

RECOMMENDATIONS FOR THE PUBLIC PROCUREMENT SYSTEM OF THE REPUBLIC OF MALAWI



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Introduction

The following recommendations were prepared by the [Institute for Development of Freedom of Information](#) (IDFI), together with the [Malawi Economic Justice Network](#), based on the assessment of the Public Procurement Law (PPL) of Malawi, its sub-legal acts and other legal texts. The assessment itself is based on the Transparent Public Procurement Rating (TPPR) [Methodology](#), a tool created by a multinational alliance of CSOs, aiming at identifying strengths and weaknesses of PPLs around the globe.

The Methodology is largely based on best international standards from organizations, such as the EBRD, WTO, OECD, EU and OCDS, and covers all the major components of any public procurement system, from the nature of the legislation to the complaint review process, with focus on the transparency of public procurement systems. The assessment covers the following key characteristics (values) of a well-functioning public procurement system: **Efficiency, Transparency, Accountability and Competitiveness**.

The aim of this document is to offer insight into areas of potential improvement for Malawi's public procurement system considering the experience and best practices [identified](#) by the TPPR Project in 18 countries in the Eurasian region. The final results of the quantitative evaluation of Malawi's public procurement legislation will be made available on the TPPR [website](#) in January 2019.

Overview

The public procurement system in Malawi is regulated by the Public Procurement and Disposal of Assets Act (2017) and other secondary legislation. Prior to 2003, Malawi had a centralized procurement system characterized by the presence of the Central Tender Board (CTB) that was responsible for all procurement above a prescribed threshold for Government Ministries and Departments. The Central Government Stores (CGS) used to procure for Government Ministries and did its own procurement without much control from the Government.

This was one of the gaps that led to the enactment of the Public Procurement Act (PPA) of 2003, which decentralized procurement responsibility to procuring entities and established the Office of the Director of Public Procurement (ODPP) as a public office with the responsibility of regulation, monitoring and oversight of public procurement in Malawi.

However, lack of limited enforcement mechanisms led to the enactment of the Public Procurement and Disposal of Assets Act (2017), which established the Public Procurement and Disposal of Assets Authority (PPDA) as an impartial and independent institution responsible for the regulation, monitoring, oversight and enforcement of public procurement and disposal of assets in Malawi.

The PPDA is now transitioning from being a government department to a fully-fledged Authority. The PPDA operates independently, i.e. Director General is appointed through competitive means and not appointed by the President like in other oversight bodies. This provides opportunity for greater independence of the procurement authority. The PPDA is equipped with relatively wide authority, which includes investigation and sanctioning of procuring entities, and granting permission to use the direct procurement procedure.

The fact that the PPDA enjoys high degree of independence and is equipped with wide authority is in line with best international standards of having an independent public procurement authority that has

enough resources and legal authority to impartially monitor the system and make sure the PPL is being followed in practice. In this way, the PPDA has good potential that needs to be further harnessed by establishing clearer legal functions, ensuring that there is no duplication of authority, and equipping the Authority with more resources to carry out its responsibilities.

However, the PPDA is unable to fulfill one of its main functions – collection of procurement information from procuring entities, who, despite being obligated by law to keep records of all procurement activities and send them to the PPDA, often fail to do so. This problem also negatively affects the PP information [platform](#) run by the PPDA, which is able to offer only minimal information about ongoing procurement opportunities in the country. This observation is in line with experience from other countries, where procuring entities fail to consistently comply with such legal obligations. The only cases where this problem is not serious enough to be a cause for concern are centralized electronic public procurement systems, where procurement related information is automatically generated and stored as procurement procedures are conducted. For example, Georgia and Ukraine, Moldova, Romania have centralized e-procurement portals, and have negligible problems with the completeness of uploaded information.

Therefore, even though the Malawian public procurement system is currently paper-based, relevant stakeholders should consider the option of transitioning to a centralized open e-procurement system, which would be run by the PPDA and enable it to fulfill its functions with much greater efficiency.

The opening of public procurement information would also help anti-corruption efforts and make it much harder to hide large-scale illicit activity. A major scandal a few years ago, commonly referred to as Cashgate, showed how easy it can be for officials to engage in corruption, when procurement information is closed. The scandal involved public officials having concealed records of appropriating more than USD 30 million of public funds by making payments to companies for goods and services that were never performed.

However, it is impossible to reap the full benefits of e-procurement without ensuring full transparency of public procurement information. In this regard, Malawi has a long way to go, since the country's PPL leans more towards confidentiality of procurement information. For this reason, as a preliminary step, a discussion should be launched on the merit of confidentiality in public procurement, considering the apparent benefits of opening up this information and the lack of negative effects that can be observed in countries that already made the transition to open PP.

Considering the above-mentioned and based on the TPR Methodology, IDFI would like to offer the following recommendations for Malawi:

Transparency

Openness vs. Confidentiality – While Malawi's PPL includes an obligation for procuring entities to keep records of most procurement documents and the separate pieces of information associated with them, it does not ensure their transparency. In fact, the law leans more towards confidentiality and anonymity, having included the latter as one of the key principles of public procurement (Article 30). Moreover, confidentiality provisions prevent disclosure of key PP documents and information. Article 34 states that public officials must keep bid related information confidential, or be subjected to fines or even imprisonment. Article 161 of the Procurement Regulations act of 2004 states that electronic medium

can be used only if appropriate measures have been taken to prevent unauthorized access to bidding, approval and award processes.

As [demonstrated](#) by the Open Contracting Partnership as well as practical experience from countries that offer full transparency of bid contents (e.g. Albania, Ukraine, Georgia, Belarus, Kyrgyzstan and Romania), disclosure of bids and related documentation does not lead to any adverse effects on commercial interests. In fact, evidence is in favor of the contrary: since competitors typically already know each other's capabilities, opening of tender proposals further encourages competition. Evidence also suggests that opening bid information reduces the duration of cartel agreements.

Full and proactive disclosure of procurement documentation serves as an invitation to all stakeholders to monitor the previously closed process and potentially identify cases of collusion, corruption or inefficiency, price-fixing and other possible violations of the law. The mere fact that procurement documents are open for everyone to see increases public trust in the whole system and discourages wrongdoers from engaging in misconduct. This effect is amplified with each additional type of procurement documentation that is disclosed.

Considering the above, should Malawi start moving towards an e-procurement system, relevant authorities should consider proactive publication of all of the following documents: full tender documentation and amendments, candidate bids and relevant documentation, tender commission decisions, contracts and their amendments, contract performance information, payment receipts, inspection and quality control reports, complaints and dispute resolutions, internal and external audit reports.

Payment Receipts – Delays in payment is an often encountered problem. Introducing an obligation to publish payment receipts may serve as a stimulus for procuring entities to comply with their financial obligations. Ultimately, however, the best solution to delayed payments is the incorporation of the payment procedure inside the electronic procurement portal, where procuring entities have to upload payment receipts as an automated, mandatory step to completing a procurement.

This issue seems to be especially relevant for Malawi, where public procurement monitoring during our assessment process revealed that around 40% of contracts (77 contracts in Education, Health, Agriculture, Roads and Water Points infrastructure) were not executed, mostly due to procuring entity failing to pay for the supplier for one reason or another.

Competition

Benefits vs. Competition – Malawi's PPL includes certain preferences that may be harmful for competition: Article 36 provides preferences for local SMEs; Article 44 (6) sets price preferences in favor of domestic and regional bidders; Article 37 (6) restricts international suppliers from taking part in local tenders (international tender being a separate procedure that can be used only in certain circumstances, above certain threshold or when no local supplier can be found.); and Article 44 (10) states that "a procuring entity shall ensure prioritization of all bids submitted to give preference to 60 per cent indigenous black Malawians and 40 per cent others for national competitive bidding".

It is the belief of the authors of this document that such preferences may be harmful to competition and the overall health of the procurement system. Specific data is needed about the beneficial impact of these policies in order to make any conclusions about their success. While it is beyond the capabilities of this document to assess the effects of these policies, experience from other countries suggests that

without a centralized e-procurement system, even generation of the data required to measure the impact of such policies on the PP system as a whole would be a tremendous challenge.

Contracts – Malawi’s PPL does not ensure automatic disclosure of signed contracts. Procuring entities are obligated to report all contract awards to the PPDA, which then publishes this information on its website. The PPDA [website](#) publishes information about contract awards only above MWK 50 million (USD 67,000). The information includes procurement entity, procurement method, date, item description, value, supplier and is published on the website in the form of tables in PDF format.

Evidence suggests that publishing full contracts that can be easily tied to the relevant tender and bidding documents greatly raises trust towards public procurement and increases participation of the private sector. As an example, having opened its contracts, Slovakia increased its number of average bidders from 1.6 in 2010 to 3.7 in 2014.

Annual Procurement Plans – Annual procurement plans in Malawi are currently closed and used as a budget planning and reporting mechanism. These documents have an important potential to facilitate competition by enabling suppliers to prepare for future tenders. Best practice in this regard is to have standardized annual procurement plans (containing key information on the subject, volume, estimated time, location of each procurement) that are published on a central website and freely accessible to all. This allows the economic operators to better prepare for procurement opportunities well in advance and gives them the possibility to plan their investments accordingly.

Efficiency

While most efficiency related benefits originate from the speed and automation that come with centralized e-procurement, including timed and automated reverse auctions, which, as an example, have led to an average of 12% saving (more than USD 600 million since 2011) in Georgia, the following change could also be beneficial:

A Classification System for Goods, Works and Services – The Malawian public procurement system does not use a system of classification of goods, works and services. The CPV system (Common Procurement Vocabulary) is one such option that can be introduced in order to avoid confusion and to have a way of keeping track of what is being purchased. Introducing a standardized classification system is also a necessary prerequisite for transitioning to a successful e-procurement system.

Accountability

Coverage of the PPL – Malawi’s PPL defines a procuring entity as “government ministry, department, agency, any other public body or any subdivision thereof engaging in procurement or disposal of public assets”, where public body is defined as “any organ or agency of the Government and includes a statutory body, local authorities, and such other bodies as may be prescribed” (Article 2).

This wording suggests that the state-owned enterprises and state non-commercial legal entities are exempt from PPL. The Law should be clear about which entities are obligated to follow the regulations. Best international practice is for the public procurement legislation to be mandatory for all publicly funded and state-owned entities.

Institutionalization of Citizen and Civil Society Complaints – Malawi’s PPL only allows tender participants that claim loss or damage to appeal to the Director General of the PPDA or the procuring entity. Appealing to the Director General is associated with paying a fee. In addition, according to Article 60 (6), the procuring entity and the PPDA are not obligated to consider complaints that are above and below certain thresholds.

IDFI believes that such monetary and threshold restrictions are harmful for the accountability of the public procurement system as a whole and should therefore be removed. Moreover, Malawi should consider allowing other stakeholders, including citizens, to file complaints. Such possibility is given to the general public in Georgia, Slovakia and Ukraine. This would increase public trust in the system by allowing all stakeholders to fully take part in the process of monitoring the public procurement system, raise awareness about how to engage in public procurement, and generate data for analysis about frequent problems.

Best international practice in this regard is to have a single, independent, permanent body or committee, ideally with involvement of civil society, that is able to review complaints from all stakeholders.

The common concern arising here is that allowing citizens to appeal would enable certain individuals to misuse this opportunity to deliberately delay the process. However, this concern can be alleviated by allowing the reviewing entity to dismiss appeals it deems to be made solely for the purpose of delaying the procurement proceedings.

Complaints and Dispute Resolutions – Public disclosure of appeals and dispute resolutions is not guaranteed by Malawi’s PPL. Disclosing complaints and dispute resolution documents serves an important purpose of increasing public and business trust towards the public procurement system.

Of similar importance is the transparency of complaints filed by the general public and other stakeholders and decisions made in response to them. Since this area is not institutionalized, no information is available about what concerns citizens, civil society and potential suppliers have.

Keeping public records of these documents allows for the possibility to generate data for analysis about frequent problems, which then enables the procurement authority to develop evidence-based recommendations and policy changes.

Civil Society Participation in Dispute Resolution – Malawi should consider including civil society representatives in dispute resolution processes. Civil society members can bring a unique perspective about the challenges of the public procurement system to the table, allowing for a fairer dispute resolution.

Private Sector, Civil Society and Public Consultation Mechanism – Malawi’s PPL should include a mechanism for wider consultations with the business sector, civil society and the general public on public procurement policy matters. Such mechanism can be mandatory and frequency for such consultations can be defined by law. Such a mechanism helps policy-makers to take into account the needs and suggestions coming from all possible stakeholder groups, which will be especially useful if Malawi decides to start transitioning from a paper-based to an electronic procurement system.