieved supplier can complain to the National Complaints Bureau, a one-stop government complaint centre for procurement complaints other than tender specifications or in cases involving corruption the Anti-Corruption Agency can receive such complaints.

³⁴ See, Surat Pekeliling Perbendaharaan Bil.2 Tahun 1995 (Treasury Circular Letter No.2/1995).

³⁵ Section 2(1) of the Official Secrets Act 1972 defines official secrets to include 'Cabinet documents, records of decisions and deliberations including those of Cabinet committees and any other official document, information and materials as may be classified as "Top Secret", "Secret", "Confidential", or "Restricted" as the case may be...by a Minister...or such public officer appointed under s 2B of the Act.

³⁶ See, APEC Non-Binding Principles on Government Procurement available at <http://www.apec.org>

governing the tenure and powers of the members of the review body must be made clear and protected from external pressure.

The scope of public accountability in respect of government procurement in Malaysia refers to the responsible implementation of government procurement processes by adhering to the stated statutory provisions and the Treasury policies and regulations. All public officers involved in procurement are legally responsible to maintain accountability in discharging their duties.³⁷ The procuring agencies are responsible for the decisions made by their officers in the procurement process. The procuring agencies are also responsible for the consequences resulting from the said decisions.

Professors McCrudden and Gross have asserted that there is no specific avenue for aggrieved suppliers to challenge any of the Malaysian Treasury rules on government procurement and any particular procurement decision made under the rules.³⁸ On the contrary, for internal monitoring and control purposes, there exist reliable mechanisms which generally assist the federal Treasury to ensure procuring agencies obey the Treasury-issued procurement regulations.

Most procuring agencies in Malaysia provide for a complaint procedure where any complaint regarding procurement can first be lodged directly with the procuring agency itself. The particular agency will review the complaint internally and decide whether to cancel the tender (if for instance, the complaint is about violation of tender rules in respect of specification tailored to a particular brand or product) and issue fresh specification.³⁹

An aggrieved supplier may also lodge a complaint with the Public Complaint Bureau⁴⁰ that can investigate such complaint and require the affected procuring agency to reply to the complaint. A report of the investigation is tendered to the Permanent Committee on Public Complaint chaired by the Chief Secretary to the Government. Even though the Bureau is not a specific oversight body for procurement, nevertheless it has a significant role in addressing public governance issues. Indirectly, breaches by procurement officials in conducting government procurement activities could fall under its purview. According to Professor Jain, the scope of complaint within the domain of the Bureau does not cover matters relating to established government policies, matters falling under the jurisdiction of the Anti-Corruption Agency, Legal Aid Bureau, Special Cabinet on Government Management, and the Public Accounts Committee.⁴¹ This exclusion raises the question of whether the quasi-legislation relating to procurement issued by the Treasury and the system of preference can be considered established government policies and therefore do not fall under the type of complaint accessible to the Bureau. This is another difficulty which might influence the judicial reasoning relating to review of decisions made in government procurement.

Another control mechanism is the office of Auditor General. The *Audit Act 1957* (Malaysia) empowers the Auditor General or his representatives to monitor and audit procurement procedures and to order corrective actions where necessary. The statute provides that all government departments at federal and state levels are subject to audit scrutiny and compliance.⁴² The annual audit report is presented directly to the *Agong*.

All of the above review mechanisms are designed to monitor the internal affairs of the government including accountability matters relating to procurement. Those mechanisms do not appear to

³⁷ See, s 3 of the Financial Procedure Act 1957 (revised-1972) states that a public officer who manages or is in charge of public money or public property is considered an 'accounting officer' (who is accountable under the Act to act accordingly). See also, guide No.58 & 59 relating to Compliance and Responsibility of procuring agencies and Departmental Head of the procuring agencies, see also above n 26 (Treasury Instruction 167.1 and 167.2, ILBS as at 20 April 2007)

³⁸ See, Christopher McCrudden and Stuart G. Gross, 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17(1) *European Journal of International Law* 173-174.

³⁹ See, <http://www.treasury.gov.my>

⁴⁰ The Public Complaint Bureau was established in 1971 under the Prime Minister's department as a complaint handling mechanism. This is a form of executive oversight and can be distinguished from judicial review, which has, generally, a greater guarantee of independence.

⁴¹ See, M.P. Jain, *Administrative Law of Malaysia and Singapore* (3 ed, 1997) 824-826. See also, Alastair Cameron, 'The Ombudsmen: Time for a Jurisdictional Expansion - The case for Extending the Jurisdiction of the Statutory Ombudsmen to Cover the Exercise of Public Power in the Private Sector' (2001) 21 *Victoria University of Wellington Law Review*

⁴² See, s 6 of the *Audit Act 1957* (Malaysia).

allow challenge against any of the decisions made contradicting any announced procurement process and procedures. Internal review may only act as the first-stop informal review that may not restrict unsatisfied supplier from choosing another review method to pursue his grievance.

Open and effective competition

The principle of open and effective competition advocates that the government procurement system in APEC states be 'open and procurement methods should suit market circumstances and facilitate levels of competition commensurate with the benefits received'.⁴³

An open system of government procurement is a transparent system with government procurement information readily accessible to the public and, in particular, to all potential suppliers. The tender process is predictable with adequate information and clear rules that are made available to the public and interested suppliers. When a procuring body and interested suppliers are clear about the elements of the tender (for example the specifications or standards required in the tender), the time limits in the procurement process, the evaluation criteria and its process and the decision to award the contract, it creates a competitive environment where the suppliers can assess their own chances and anticipate the outcome of the procurement procedure.

In the context of Malaysia, open system means procuring agencies in Malaysia are required to offer fair and equitable opportunities to all eligible and qualified bidders who wish to participate in any procurement exercise. Competition can be between Malay suppliers,⁴⁴ between all local suppliers including the Malays,⁴⁵ or between joint-venture companies comprising local and foreign suppliers.⁴⁶ International suppliers will only be allowed to compete for government contracts when the Ministry of Finance decides that there is no suitable local supplier able to supply the said goods or services.⁴⁷ This particular requirement clearly discriminates against any potential foreign suppliers having a chance in a tender competition. The policy demands priority is given to the reasonably located domestic suppliers who have the ability to compete for the procurement. One possible way for foreign suppliers to enter the Malaysian procurement market is through joint-venture incorporation with a Malaysian counterpart. A joint-venture company incorporated under Malaysian company law can be considered a local firm for the purposes of works procurement.⁴⁸ Participation of foreign suppliers can be very minimal for goods and services procurement.⁴⁹ It seems that greater participation of potential suppliers in Malaysia can be enhanced when they can access invitations for procurement tender or quotations through the e-Procurement system currently in place.⁵⁰

Fair dealing

The principle of fair dealing encourages the government procurement system to be designed, and parties involved in government procurement to behave in a way that ensures procurement activities are conducted in a fair, reasonable and equitable manner, with integrity.⁵¹ In the event that a supplier complains to a procuring body regarding a breach of procurement rules under the rules, the procuring body shall provide *impartial* and timely consideration to such complaint.

According to the Malaysian procurement context, fair dealing policy demands all procedures and processes relating to procurement be conducted with fairness based on the announced Treasury policies and regulations. The manner in which the procurement is advertised, processed and

⁴³ See, above n 36.

⁴⁴ The companies with majority share holding by Malay entrepreneurs and incorporated in Malaysia.

⁴⁵ The companies either with majority share holding by Malay entrepreneur or owned by non-Malay Malaysians and incorporated in Malaysia.

⁴⁶ The joint venture companies with local and foreign share holdings and incorporated in Malaysia.

⁴⁷ See, Treasury Instruction No.169.2, Arahan Perbendaharaan (as at 20 April 2007)

⁴⁸ See, Guide 15.1 (c) of Annexure 1 of the Treasury Circular Letter No. 5/2007 relating to the tender procedures of government procurement.

⁴⁹ See, Guide 13.3 of Annexure 1 of the Treasury Circular Letter No. 5/2007 relating to the tender procedures of government procurement.

⁵⁰ See, <http://www.eperolehan.gov.my>

⁵¹ See, above n 36.

evaluated must adhere to the published policies and rules.⁵² Based on this policy, the procuring agency needs to treat all competing tenders fairly, applying the technical and financial criteria and provide fair evaluation on all participating tenders. Tender documents must contain all necessary information for bidders to submit responsive bids. Any changes to tender information such as evaluation criteria or the technical specification must be informed to the bidders well in advance.⁵³ Information on the procurement process, for example, the tender evaluation process, must be explained to bidders so that they will get a true and fair evaluation. In this context the onus will be on the procuring agencies to perform according to the stated policy. Participating suppliers are not privy to such evaluation documents as they are government documents classified as 'secret'.⁵⁴

Non-discrimination

The non-binding principle of non-discrimination provides that government procurement laws, regulations, policies, administrative guidelines, procedures, and practices should not be prepared, adopted or applied to give effect to any protection/favour/preference to, or discrimination/bias against, the goods, services or suppliers of any particular APEC state. The underlying objective of non-discrimination principle under the APEC standard is to eliminate discriminatory practices in any form in the procurement of goods and services and the selection of suppliers for any procurement contract. APEC states, however, can continue to apply preferential treatment in their government procurement because despite the timeline set by APEC, the states will not be legally obliged to adhere to the non-binding principle.

The non-discrimination principle is applicable to all stages of procurement. The APEC states, on a voluntary basis, should not discriminate against foreign goods or services or suppliers. The implementation of the non-discrimination principle can be excluded in matters of essential security or defence purposes.

In the context of Malaysia, the non-discrimination principle is applied to the selection of the best bid tendered by bidders within the categories of eligible or qualified bidders as determined by the Treasury Instructions, Treasury Circular Letters and also the tender documents. Any bids tendered by eligible and qualified bidders within a determined category of bidders (e.g. categories of all *Bumiputera* bidders or all local bidders) will not be discriminated by a procuring agency. Thus, international bidders (arguably will be placed in one category of international bidders) will be considered on equal terms as it is not the practice of the Malaysian Government to accord the 'most-favoured nation' treatment to any bidder or product of a specific country or origin.

Value for money

Generally, value for money is the core principle underpinning any state procurement.⁵⁵ The procurement regime under APEC provides for procurement rules and standards to ensure that procurement is obtained on the best available terms resulting in value for money spent. APEC states are guided in their individual state implementation to adopt the principle of value for money in their respective procurement systems. In the procurement process, this principle requires a 'comparative analysis of all relevant costs and benefits of each proposal throughout the whole

⁵² See, Treasury Instruction No.170.2, Arahan Perbendaharaan (as at 20 April 2007) states that the procuring agency needs to develop a consistent advertising method for quotation to known suppliers to ensure that the suppliers are fairly treated.

⁵³ See, *R v National Lottery Commission Ex p. Camelot Plc* (Times, October 12, 2000 QBD) where the Commission decided to terminate the competition after the submission of bids on the reason being neither bidder (Camelot and People's Lottery) has satisfied the relevant statutory criteria. The Commission then commenced a new award procedure by negotiating with the more favourable bidder People's Lottery only. Camelot challenged the decision to negotiate only with the People's Lottery as breaching principles of administrative law. The court held that there had been a breach of an obligation of fairness by failing to give even handed treatment to persons in a similar position. The Court held that the Commission failed to show 'compelling reasons' to justify treating both bidders differently. The said decision was quashed.

⁵⁴ See, Guide 34.1 of the Annexure 1 of the Treasury Circular Letter No. 5/2007 regarding the classification of tender documents as 'confidential' documents.

⁵⁵ See, Sue Arrowsmith, John Linarelli and Jr. Don Wallace, *Regulating Public Procurement: National and International Perspectives* (2000) 28-31

procurement cycle'.⁵⁶ This is called whole-of-life costing. When procuring bodies evaluate suppliers' offers, the procurement decision is not based on lowest price alone. The evaluation must also consider whether the offers have 'complied with all the requirements in the tender specification, meet the required quality of the goods and services, timeliness of delivery, reliability and after-sales service'.⁵⁷

Value for money in the context of Malaysian procurement requires the best return made on every Malaysian Ringgit spent for the procurement. Decisions to award a procurement contract are based on the evaluation of price and non-price factors, including the whole-of-procurement life cycle.⁵⁸

Implementation of the principles

Because the principles are non-binding in nature, APEC states are not legally bound to adopt them in their government procurement. Flexibility in applying the principles has encouraged the states to implement the principles at their own pace. For instance, APEC encourages the establishment of an electronic procurement (e-procurement) system in the APEC states. E-procurement allows suppliers and procuring agencies in the APEC states to deal in an open and transparent tender system. The procuring agencies are expected to be more accountable and fair in their dealings with potential and participating suppliers, create chances of obtaining value for money for supplied procurement and, the open system can lessen any form of discriminatory or inappropriate measures.⁵⁹

In the case of Malaysia, its Individual Action Plan 2008 indicates that the government is in the process of reviewing the national procurement rules and procedures in order to delegate more powers to the procuring agencies and expedite procurement to meet current needs (including APEC non-binding principles).⁶⁰ In terms of a check and balance mechanism, Malaysia's approach of having an internal accountability audit is considered sufficient and consistent with the APEC standard of accountability and due process.

CHALLENGES TO MALAYSIA

Government procurement principles advocated by APEC entail public law values. Indirectly, public law standards can provide control over decisions relating to government procurement. It appears that government procurement in Malaysia is viewed as private power of the government, regulated by executive policies, thus not subject to legal scrutiny. In this way, decisions made by procuring bodies are currently not amenable to independent administrative or judicial review.

Even though Malaysia indicates that it has met APEC standards on government procurement, the interpretation and application of the said standards vary significantly in Malaysia. In the event Malaysia wishes to negotiate bilateral trade treaty with foreign states that includes government procurement, these APEC standards can provide minimum requirement for government procurement. In particular, the creation of dispute review mechanism within national system will be paramount consideration.

CONCLUSION

In conclusion, several perspectives can be made in respect of the Malaysian government procurement laws and policy. First, government procurement in Malaysia maintains an important position in the framework of the development policy of the country. As a specific policy, government procurement in Malaysia embraces corresponding policies underlying the APEC non-binding principles in government procurement. However, the clear difference is the scope of

⁵⁶ See, above n 36.

⁵⁷ See, above n 36.

⁵⁸ See, Treasury Instruction No. 193 (b) and No. 197.3, Arahan Perbendaharaan (as at 20 April 2007)

⁵⁹ Malaysia has already implemented an e-procurement system called *e-perolehan*

⁶⁰ See, Malaysia 2008 available at <http://www.apec.org>

definition and implementation mechanism undertaken by the Malaysian government to operationalise the said policies within the domestic procurement framework. On a careful scrutiny of the chosen procurement policies, it appears that these policies are deeply rooted in the national policies agenda to support the National Development Policy and Vision 2020.

On the legal front, the broad source of statutory power to regulate government procurement in Malaysia may hamper the creation of clear public law obligation. Greater accountability, non-discriminatory and transparent rules and conduct in government procurement would help procuring entities, in particular, the procuring officials to advocate clear and fair procurement procedures. In the process, the procuring officials would have to be accountable and able to justify their procurement conduct in accordance with the available rules. At the same time, the bidders (local and international alike) would be rest assured that government procurement procedures are engaging in a clear and transparent environment whereby they have legal right to challenge any non-compliance of such procedures.