

SECOND GENERATION PROCUREMENT. MOVING FROM COMPLIANCE TO RESULTS IN PUBLIC PROCUREMENT. TRENDS, CHALLENGES AND OPPORTUNITIES FROM THE UGANDA EXPERIENCE.

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ABSTRACT. It is now over ten years since several developing and transition countries undertook reforms of their public procurement systems to contribute to the improvement of public financial management and the development of the national private sector. The reforms established robust regulatory and institutional frameworks for procurement and introduced tools to monitor compliance with these systems. This paper examines the need for the second generation reforms, highlighting the areas that need attention in the implementation of the second generation reforms particularly the need to change focus from compliance to set regulations but pay attention to the results of the process.

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INTRODUCTION

The government of Uganda initiated reforms in the public procurement and disposal sector in 1997, following the enactment of the 1995 constitution and the introduction of several reforms and structural adjustment programmes. Prior to this, public procurement was governed by the 1977 Public Finance (Tender Board) Regulations under the Public Finance Act of 1964. The system was centralized and had been in operation for over thirty years. Uganda was one among many developing countries that implemented these reforms at the dawn of the 1990s. The reforms were so widespread that Professor Don Wallace Jr remarked that the changes taking place in public procurement amounted to a 'global revolution' or reformation[†].

These reforms included the implementation of legislative and regulatory frameworks in compliance with generally accepted standards at the international level and enabled the promotion of the principles of competition, free access, fairness, transparency, etc. Secondly, they focused on the establishment of new institutional frameworks for clarifying and spreading, in a balanced way, the responsibilities of the different actors in the procurement process, and enabling effective development of national capacities of public purchasers and private operators. These institutional changes led in particular to the establishment of regulatory bodies involving public sector administration and the private sector, internal control structures, and the responsible entities of public procurement.

The motivation to reform was different for many countries but for Uganda as in some other countries it was partly in consequence of requirements set by the World Bank and other donor organizations as conditions for providing development aid but principally because the inefficiencies of the unreformed systems had become self-evident (Agaba and Shipman, 2006).

Objective of procurement reform

[†] D. Wallace Jr, 'The changing World of National Procurement systems: Global reformation' (1995) 4 *Public Procurement Law review*

A taskforce commissioned by the Government of Uganda in 1999 considered the following as the desired outcomes from the reform of the public procurement system:

1. Transparency, characterized by
 - Well-defined regulations and procedures open to public scrutiny;
 - Clear, standardized tender documents containing complete information; and
 - Equal opportunity for all in the bidding process;
2. A more effective means for fighting waste and corruption and improving financial accountability;
3. Integration of the public procurement system with national budgeting procedures;
4. A more attractive investment climate by lowering risk;
5. Greater competitive pressure to satisfy customer needs; and
6. A streamlined procurement process through greater use of electronic commerce.

The recommendations of the taskforce were adopted by the Government. The reform consisted primarily of:

- **Legislation:** the enactment of the Public Procurement and Disposal of Assets Act (Act No.1 2003). In 2006, the local government public procurement and disposal of public assets regulations followed.
- **Oversight:** the creation of the Public Procurement and Disposal of Assets Authority (PPDA)
- **Decentralization:** the dissolution of the Central Tender Board. Today, there are 29 central government Procurement Disposal Entities (PDEs) and local governments have their own PDEs.

The Law that was enacted in 2003 is in line with the UNCITRAL Model Law. Robert Hunja of the World Bank had in an essay 'The UNCITRAL model Law on procurement of goods, construction and services and its impact on procurement reform' concluded that adoption of procurement legislation based on the Model Law enabled states to put in place such modern and up to date procurement systems. So in that regard, the Ugandan procurement Law can be said to be in line with international best practices.

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Uganda participated in the Organisation for Economic Cooperation Development Assistance Committee (OECD/DAC) World Bank baseline and compliance performance indicators review where Uganda's public procurement system scored 76% in the system which assessed the country's procurement system against the set international standards. (OECD/DAC, 2007)

Performance of the procurement system

To understand how the reformed procurement system has performed since 2003, we have to measure it against the objectives of the reform as set out in 2003. The major objectives of the reform were: to create transparency and accountability in public procurement.

In the pursuit of this objective, the Public Procurement and Disposal of Public Assets Authority (PPDA), the Regulatory body for public procurement has carried out the following activities:

Procurement Audits

PPDA conducted **206** procurement audits in various Procuring and Disposing Entities. The purpose of the audits was to ensure that public procurement and disposal activities were conducted in a manner which promotes transparency, accountability and fairness, in accordance with the PPDA Act and Regulations. The procurement audits conducted in each FY are indicated below:

FY	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
No	0	0	2	4	4	16	34	54	57	35

Source: PPDA annual reports

The procurement audits are an important aspect of promoting accountability. The audits play two important roles; they help the

regulator understand the level of compliance of Government agencies to the set standards and Regulations and also play a psychological role of making the Government officials conscious of the fact that they will be held to account for the decisions they make. Since 2003, as the number of audits have steadily increased the reports have shown a steady improvement in compliance to set standards. An encouraging trend in reduction of high risk cases has also been noted especially when a follow up audit is carried out in agencies that were previously audited. Procurement audits also identify weaknesses that call for capacity building. The procurement audits carried out have shown the following perennial problems in the system that form a basis for capacity building interventions:

1. Poor record keeping leading to lack of transparency and accountability due to no audit trail.
2. Use of wrong methods of procurement specifically the direct method affecting competition and value for money
3. Awarding bids by the Contracts Committees at Engineer's estimates leading to financial loss or shoddy work
4. Lack of involvement of the Contracts Committee in the various approvals of the procurement cycle.
5. Lack of Solicitor General's approval of contracts above UGX 50m.
6. Poor contract management leading to shoddy work, payment with no evidence of deliverables, contract variations at higher unit rates causing financial loss and delays in contract completion and payment.
7. Forgery by Bidders of key documents e.g. bid security, payment and performance securities, manufacturer's authorization, audited books of accounts, annual turn-over etc

Administrative Reviews

The Authority derives its mandate to conduct administrative reviews from Sections 8 (e) and 91 of the Act, Regulation 347 of the PPDA Regulations, 2003 and Regulation 140 of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006. The Authority adjudicated **99** administrative reviews from

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providers arising out of unethical practices by both bidders and government officials, lack of professionalism in the Entities and poor knowledge of application of the PPDA law. The administrative reviews handled per FY are indicated below:

FY	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
No	0	0	0	5	3	3	21	17	33	17

Source: PPDA Annual reports

Administrative reviews provide an important tool to not only gauge the level of transparency in the public procurement system but also the degree of confidence in the adjudication process in public procurement. Some interpret the increasing number of administrative reviews to be a signal that the procurement system is getting worse. On the other hand the increasing number of administrative reviews is a signal that providers have confidence in the appellant process in the system and thus the system is fair and transparent.

Procurement Performance Measurement Systems

In 2009, the Authority developed a Procurement Performance Measurement System (PPMS) based on an agreed set of key performance indicators, to ascertain the performance of the public procurement system in Uganda and to facilitate the preparation of reports to various stakeholders. 15 pilot Entities were used to test the system in FY 2009/2010. The PPMS has been rolled out to a further 44 PDEs in two lots in FY 2010/2011. The tool has key performance areas as illustrated below:

Key performance areas and Indicators for the PPMS

Key Performance Area	No. of Indicators	No. of sub indicators
1. Procurement Planning	2	7
2. Procurement Cycle Management	5	13
3. Procurement Records	4	12
4. Procurement Management and compliance issues	3	8
5. Disposal Planning	1	2

Source: PPDA Procurement Performance measurement system.

The procurement performance measurement system has provided the Authority with a tool to collect and analyze data on a set of indicators that show the performance of the procurement system. The way in which performance measurement systems are used can differ widely depending on their application (Feurer & Chaharbaghi, 1995). For example, some performance measurement systems are used as a reporting mechanism (e.g. financial reports) while other systems are employed for controlling the performance of products, employees and other resources within an organization (e.g. costing systems, staff appraisal and reward systems). Performance measurement systems can provide (quality) information to decision makers so that they can determine whether efforts are on course and help managers understand when their programs are succeeding or failing (Cook *et al.*,1995). From this context, the procurement performance systems are intended for reporting the progress of systems, which are put in place to facilitate acquisition processes of government departments.

Training and Capacity Building

Under Sections 6 (e), 7 (c) and (m) of the PPDA Act, the Authority is mandated to build procurement and disposal capacity in Uganda, set training standards, competence level certification requirements and professional development paths and develop policies and maintain an operation plan on capacity building. Since 2003, the Authority carried out capacity building for different stakeholders. These included staff of PDEs (Accounting Officers, Contracts Committees, User Departments, Evaluation Committees and Procurement and Disposal Units), providers (consultants, suppliers and contractors), professional associations, and politicians, Training of Trainers, the media and civil society organizations. In total, the number of participants trained was **22,944** as indicated below:

FY	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
No	1421	2259	2704	7620	1698	2347	780	1626	1674	815

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The capacity building activities have created a pool of technical staff that are now knowledgeable on the conduct of public procurement, which was not the case in 2003 when the reforms were being started. These efforts have been re enforced by education institutions that now have courses up to PhD level. In 2003, the only available training was the UK based Chartered Institute of Purchasing and Supplies certification.

Despite these noticeable achievements, the PPDA reports still show problems in the following areas:

1. **Existence of Procurement Capacity Gaps:** There is a resources gap in the procurement sector especially for the Local Governments in terms of human resource, experience, skills and tooling. The PPDA thus faces an overwhelming demand for training which cannot be met with the limited resources available. There is also a challenge of low capacity of bidders to submit responsive bids which leads to aggressive commercial wars in procurement. The capacity gaps have led to delays in initiating procurements by Procuring and Disposing Entities which affects absorption of funds.
2. **Persistent Cases of Abuse of the Procurement Law:** A number of PDEs in both Central and Local Governments are still weak in implementing the law. Cases of lack of procurement plans, poor record keeping, failure to use PPDA standardized documentation and frequent use of the direct procurement method in high value contracts are still noted. Entities have also persistently failed to debrief bidders on reasons why they are unsuccessful in the tendering process.
3. **Limited Awareness of the Procurement law:** The Authority is still faced with an awareness gap amongst the general public which is more evident in the Local Governments, where most members of the public are still unaware of the PPDA Act, Regulations and the role of PPDA. As a result, most members of the public are not actively involved in demanding for accountability in the procurement sector, which hinders effective implementation of the procurement law.

4. **Failure to Implement PPDA's Recommendations:** The audit reports issued regularly by PPDA contain numerous violations of the law by managers in Procuring and Disposing Entities and although PPDA sends them to competent authorities for legal and administrative action, nothing seems to happen. So the impunity continues.
5. **Staffing:** The Authority's mandate has increased over time especially following amendment of the Local Governments Act in 2006 which harmonized the procurement systems to incorporate public procurement regulations. The organization structure has however not been revised to take cognizant of the growing mandate. This negatively affects the effectiveness of the Authority on achieving its mandate.
6. **Unethical Conduct:** Collusion between PDEs and bidders has been noted which frustrates the Authority's attempts to suspend bidders with unethical practices. PDEs do not adhere to the principle of confidentiality during the bidding process which causes leakage of information to bidders and complaints.

Beyond Compliance to Performance in the Public Procurement System

Globally, public sector management is increasingly under pressure to go beyond the implementation of policies and procedures and to produce results. The public procurement sector has not been spared and in Uganda, there has been criticism that the public procurement legal framework is focused on compliance with little or no regard for results that come from the process. Of particular concern, has been the apparent financial loss to Government when bids with high prices way above the market rates are awarded contracts while the lower priced bids are disqualified due to non compliance with procedural requirements. Further, public officers are being held accountable not for results in service delivery but adherence to procedural

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requirements of the procurement processes. In some Government departments, failure to absorb Government funds and provision of the much needed social services has been blamed on the 'cumbersome' public procurement rules.

This has led to a debate on the following questions: How can performance in public procurement be adequately measured? Do current regulatory mechanisms adequately target performance? What is needed to ensure good results in public procurement? Is focus on compliance alone without performance able to deliver value for money?

These questions have led for calls for the second generation procurement reforms that place emphasis not only on compliance to set Regulations, but also results of the process. There have been concerns among a cross section of people that the procurement regulatory framework places a lot of emphasis on ensuring that there is compliance with the standards governing public procurement. That procedures set out in various pieces of Regulations for implementing the procurement laws have been the main focus of operational staff in the entities as well as the oversight bodies. There is need for a shift in focus from just the process and compliance. . That the most important aspect of any procurement is its outcome. When one talks about performance, then one needs to look at the results, namely the outputs and outcomes. The wider public is interested in delivery of service in an efficient, effective and economic manner. Taxpayers want to see their taxes spent reasonably. All these make public procurement so important and therefore a subject of tight scrutiny because where large sums of money are involved, vulnerability to abuse increases.

SECOND GENERATION PROCUREMENT REFORMS

Some of the key reforms that Uganda is considering to adopt are highlighted below.

1. Increased participation in public procurement by local providers

While Small and Medium Enterprises in Uganda are responsible for three-quarters of our annual GDP, their share in public markets (procurement) is still limited and estimated to represent only 15% of all enterprises participating in public procurement schemes. Although this may be attributed to the small formal sector, the low level of participation is discouraging since public procurement represents an important and relatively stable market for such enterprises. This low response has largely been attributed to limited capacities to produce, innovate and access market information. The public sector quite often follows consistent spending patterns over the years, and the stability, or even predictability, of public purchasing allows for long-term planning horizons for the private sector. According to the Private Sector Foundation in Uganda, Public spending in procurement across Ministries is provided for under every national budget, which renders it a more stable market for the private sector to exploit.

The PPDA Regulations include two types of preferential treatment. Firstly, there are Preference schemes where, procurement bodies can add a margin to the evaluated price of non-local bidders during the evaluation of bids. Secondly, the regulations use reservation schemes. Under a reservation scheme, only members of a target group or community are eligible to participate. The reservations aim to develop these targeted groups, which in particular include those communities and geographic areas that are subject to conflict, calamity and neglect. To benefit from preference schemes, firms need to be listed in the PPDA's registry of providers. While the legal provisions for preference schemes are in place, they are currently not applied. A Ugandan research team found in a comprehensive empirical study that none of the surveyed PDEs ever used preference schemes, (Boddo, 2010). To rectify this, the PPDA Act has been amended and guidelines on how to apply the preference schemes are to be developed, after having studied the same practices in Kenya and Tanzania. The guidelines are scheduled to be introduced this year.

Besides ensuring that regulations for price preferences and reservations for local firms are adhered to, there are additional

measures that could be applied to ensure the improvement of the developmental impacts of public procurement for the national economy. Such measures include making sub-contracting to Ugandan firms obligatory, downsizing contracts to volumes that local businesses can manage, addressing providers' concerns over bidding costs by reducing bureaucratic barriers, and providing better feedback to local providers and bidders. These are to be closely studied with the intent of applying them to the system.

2. Application of sustainable procurement

Sustainable Public Procurement (SPP) is receiving an increasing amount of attention as a consequence of a rise in environmental, social, and economic challenges both in developed and in developing countries. Sustainable Procurement is a process whereby organizations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organization, but also to society and the economy, whilst minimizing damage to the environment." Taken from 'Procuring the Future' - report of the UK Sustainable Procurement Task Force, June 2006. Sustainable Procurement should consider the environmental, social and economic consequences of: Design; non-renewable material use; manufacture and production methods; logistics; service delivery; use; operation; maintenance; reuse; recycling options; disposal; and suppliers' capabilities to address these consequences throughout the supply chain.

A Study done by the United Nations Environment Programme (UNEP) concluded that there is avenue for implementation of SPP policies in Uganda. The PPDA Act 2003 (as revised in 2011) and its Regulations contain provisions covering the social, economic and environmental aspects, although economic provisions dominate the implementation of public procurement. The institutional framework and various policies highlighted above, provide the foundation under which SPP policies can be implemented. Buying leadership attention and getting championship from leadership in the implementation of the SPP policies will be critical. Sustainable procurement is good procurement

because it considers the whole lifecycle costs of procurement and in the long term leads to efficiency gains. A guideline and capacity building in this area is to be developed. Capacity building and awareness creation needs to be done in this area as the opportunity is there in the Law but is not being properly utilized.

3. Implementation of E-procurement

E-procurement holds a potential for linking procurement to the broader public financial management system, and creates new opportunities for measuring procurement performance. The use of e-procurement may hence support the streamlining and simplification of procurement processes. E - Procurement has the potential to act as a catalyst for developing the procurement area. E -procurement is also a reliable tool in promoting good governance in public procurement as it reduces the human factor in the process thus limiting the ability for practitioners to engage in corrupt practices. The Government of Uganda through the Financial Management and Accountability Program has commissioned a study that will lead to the development of an e-procurement implementation strategy. Many Government agencies, especially the Local Governments do not have important tools for e- procurement such as internet connectivity. Any efforts on e-procurement will have to be implemented in a phased manner as not all agencies are at the same level in terms of infrastructure.

4. Development of strategic Partnerships

Public Procurement has many stakeholders ranging from Government agencies, the private sector, the public, development partners among others. The experience of Uganda in the last decade is that for effective regulation to take place, the procurement Authority has to develop partnerships and work very closely with other oversight agencies. This cooperation should be in sharing reports and strategies in improving compliance to public procurement since public procurement is only one aspect of public financial management and good governance in Government. It is therefore expected that there will be increased focus on the linkage between the procurement agenda and other

development agenda, e.g. those related to preventing corruption in public procurement, anti-bribery, public governance, various Public Financial Management initiatives, etc. These linkages are likely to support our work on developing procurement capacity initiatives and enhance the potential for strengthening procurement not only as a separate programme activity, but also within the framework of existing related programmes.

Linkages or partnerships should not only be limited to other Government agencies but also with stakeholders like the media and civil society organizations who have a wider reach to influence behavior than Government in the form of perceptions. Development partners because of their broad experience and pool of technical resources need to be engaged closely to support the strengthening of capacity both in the public sector and the private sector especially facilitating benchmarking with success stories in other countries.

5. Broad Capacity building

The UNDP Definition of Capacity Development is “The process through which individuals, organizations and societies obtain, strengthen and maintain the capabilities to set and achieve their own development objectives over time.” (UNDP Practice Note: Procurement Capacity Development (2008))

This definition emphasizes the viewpoint that capacity resides not only within individuals, but also at the level of organizations (or institutions) and within the enabling environment (sometimes called the societal level.) The enabling environment is the term used to describe the broader system within which individuals and organizations function and one that facilitates or hampers their existence and performance. Capacity development as a long-term effort that needs to be embedded in broader, endogenous change processes that are owned by those involved, that are context-specific and that are as much about changing values and mindsets through incentives, as they are about acquiring new skills and knowledge

As noted earlier Uganda has a fairly robust legal and regulatory framework, an established public procurement authority, and has trained thousands of officials. Yet in recent years there has emerged widespread consensus that the procurement reform programmes have not achieved the desired outcomes in terms of improved performance of public procurement systems. One mistake that was made in the initial capacity development efforts was to pay so much attention to the Government officials at the expense of other stakeholders. This has proved to be a mistake as the system cannot function efficiently if the providers in the private sector have limited capacity or if the civil society or media has no capacity to monitor and report on public procurement. For broader accountability, all stakeholders have to be equipped with the necessary skills to play their respective roles.

6. Integrated Performance Measurement

The focus on measuring procurement performance will continue and be strengthened. There is a need to strengthen the systems for procurement assessment as they exist and to institutionalize them. There needs to be change management to let agencies do self assessment and to institutionalize it as a performance measurement system. It is also important that qualitative assessments through surveys be carried out to measure confidence of the private sector in the procurement system. This will call for the application of a balanced scorecard in procurement performance measurement. One complaint that has come up is that the performance measurement system as it exists only looks out for bad performance and never rewards good performance. A system needs to be developed to start rewarding good performance as motivation for Entities.

CONCLUSION

The Public sector in Uganda and the rest of the world is increasingly coming under pressure to go beyond the implementation of policies and procedures and to produce results. Implementation of Government programmes revolves around the public procurement system. The public procurement reforms that were initiated in the late 1990s were successful in

putting in place very strong legal and regulatory frameworks that are up to international standards. With now nearly a decade in the implementation of these rules, a number of successes has been recorded but also a number of problems identified. It is now time to think of the next phase of these reforms in order to meet the growing expectations of the public on provision of public services that rotate around public procurement. This paper recommends consideration of the key areas of increased participation of SMEs, application of sustainable procurement, e-procurement, and development of strategic partnerships, capacity building and integrated performance measurement.

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