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Taking Forward Public Procurement Reforms in Ghana

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Abstract

The construction industry in Ghana, like many others worldwide, has had its fair share of damning independent reviews. Huge and unsustainable foreign debt, excessive budget deficits, huge contractual payment arrears, poor construction performance, corruption and pressure from international financial institutions, forced the government to commit to a reform of public procurement, which culminated in the passing of the Public Procurement Act, 2003 (Act 663). The paper outlines the events leading to, and features of, the public procurement reform in Ghana and analyses its potential impact and the unique challenges it presents. Comparisons are also drawn from relevant scenarios in other countries. The paper concludes that while the Procurement Act sets out the legal, institutional and regulatory framework to secure fiscal transparency and public accountability, the sole reliance on traditional contracting and price-based selection limits the scope for the value for money achievable. Expanding the reforms to cover procurement and project delivery methods and strategies, with a focus on 'best value', will increase the potential and likelihood of achieving value for money in public construction in Ghana.

Keywords

Construction performance, Ghana, procurement reform, value for money, VfM

BACKGROUND

A low-income economy in Sub-Saharan Africa, Ghana is a country of firsts. In 1957, it was the first country in Sub-Saharan Africa to emerge from colonialism. It experienced the highest GDP on the continent before an economic crisis in the late 1970s, and was the first to survive the trauma of military takeovers. It rebounded after launching one of the first and more stringent economic recovery programmes in the region two decades ago. However, falling prices for gold and cocoa, and rising prices for petroleum imports led to a sharp deterioration in 1999-2000. Through a World Bank-assisted macroeconomic programme, Ghana has made a robust recovery and achieved a fairly stable macroeconomic environment. These reforms also culminated in a new vision of Ghana that emphasizes wealth creation, improved governance and reduced income and regional inequalities. A critical component of this new vision is the government's efforts to promote the private sector as the

engine of economic growth. The Government has also identified construction as a priority sector for foreign and private investment.

An approximate annual value of public procurement for goods, works, and consultant services has been given as US\$600 million [World Bank 2003] representing about 10% of the country's GDP. The bulk of the expenditure programmes of Ministries, Departments, Agencies (MDAs) and District Assemblies (DAs) involve capital construction procurement [Westring 1997]. Any improvement in the public procurement system will therefore have a direct and substantial impact on the overall economic situation of the country and result in budgetary savings and efficiency in government expenditures. However, successive reviews have revealed substantial inefficiencies and concluded that value for money was not being achieved in both government- and donor-financed procurement. The Public Procurement Act (PPA) (Act 663) was enacted in 2003 to address these weaknesses in public procurement. This paper explores the major issues in construction procurement in Ghana and analyses the potential impact of the Public Procurement Act on the search for VfM in public construction procurement.

INTRODUCTION

All around the world, public infrastructure services needs are fast outpacing the resources for providing them. These socio-economic realities have intensified the search for more innovative means of delivering public services and the need to achieve value for money. However, a persisting spectre of adversarial contracting, sub-optimal outcomes and the deteriorating quality of construction workforce and health and safety performance have threatened to derail efforts aimed at delivering value for money in public construction. Many construction reviews in the developed economies, for example the Latham [1994] report in the UK and the Tang [2001] report in Hong Kong, lamented these developments and made sweeping recommendations for industry reform. Following these, ambitious targets have been set. Some examples include *Accelerating Change* in the UK and *Construction 2020* in Australia. The case histories of construction in these developed economies and their reform efforts and successes have been told and recounted in many forums. The story has largely not been told of the construction industries in low-income countries, whose problems have been further exacerbated by fiscal and monetary constraints and corruption.

Based on a review of literature, this paper outlines the events leading to, and features of, the construction procurement reform in Ghana and analyses its potential impact on VfM and the unique challenges it presents. Comparisons are also drawn from relevant scenarios in other countries. Even though the paper focuses on the construction industry in Ghana, there is considerable evidence to suggest that the case histories enacted here are representative of the situations in many African and some Asian countries [Aniekwu and Okpala 1988, Kumaraswamy 1994, Rwelamila *et al.* 1999]. The issues discussed herein are therefore of broader significance to many developing economies. Considering that the bulk of the global construction market demand is shifting to the developing economies, the issues discussed here will be of significant importance to consultants, contractors and service providers in developed economies that are looking for ways to finance their construction budgets and increase the networth of their companies. The paper starts by outlining the existing framework for public construction procurement. Construction performance is then discussed and comparators are drawn from other countries. The public procurement reform programme is then presented. Notable provisions of the PPA are highlighted and the impact/

significance of the PPA within the broader concept of VfM is analysed. Relevant recommendations are offered for extending the scope and potential for VfM in public construction in Ghana.

FRAMEWORK FOR PUBLIC PROCUREMENT

There is no comprehensive guidance on the scope and procedures of public construction procurement in Ghana. The procurement of construction works and services have been regulated mainly through circulars from the Ministry of Finance, which complement a set of procedures evolved by convention in connection with the control of procurement exercised by the ministry. Central, regional and district tender boards process and award contracts within thresholds defined by the Ministry of Finance. World Bank projects use the World Bank Procurement Guidelines [World Bank 1995] and the World Bank Consultant Guidelines [World Bank 1997]. The procurement method used for public works is the traditional method, with design split from construction. There is a provision for mandatory registration and classification of contractors under guidelines administered by the Ministry of Works and Housing. However, the MDAs and many DAs maintain separate lists for the pre-qualification of contractors and use different standard conditions of contract for works procurement. World Bank-administered projects use the FIDIC conditions of contract for works contracts and shortlists for the selection of consultants.

The classification by the Ministry of Works and Housing has been observed to be too general and obsolete and the registration criteria, lists of contractors and monetary thresholds are not regularly updated [Eyiah and Cook 2003, World Bank 1996]. Except for major or complex assignments, most government-financed architectural consultancy services and project supervision have been assigned to the Architectural and Engineering Services Limited on sole basis [World Bank 1996]. The shortlists used on World Bank-administered projects for the selection of consultants have been observed to be repetitive, with the same firms recurrently selected in civil engineering and building works supervision [World Bank 1996]. Many instances of a single contractor buying and pricing all the bidding documents, and of the award of a number of contracts (or lots) to the same contractor/supplier, under different contracting names have also been observed [Crown Agents 1998, Westring 1997].

CONSTRUCTION PERFORMANCE

The performance of construction in Ghana is poor and many reports have decried the public sector's lack of commercial edge in the exercise of its procurement function. Contracts for both works and consultancy services take very lengthy periods to reach financial closure and are subject to unnecessary delays [Crown Agents 1998, Westring 1997]. Westring [1997] attributes the causes of the delays to extensive post-award negotiations, delays in the preparation of technical specifications and drawings, delays in evaluation, an extensive system of controls, reviews and approvals, and land ownership disputes. Project implementation has itself been characterised by extensive cost and time overruns and poor quality [Crown Agents 1998, Westring 1997, World Bank 1996, 2003]. The process for payment to contractors and suppliers is also long, involving over thirty steps from invoice to receipt of the payment cheque, and often over-centralized, thus leading to delays in project execution [Eyiah and Cook 2003, Westring 1997, World Bank 2003]. Fiscal constraints and poor procurement practices (as outlined above) have led to insecurity of funding for construction projects and created a constant spectre of delayed payments and payment arrears to contractors and

consultants [World Bank 1996]. The accumulated interest on late payments and the frequent price changes due to extensive renegotiations, further exacerbate the funding problem [World Bank 2003].

Consultants and contractors encounter difficulties in processing claims arising from escalation clauses and are indirectly pressured not to push forward these claims [World Bank 1996, 2003]. Many private sector entities delivering works and services to government establishments try to limit their losses by cutting corners or abandoning the work altogether [Westring 1997]. This often has negative consequences for project execution and leads to adversarial relationships developing between contractors and clients. There is reduced respect for contracts entered into with neither party to the contract expecting it to be fully binding. Small contracts and *ad hoc* approaches are favoured at the expense of full-fledged competitive bidding for economic sized projects. Long-term strategic planning by both public and private sectors is difficult and so is the monitoring and control of procurement [Ayirebi 2005, Westring 1997]. Some procuring entities also resort to making contractual payments before the due dates in order to prevent a budget allocation lapse and advance mobilisation funds provided to contractors can exceed considerably the 15% allowable [Westring 1997, World Bank 1996]. Contract management is very poor and so are the training and working conditions of the construction workforce [World Bank 2003].

GHANAIAN CONSTRUCTION - A GLOBAL PERSPECTIVE

This paper focuses on the construction industry in Ghana. Such a focus provides a comprehensive case history of Ghana's procurement reform journey, which makes it easier to model, compare with other construction industries and evaluate the suitability/ applicability of strategies developed in other countries. However, there is considerable evidence to suggest that the case histories enacted here are representative of the situations in many Sub-Saharan African countries in particular [Aniekwu and Okpala 1988, Lopes 1998, Rwelamila *et al.* 1999, Rwelamila and Meyer 1996]. Similar comparators can be drawn in Asia [Kumaraswamy 1994]. The inadequacy of, or deficits in, existing infrastructure services and a rapidly increasing population have left the public sectors in these countries struggling to cope. The infrastructure services required are invariably basic in nature - housing, hospitals, schools, water, and sanitation. These harsh realities have intensified the search for more innovative means of delivering public services and the need to demonstrate value for money in public construction procurement. The issues discussed in this paper are, therefore, of broader significance to the global construction industry.

THE PUBLIC PROCUREMENT REFORM PROGRAMME

The public procurement reform programme is part of a wider reform agenda targeted at improving public financial management. The objectives of the procurement reform proposals are to [Ministry of Finance 2001]: promote national development; enhance harmony with other local and international laws; foster competition, efficiency, transparency and accountability; facilitate ease of procurement administration; and, ensure value for money. Annual savings of about US\$150 million are envisaged through better management of government-financed procurement alone [World Bank 2003]. A key deliverable of the procurement reform was a draft Public Procurement Bill, which was enacted into law by Parliament in 2003. Direct measures also undertaken by Government include: the issuance and monitoring of expenditure ceilings for each MDA consistent with the annual

budget and updated cash flow forecasts; and implementing new anti-corruption strategies including codes of conduct for state officials. All procuring entities must seek clearance from the Ministry of Finance, through certification as proof of the availability and adequacy of funding, before any works contract is awarded.

THE PUBLIC PROCUREMENT ACT (ACT 663)

The PPA establishes the five basic pillars of public procurement [World Bank 2003]: (1) comprehensive, transparent legal and institutional framework; (2) clear and standardised procurement procedures and standard tender documents; (3) independent control system; (4) proficient procurement staff; and (5) anti-corruption measures. Some notable provisions in this Act are highlighted below.

Legal and institutional framework

The PPA provides for the establishment of a Public Procurement Board (*the Board*) (s.1) as a legal corporate entity. Procurement entities are defined as comprising MDAs and all para-statal establishments that utilise public funds (s.14). A tender committee in each procurement entity provides a one-stop shop for concurrent approvals, awards and management of contracts to predefined value thresholds (s.17). The tender committee may make use of external consultants in the performance of its functions. The tender committee shall refer any procurement exceeding its value threshold to the appropriate tender review board at the district, regional, ministerial or central government level. The tender review board reviews all procurement activities for compliance with the PPA, provides concurrent approval or otherwise of procurement referrals, hears complaints and escalates unresolved issues to the Board (s.20).

Procurement procedures and documentation

Parts III-V stipulate procedures for the sizing of tender packages, soliciting and evaluating tenders and for contract award. In particular, s.22 provides for the pre-qualification of tenderers for large and/ or complex works and technical services contracts. All contracts must be tendered on an open competitive basis, except otherwise provided for in the Act (s.35). Restricted tendering is justifiable only on the grounds of providing greater economy and efficiency and subject to the approval of the Board (s.38). Two-stage tendering is only allowed where detailed specifications cannot be made available before going to tender (s.36) or the optimal solution is unknown and tenders are solicited to provide this. National Competitive Bidding shall be used when the procurement entity so decides (s.44) and subject to contract value thresholds specified in Schedule 3. International Competitive Bidding shall be used when effective competition cannot be achieved without the inclusion of foreign firms (s.45).

All procurement must use the appropriate standard tender/ contract document provided in Schedule 4 and modifications can only be introduced through tender/ contract data sheets or special conditions of contract (s.50). The successful tender for works contracts shall be the lowest evaluated tender price ascertained on the basis of criteria specified in the invitation documents, which shall include (s.59): (1) the tender price subject to any margin of preference for domestic contractors (s.60); (2) the lifecycle costs of the tendered solution; (3) the potential for economic development, local involvement or technology transfer; and (4) national security considerations. The selection of

consultants shall be on quality and cost-based criteria (s.75) with the price component assessed in a similar manner as for works (s.69). Quality-based selection is allowed for complex or highly specialised assignments (s.72), and least-cost selection is reserved for small value assignments.

Procurement oversight, capacity building and anti-corruption measures

The Board's duties include, to (s.3): provide policy and regulatory oversight; provide training and capacity building for procurement officials; hear appeals and complaints; and, assist local industries to become competitive and efficient suppliers to the public sector. The Board shall maintain a database of all suppliers, contractors and consultants and shall debar from procurement practice under the PPA, and publish the list of, all suppliers, contractors and consultants with proven misconduct under the Act. The right to review is provided for in section 78. The head of the procurement entity must first investigate a complaint (s.79) and then, if unresolved within the time frame allowed, the complainant may seek administrative review by the Board (s.80). Third parties whose interests may be affected by the review proceedings are permitted to participate in them. The Board shall establish and publish a code of conduct for all procurement officials, the Board, tender review boards as well as for suppliers, contractors and consultants (s.86). Corrupt practices, as defined in the Constitution and the Criminal Code, 1960 (Act 29), are outlawed under the PPA (s.93). Violation of any provision of the Act, upon conviction, is punishable by a fine not exceeding 1000 penalty units or a term of imprisonment not exceeding five years or both (s.92).

Scope of application

The PPA applies to all procurement financed in whole or in part from public funds (s.14). Notwithstanding this provision, procurement with international obligations arising from any grant or concessionary loan to the government shall be in accordance with the terms of the grant or loan (s.86). However, it has been suggested that the World Bank/ FIDIC procurement procedures are used on World Bank-administered projects because MDAs have no set of comprehensive guidelines for procurement [Westring 1997, World Bank 1996]. There is therefore reason to expect that donor partners will defer to the use of the PPA. The agreement between the Ministry of Health and its cooperating partners, under a World Bank-administered programme, to organise procurement under specific Ministry of Health procedures is perhaps evidence of this expectation [World Bank 2003].

ACHIEVING VfM IN CONSTRUCTION

The five basic pillars of a 'well functioning procurement fiduciary management' are all addressed in the PPA, which if completely implemented will create the necessary conditions for 'best value', transparency and accountability in public sector construction procurement [World Bank 2003]. However, the procurement reforms described above are not, of themselves, sufficient conditions for the achievement of VfM. The 2003 CPAR acknowledges this fact and calls for improved contract management and greater professionalism in the procurement function. The sole reliance upon the traditional method and the use of largely price-based contractor selection criteria seem to be fundamental mistakes [see e.g., Palaneeswaran *et al.* 2001, Rwelamila *et al.* 1999]. The designer's focus on reputation and the contractor's preoccupation with price competition and cost reduction often leads to conflict and lack of cooperation. This lack of cooperation has permeated the various construction professions and academic institutions in the country. The objectives of public implementing agencies tend to be aligned with the traditional method and projects are configured to spend available funds while the longer-term sustainability aspects are often ignored. Rwelamila and

Meyer [1996] demonstrate how this 'fixed constraints syndrome' (p.44) has contributed to the poor balancing of project priorities and consequently, poor construction performance in Southern Africa Development Community countries. These trends mean that dramatic changes are required in the way infrastructure projects are procured.

Rationalist procurement theory considers the interplay of time, cost, quality and finance as the primary determinants of value in construction procurement and provides criteria for the selection and use of any particular procurement arrangement [Rowlinson 1999b]. These procurement systems and delivery modalities are, however, not without their limitations. There seems to be a lack of consensus on procurement assessment criteria and, hence, on the relative performance of different procurement paths [Hamilton 1987]. There are inconsistencies in procurement systems definitions and terminology [Rowlinson 1999a]. The procurement selection practices of construction clients' have been observed to deviate markedly from procurement theory, employing rather simplistic selection criteria and sometimes yielding outcomes that are at variance with procurement theory [Bowen *et al.* 1997]. The procurement arrangements adopted sometimes even defy classification under any of the generic procurement routes [Tookey *et al.* 2001]. Similar debates have shrouded the development of partnering [e.g., Bresnen and Marshall 2000]. However, the literature suggests a growing consensus that there is no 'best-buy' procurement solution and that procurement selection should be based on a contingency approach [Rowlinson 1999b].

Whatever the difference of opinion concerning these procurement systems and delivery mechanisms, it is quite clear that relying on a single procurement arrangement is not sufficient to promote the achievement of VfM in public procurement. The proliferation of procurement systems and the many delivery techniques, at least, are a reflection of the determination of the global construction industry to walk towards a brighter future and to address long-known and recognised problems. A structured approach considering all procurement arrangements and project delivery modalities is considered the best way to secure VfM [Kumaraswamy 1998]. The concept of choice, which these alternative systems bring into play, is, of itself, a great advantage as it forces a systematic evaluation of the project requirements, the contextual conditions and risks and thus facilitates 'best value'-focused decision making. However, our understanding of culture, and the differing motivations for human behaviour it presents, implies that great care needs to be exercised when considering the use of these innovative concepts in construction procurement [Bresnen and Marshall 2000, Hofstede 1980, Muriithi and Crawford 2003]. Nonetheless, these procurement systems and delivery techniques are paradigmatic and with reasoned application can contribute to the realisation of Ghana's quest for VfM in public construction.

CONCLUSION

The PPA establishes the legal and institutional framework for ensuring transparency, probity and accountability in public construction procurement. The wider reform programme described above will guarantee the rule of law and the protection of private property rights. These reforms create an investor-friendly environment in a country where there is an acute shortage of infrastructure services. Proactive governance and further initiatives are however required to complete the VfM equation. In particular, the 'fixed constraints syndrome' and the largely price-based contractor selection strategies will need to be reviewed. Procurement planning and project organisational structures must be tailored to meet particular needs.

The various procurement systems and delivery modalities provide reasonable scope for achieving this objective. The reasoned application of these alternative approaches will contribute to the realisation of Ghana's quest for VfM in public construction. A framework for guiding the implementation of the PPA and other alternative procurement arrangements and modalities will be required to sustain the momentum to reform, and improve the scope for achieving VfM in the public procurement function. Such a framework has been proposed in Anvuur [2002]. A strongly committed task force, as also suggested by the 2003 CPAR, should be created to support the work of carrying out priority tasks in connection with the proposed framework.

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