

**PUBLIC PRIVATE PLATFORM
AGAINST CORRUPTION**

REPORT OF SUBCOMMITTEE

**PROCUREMENT AND
CONTRACT
MANAGEMENT**

September 2014

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1.0 BACKGROUND

Corruption is a multi-stakeholder problem which requires collective actions from all parties for its elimination. In this context, the 'Public Private Platform Against Corruption' was set up in December 2013 to facilitate such collective actions from two major partners in the economic environment of the country namely the public and the private sectors.

Given its objectives, the platform identified the issue of "Procurement, Contract and Project Management" as one of its priorities as a result of the perception rate of corruption in this area in the public eye. Secondly, there is the perception of influence in the allocation of major contracts. Thirdly, the abuse of the 'emergency procedures' to bypass normal procurement procedures is seen as aggravating and gives rise to more suspicion.

The perception of corruption in procurement and contract management, particularly for large scale projects impacts negatively on Transparency International Corruption Perception Index which is detrimental to the country's economic growth, development and image.

Accordingly, this subcommittee was set up to make recommendations for the reinforcement of the 'Procurement and Contract Management' framework to improve integrity of procurement infrastructure and eliminate opportunities of corruption and the perception of corruption.

Recommendations have taken into account international best practices on procurement and contract management.

2.0 PROCUREMENT AND CONTRACT MANAGEMENT (*Guidebook on Anti-corruption in public procurement and the management of public finances, United Nations Office on Drugs and Crime (UNODC) 2013*)

In order to carry out its functions, a government needs to procure goods, services and works. The procurement of stationery, information technology (IT) equipment or medical devices, the provision of health services or consultancy services, the construction of roads or schools, are few examples of government spending regarding procurement. The government is under an obligation to purchase goods, services and works only from the firms which offer the best value for money and in the most transparent and competitive manner because the expenditure is met out of public funds.

It is the huge sums involved in public procurement that make it so vulnerable to corruption. In fact, public procurement is estimated to account for 15-30 per cent of the gross domestic product (GDP) of many countries. This means that millions are spent by governments every year to purchase different kinds of goods, services and works.

Although the costs of corruption are difficult to measure, due to its clandestine nature, it is obvious that corruption in public procurement has an enormous negative impact on governments spending. These costs arise in particular because corruption in public procurement undermines competition in the market and impedes economic development. This leads to governments paying an artificially high price for goods, services and works because of market distortion and often resulting in inferior goods, substandard services and works.

Various studies suggest that an average of 10-25 per cent of a public contract's value may be wasted due to corruption. Applying this percentage to the total governments spending for public contracts, it is clear that millions could be lost to corruption in public procurement every year.

The volume and complexity of any particular procurement play an important role when it comes to corruption. Larger procurements are often perceived to be most vulnerable, as bribes are allegedly demanded and paid as a percentage of the public contract's value. Experience also shows that certain areas are particularly vulnerable to corruption such as direct procurement by public bodies, infrastructure works and other large scale projects, very often attributed to lack of transparency.

Despite its negative impact and the various efforts undertaken to curb corruption in the field of governments' contracts, public procurement has remained prone to corruption. Even in an environment where the public and private sectors are aware of the enhanced enforcement of anticorruption laws, corruption opportunities and challenges continue through private sector contacts with public officials.

It is thus vital that anti-corruption initiatives by the private sector and procurement reform at public bodies level move together. More focus is needed to support the rules that promote transparency, accountability, competition and integrity.

2.1 Procurement phases

The scope of procurement and contract management includes:

- Pre-tender stage: Identification of needs and procurement planning and strategy
- Tender stage: Invitation to bid and evaluation and award
- Post tender stage: Contract management and payment.

Pre-tender stage: The pre-tender stage includes the decision on the scope of the government need, i.e., deciding which goods, services or works are to be purchased; in which quantities, by when and with detailed specifications. The needs have to be thoroughly assessed and justified to ensure that public funds disbursed would bring value for money and procurement officials need to identify the relevant technical requirements to determine what exactly will be sought from the private sector and when. The pre-tender stage will also involve budgeting and planning.

Tender stage: The tender stage includes the invitation to tender, which is selecting which bidder will become the contract partner by evaluating the actual tender and the tenderer, and the award of a contract based on established terms and conditions for how the goods, services or works are to be provided. It includes any conditions or limitations relating to the award, including agents and subcontractors.

Post-tender stage: The post-tender stage, often referred to as contract management, refers to the administration of the contract to ensure effective performance. Further interactions of many kinds between the successful bidder and governmental authorities continue during the course of contract performance.

The potential for corruption exists at all phases of the procurement cycle. The consequences of corruption in public procurement include:

- At micro level: for high contract value, mistrust in the procurement system may be developed and leads to non-participation of important suppliers in bidding exercises.
- At macro level: there can be reduced investments in the country due to limited effectiveness of foreign aid and slow economic growth.

2.2 Choice of procurement procedure/methods

The choice of the procurement procedure is a crucial factor in the procurement process. In particular, it determines the number of stages intervening between the decision to buy and the actual purchase. It is important to understand how the choice of the procurement method can have an impact on

corruption in public procurement. There are different ways of categorizing procurement procedures, for instance distinguishing between types of procedures with or without a public notice, procedures with one or several stages, or procedures with or without negotiations. The choice of tender method depends on the estimated contract value, the estimated number of bidders and the complexity of the relevant good, service or work (particularly if the procuring entity is able to specify its exact need). Procurement methods are includes the following:

Open procedure (sealed bidding): Open tendering is a formal single-stage procurement method in which any interested company, without any pre-selection, may submit a bid. Bids are usually made against detailed specifications and the award is usually made to the bidder offering the lowest substantially responsive bid. This method allows maximum transparency and competition, for it generally requires a **public notice advertising** the contract opportunity, exhaustive technical specifications and contractual terms, a public opening of tenders and no possibility to negotiate the contract. In general, a procuring entity must use this procurement method unless the use of alternative methods is justified.

Restricted procedure: A restricted procedure is different from an open procedure in the sense that only pre-selected qualified companies are allowed to submit a bid. There are slight variations in restricted procedures under different frameworks. They may involve a restriction of the bidding to those companies which pre-qualified following a public advertisement and on the basis of disclosed minimum and/or selection criteria. A restricted procedure may also mean that a public advertisement of a contract opportunity is not required, as interpreted in the United Nations Commission on International Trade Law (UNCITRAL) Model Law. This may happen, for instance, if the subject matter of the procurement is available only from a limited number of suppliers.

Negotiated procedure: A negotiated procedure is often used for cases in which it is not possible to formulate exhaustive technical specifications and contractual terms. It is thus necessary to enter into a dialogue with the providers to conclude the contract. A negotiated procedure is also often used for cases of failed tendering procedures (e.g., no tenders or only non-responsive tenders were delivered). Another frequent reason for a negotiated procedure is circumstances of urgency or a catastrophic event.

Single-source procurement (direct award or limited tendering): Single-source procurement often allows the procuring entity to choose the contracting partner without any form of transparency or competition. This type of procurement constitutes a major departure from the fundamental principles outlined above. Grounds for direct contracting may include, for instance, the low estimated value of the contract, the fact that the goods, services at issue are available only from a particular provider, urgent needs, a catastrophic event, the need for additional supplies to be procured from an existing contractor, or special concern regarding national defence or national security. The type of procurement procedure chosen may have a direct impact on the corruption risks involved in a public procurement.

2.3 Procurement process for infrastructure works and other large-scale projects

Procurement is complex and in the case of infrastructure and other large-scale projects, it often takes years from project kick-off to completion. Due to the fact that public officials exercise some discretion at every stage of the process, especially at contract management level, they have ample opportunities to seek irregular payments from prospective contractors. Officials who receive a bribe or accept an undue advantage may return the corrupt favour by restricting or eliminating competition. They may do so by exerting undue influence on junior officials, splitting contracts which should be aggregated, tailoring award criteria to a favoured company, approving anti-competitive consortia which would otherwise violate anti-trust laws, accepting non-responsive bids, hosting flawed bid openings or staging discriminatory contract negotiations.

On the private sector side, temptations to shortcut the process, or to tilt it in some illegitimate way, similarly abound. Once a contract is awarded, the temptations do not stop, as contract management similarly involves numerous interactions between the public and private sectors that can lead to corrupt payments. Bribes can be paid to overlook under performance or non-performance. It is important to note that the tendering (or bidding) stage in public procurement, in particular, is highly regulated. International texts on procurement, especially the United Nations Commission on International Trade Law (UNCITRAL) Model Law, focus on this stage. Practice, however, shows that corruption risks in the procurement cycle can be equally high before the tender process even begins (in the pre-tender or planning stage) or once the contract has been awarded (in the post-tender stage).

For instance, large-scale infrastructure projects may be initiated although there is no immediate need for such projects. Also, a large number of international scandals, such as the Venice flood barrier graft scandal 2014, Construction of stadiums and other infrastructure-2010 Murray and Roberts, South Africa have stemmed from contractors' failure to perform according to the contracted terms and conditions. For example, when the contractor meets delivery requirements by using lower-quality materials, or when contractors have falsely overstated the volumes of work done and have colluded with public officials to hide this underperformance.

With regard to the bidding stage, corruption may arise even when policymakers have put in place a sound public procurement system regulating the tender phase. Exceptions from competitive procedures often made on the basis of national security interests or on grounds of emergency are examples.

2.4 Main actors in the procurement and contract management process

It is rarely the case that a single individual is responsible for corrupt behaviour. Corruption in public procurement usually involves a series of actors. The key actors facilitating corruption are the entity paying the bribe and the recipient of the bribe. The briber is usually the legal entity competing for and delivering on contracts (e.g., the bidder, including consortium partners, subcontractors or

suppliers). The recipient of the bribe is usually a procurement official with the procuring entity who is responsible for awarding and/or managing the public contract. Frequently, bribes do not flow directly between the bidder and the procuring personnel but instead through an agent, consultant or other intermediary. Corruption, broadly understood here to mean a breakdown in the best-value procurement process, may take place even when no procurement officer is involved. A good example of this is anti-competitive agreements, such as price fixing between bidders.

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3.0 SITUATIONAL ANALYSIS

3.1 The main procurement methods in practice in Mauritius are as follows.

For goods, works and other services:

- Open Advertised Bidding
- Restricted Bidding
- Request for Sealed Quotation from pre-selected companies following an annual public advertisement and on the basis of disclosed minimum and/or selection criteria
- Direct Procurement

For consultancy services:

- Request for Proposal
- Direct Procurement

3.1.1 Open Advertised Bidding

Open Advertised Bidding method may include a pre-qualification stage or a single stage bidding process. Bids are invited against detailed specifications and the award is made to the bidder offering the lowest substantially responsive bid. This method allows maximum transparency and competition. It requires a public notice advertising for the procurement. Public opening of bids is conducted in the presence of the bidders' representatives who choose to attend. In general, a procuring entity must use this procurement method unless the use of alternative methods is justified.

3.1.2 Restricted Bidding

Restricted Bidding method may be used in the following situations.

- (i) Where a public body has reason to believe that the goods, other services or works are only available from a limited number of bidders ;
- (ii) Where the time and cost of considering a large number of bids is disproportionate to the value of the procurement
- (iii) By limiting the participation in a particular procurement to those suppliers included on pre-approved supplier maintained by the public body so as to ensure that suppliers of specialised goods and services have and maintain the necessary technical and financial capability to provide them

Where restricted bidding is used, the public body shall, as far as reasonably possible, solicit bids from a minimum of five bidders. There is no financial limit for restricted bidding method.

3.1.3 Request for Sealed Quotations

Request for Sealed Quotations method is only to be used for the procurement of readily available commercially standard goods not specially manufactured to the particular specifications of the procuring entity , small works or small other services . It applies for contracts which are of value up

to Rs 5 million. A public advertisement is not required and the subject matter of the procurement is readily available. Sealed quotations are requested in writing from not less than 3 bidders unless the item to be procured is not available from three suppliers.

3.1.4 Direct Procurement

Direct Procurement Method allows a public body to purchase goods, other services or works from a single source without competition where only one supplier has the exclusive right to manufacture the goods, carry out the works, or perform the services to be procured. In other cases of low value procurement, Direct Procurement Method is used for procurement of goods where the total cost per single item does not exceed Rs 100,000 and the value of the contract does not exceed Rs 500,000. In the case of procurement of works, consultancy services or other services the contract value does not exceed Rs 500,000. The public body has to maintain records showing details of oral or informal quotations sought from suppliers prior to the award of the contract.

3.1.5 Emergency Procurement

Emergency Procurement may be used to purchase goods, other services or works from a single supplier without competition in cases of extreme urgency. Extreme urgency includes a situation wherein:

- The country is seriously threatened by or actually confronted with a disaster, catastrophe, war or Act of God.
- Life or the quality of life or environment may be seriously compromised.
- The condition or quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate unless action is urgently taken to maintain them in their actual value or usefulness.
- An investment project may be seriously delayed for want of an item of a minor value.

3.1.6 Consultancy services: Request for Proposals

Where, in respect of consultancy services up to Rs 10 M the Request for Proposals method is used. The public body shall draw up a list of consultants to ensure effective competition, from those who have the capacity to perform the required services. The list may be drawn up on the basis of the public body's own knowledge and information.

Where the contract value exceeds the prescribed threshold (above Rs 10 M), in order to draw up a shortlist, the public body shall seek expressions of interest by publishing a notice in a national and/or international newspaper of wide circulation.

3.1.7 Consultancy services: Direct Procurement

For procurement of consultancy services, direct procurement method is used where the nature of the consultancy services requires that a particular consultant be selected due to unique qualifications or where the continuity of consultancy services is essential to meet the objectives of the consultancy assignment.

3.2 Investment projects

(Investment Project Process Manual, Ministry of Public Infrastructure, National Development Unit, Land Transport and Shipping). *The manual is being currently revised.*

An investment project involves the procurement of:

- new infrastructure/facilities
- significant long-term renewal
- improvements to existing infrastructure/facilities
- a combination of any or all of the above

Typical investment projects include construction of new buildings, hospitals, roads, power plants, water reservoirs and other infrastructure items; replacement of old facilities; renovation of existing facilities; acquisition of new facilities; or purchase of equipment. Investment projects normally are large, non-recurring expenditures which involve multi-year funding, have a useful life greater than five years, are based on a comprehensive needs assessment, meet an essential public purpose, and require public accountability for funds.

The Project Plan Committee which is set up in the Ministry of Public Infrastructure, Land Transport and Shipping has as functions to:

- Assess whether project proposals meet the infrastructure needs of the country.
- Examine feasibility and cost benefits of infrastructure project proposals.
- Make recommendations on investment projects for inclusion in the project pipeline.
- Examine and review specifications.
- Advise Public Bodies on the appointment of Project Managers.
- Give clearances on projects whose pre-tender cost estimates exceed the approved cost estimates.
- Review the progress of investment projects above Rs 100 million or any priority project as instructed.

Each Public Body will develop an investment plan comprising a list of projects that would support the delivery of the output necessary to achieve the goals and objectives in the strategic plan. This list of projects is an outcome of policies, programme and sectoral needs of the Government.

All investment infrastructure project proposals above Rs 25 million will be reviewed by the PPC, in consultation with implementing agencies and other concerned Public Bodies prior to the development of a pipeline of projects.

The Public Sector Investment Programme (PSIP) document is a coherent plan for public sector investment that aligns Government economic vision with sector policies, corresponding infrastructure needs and the required funding arrangements. It is a useful guide to policymakers, development partners, line ministries/public enterprises and the private partners for informed decisions on those investment projects that can be funded partly or wholly through public funds, foreign loans/grants and private capital.

3.3 Procurement Legal Framework

Institutions concerned with the regulatory framework regarding procurement are the Procurement Policy Office, Central Procurement Board and the Independent Review Panel. The legal framework governing procurement is embodied in the Public Procurement Act 2006 and its accompanying regulations. In spite of the existing robust regulatory and legal framework governing procurement, the perception of corruption in this area persists and may have an impact on Transparency International Corruption Perception Index (CPI).

One of the key objectives of the procurement system is to promote good governance and important initiatives have been taken to promote same. Strategies have been designed and are being implemented in order to keep corruption and collusive practices under control. Although the Criminal Code makes provisions for offence of bribery (including bribery for government contracts), the enactment of the Prevention of Corruption Act (PoCA) 2002 and the setting up of the Independent Commission Against Corruption (ICAC) constitutes a landmark in the fight against corruption. The Public Procurement Office has assisted ICAC in developing a Code of Conduct for public procurement officials which supplements the provision of the law and aims at inculcating such behaviour and practices among procurement officials that will reinforce the integrity of our public procurement system. The Code of Conduct was launched at the beginning of December 2009 and has been subject to review recently.

Another important legislation that promotes good governance is the Competition Act 2007 which established a competition regime in Mauritius. Collusive agreements, which include bid rigging, are considered to be a serious breach of the Competition Act. An entity involved in bid rigging is liable to financial penalties up to 10 % of its turnover during the period of breach (up to max of 5 years) if committed intentionally or negligently. Since the proclamation of the Act recently, no serious case of bid rigging has been witnessed. This does not necessarily mean that bid rigging does not exist in Mauritius. There have been a few allegations on collusion among bidders.

Further, Mauritius has ratified the UN Convention Against Corruption in 2004, the SADC Protocol Against Corruption in 2002 as well as the UN Convention Against Transnational Organized Crime in 2003 and is party to the African Union Convention on Preventing and Combating Corruption in 2004.

3.4 Procurement within the private sector

Procurement of goods, services and works within the private sector is also perceived as being tainted with corruption. Private businesses are not strictly regulated and only voluntary adherence to the code of corporate governance or to any other code can be expected.

However, private companies listed on the stock exchange and those involved in financial transactions are required to adhere to the code of corporate governance, the Bank of Mauritius and Financial

Services Commission regulations among others. These companies are required to adopt transparent procedures for procurement and are accountable to shareholders.

3.5 Integrity in Public Procurement

One of the fundamental objectives of our public procurement system is to promote the integrity of the procurement process. According to United Nations, integrity refers to “honesty” or trustworthiness” in the discharge of official duties, serving as an antidote to “corruption” or “the abuse of office”. It includes impartiality, probity and fairness. Integrity is the basis for transparency and accountability. Promoting integrity entails tackling both demand and supply side of corruption.

The World Bank Procurement Guidelines under the heading of “Fraud and Corruption” provides for all key stakeholders-bidders, suppliers, contractors and their agents, subcontractors, sub-consultants, service providers and any personnel thereof to observe the highest standard of ethics during the procurement and execution of procurement contracts. These provisions are reflected in the Standard Bidding Documents used by public bodies in Mauritius.

The key elements underpinning integrity in public procurement in Mauritius are:

- Corruption
- Conflict of interests
- Collusion and bid rigging

3.5.1 Corruption

Corruption is often considered as a problem of behaviour. An ‘act of corruption’ as per the Prevention of Corruption Act 2002 means an act which constitutes a corruption offence and includes

- (i) any conduct whereby, in return for a gratification, a person does or neglects from doing an act in contravention of his public duties;
- (ii) the offer, promise, soliciting or receipt of a gratification as an inducement or reward to a person to do or not to do any act, with a corrupt intention;
- (iii) the abuse of a public or private office for private gain;
- (iv) an agreement between 2 or more persons to act or refrain from acting in violation of a person's duties in the private or public sector for profit or gain;
- (v) any conduct whereby a person accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification for inducing a public official, by corrupt or illegal means, or by the exercise of personal influence, to do or abstain from doing an act in the exercise of his duties to show favour or disfavour to any person;

Corruption hurts everyone who depends on the integrity of people in position of authority. The most common form of corruption is bribery. There can be many related forms of corruption, for example, if a public official accepts an undue advantage in return for performing or failing to perform an act in violation of laws; if a public official trades in influence to lend private parties an undue advantage;

if a payment is made by a private party to a private party, for example a prime contractor in connection with the award of a subcontract to the paying party, the payment may constitute a bribe or a kickback.

3.5.2 Conflict of interests

Transparency International states that conflict of interests may arise at various stages of the procurement process whenever public officials' decisions can be influenced by their private interests. The evaluation and award of bids are often assessed as the most vulnerable phases, due to the high level of technical expertise required and the specific features of evaluation committees.

Section (13) of the Prevention of Corruption Act 2002 is about conflict of interests. It occurs:

(1) Where-

(a) a public body in which a public official is a member, director or employee proposes to deal with a company, partnership or other undertaking in which that public official or a relative or associate of his has a direct or indirect interest; and

(b) that public official and/or his relative or associate hold more than 10 per cent of the total issued share capital or of the total equity participation in such company, partnership or other undertaking, that public official shall forthwith disclose, in writing, to that public body the nature of such interest.

(2) Where a public official or a relative or associate of his has a personal interest in a decision which a public body is to take, that public official shall not vote or take part in any proceedings of that public body relating to such decision.

(3) Any public official who contravenes subsection (1) or (2) shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

3.5.3 Collusion and Bid Rigging

According to the Organisation for Economic Co-operation and Development (OECD), bid rigging occurs when businesses that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Common forms of bid rigging include:

- Cover bidding occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer
- Bid suppression: In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.
- Bid rotation: In bid rotation schemes, all conspirators submit bids but take turns being the low bidder.

- Market allocation or division schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves.
- Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold.

4.0 DYSFUNCTIONS AND WEAKNESSES

This subcommittee has identified a number of dysfunctions / weaknesses and suggested corrective measures which can be implemented in the short, medium and long term on both the demand and supply side of corruption, that is public and private sectors respectively.

The dysfunctions /weaknesses have been grouped under six sub-headings as follows:

4.1 Rules, Regulations and Procedures

- (i) The procedure to make a shortlist of suppliers, particularly in low value procurement and restricted bidding is not clearly defined. The absence of such procedure might lead to arbitrary shortlisting.
- (ii) Clear guidelines for dealing with low value procurement is not spelled out. Each public body procures low value items according to its own judgement.
- (iii) Little guidance is provided for conducting negotiation where this is allowed.
- (iv) Provisions for Emergency Procurement in the Act are inadequate, leading to the perception of the public that there may be an abuse of the emergency process.
- (v) Procurement system is complex. Despite efforts by Procurement Policy Office, the procurement proceedings need further simplification which would particularly relieve Small and Medium Enterprises (SMEs).
- (vi) There are no clear guidelines on contract management.
- (vii) Post contract evaluation methodology and responsibilities are not clear.

4.2 Capacity constraints

- (i) It has been observed that although much has been done to towards capacity building of suppliers and public officials, lack of capacity remains a serious weakness in the procurement system. Stakeholders include public procurement practitioners, evaluators, auditors, board members, council members of Municipalities and District councils, suppliers and contractors.
- (ii) There is need for training in the following fields: procurement rules and regulations; awareness on how to deal with bid rigging, risk management, integrity, conflict of interests, bid evaluation and contract management.

4.3 Accountability

- (i) Whilst the structures in place lay emphasis on separation of duties, there is an inherent weakness as far as accountability is concerned. Very often the blame is transferred on committee and ultimately no one is responsible for a particular act.

- (ii) Undue influence in the procurement process which may weaken all initiatives to fight corruption and prevent public officials to act responsibly.
- (iii) Procedures for 'certification for payment' to contractors have loopholes.

4.4 Collusion and Bid Rigging

There are possibilities for collusion and bid rigging by contractors. Public bodies do not have adequate instrument to detect bid rigging and collusion.

4.5 Role of National Audit Office, Internal Auditors, Office of Public Sector Governance and Procurement Policy Office

Whilst each institution is carrying out its duties responsibly, one weakness remains. There is lack of coordinated action. Very often, the same tasks are carried out by the different institutions resulting in duplication and some tasks not attended to.

4.6 Transactions not covered by legislations

Government to government transactions are not covered by any specific legislations. Similarly, purchase of electricity from independent power producers are not covered by any specific legislations but by agreements between parties concerned. Such situations fuel further the perception of corruption due to lack of information on deals made.

There is need for enhanced transparency in procedures to dissipate negation perception of corruption.

4.7 Others

- (i) There was merit on 30 % of cases challenged at the level of the Independent Review Panel (IRP). Source: Procurement Policy Office Website 2013. The percentage was 50 % in 2008. Although the figure has decreased, it should be noted that more efforts are required.
- (ii) Private companies complain about tailor made specifications by public bodies.
- (iii) Small and Medium Enterprises (SME's) feel disadvantaged for not securing contracts as expected.
- (iv) Low value bidding by contractors which results in sub-standard works or goods supplied.

5.0 FORTHCOMING CORRECTIVE MEASURES

These are as follows:

- (i) A revised Code of Conduct for Public Officials involved in procurement, which is an initiative of the ICAC and the Procurement Policy Office.
- (ii) An Integrity Framework for the sector, which is an initiative of ICAC and the Procurement Policy Office.
- (iii) The signing of an 'Integrity Pact' by large contractors, which is an initiative of the Procurement Policy Office and Transparency International (Mauritius).
- (iv) The coming into operation of 'E-procurement', an initiative of the Procurement Policy Office, which is expected to promote transparency and integrity at all levels in the procurement process.
- (v) The proposal by the Private Sector Anti-Corruption Task Force for the implementation of an 'Integrity Pledge' by businesses such as contractors, suppliers of goods and services.

6.0 PROPOSED RECOMMENDATIONS

6.1 Issues considered

The subcommittee took into consideration the following issues while drafting recommendations.

- (i). The need for results oriented proposals which can be achieved in the short, medium and long term, and
- (ii). Practicability of implementation of recommendations by stakeholders.

Recommendations cover the three main broad areas listed below and have been made for implementation by the Procurement Policy Office. Ministries and other public bodies and private businesses

- (i) The people behaviour aspect.
- (ii) Systems, procedures and practices.
- (iii) The legal framework.

6.2 Proposed recommendations for implementation by the Procurement Policy Office

6.2.1 Short term (up to 6 months)

- (i) Development of guidelines / procedures for low value, direct procurement.
- (ii) Conduct of an education programme to raise awareness of suppliers/contractors on requirements of bidding documents, rights for appeal and criteria for challenging decisions to the Independent Review Panel.
- (iii) Capacity building of public officers involved in procurement and contract management for more effectiveness, rigorous application of clauses and bridge skills gaps.
- (iv) Reinforce guidelines on Contract management and procedures for 'certification for payment' for enhanced transparency and accountability.
- (v) Review procedure for shortlisting of suppliers for direct procurement and restricted bidding for enhanced transparency and accountability.
- (vi) Review negotiation procedures for procurement of specific supplies for enhanced transparency and accountability.
- (vii) Reinforce guidelines for emergency procurement by public bodies for enhanced transparency and accountability. Ex. Publication of list of suppliers/service providers.

6.2.2 Medium Term (up to 1 year)

- (viii) Signing of a 'Covenant of Integrity' or 'Integrity Pact' by bidders to make them answerable to their bid contents and to cater for situations where services/ works are not to standard and to ensure level playing field for all contractors and suppliers.
- (ix) Setting up of a Compliance Unit to ensure supervisory control on staff involved in procurement and contract management in public bodies and provide for sanctions for non-compliance to regulations.
- (x) Propose for a research study on procurement to have a holistic view of the current situation and to identify root causes of the problems for long lasting remedial actions. This study can be conducted by Mauritius Research Council or University of Mauritius or the PPO could encourage PhD research studies and provide funding for same.

6.2.3 Long Term (1 - 2 years)

- (xi) The establishment of a Procurement Academy as a joint initiative of the Public and private sector to professionalise procurement.
- (xii) A new Procurement Act to cater for various amendments made and new proposals to be addressed as listed below. The current legislation is based on UNCITRAL model Law of 1994. The latter has already reviewed this version and the latest version is that of 2011. All other leading jurisdictions such as EU procurement Directives and World Trade Organisation have also reviewed their procurement legislations recently.
 - Appointment of independent professionals IN ALL TRANSPARENCY for supervision of large projects during all phases including contract management. An independent professional would act as an oversight mechanism to ensure proper project implementation in terms of compliance to specifications, terms and conditions, quality and transparency of procedures.
 - Propose for decisions of the Independent Review Panel (IRP) to be binding. At present, the IRP make 'recommendations' to the concerned public body.
 - Consider the inclusion of a representative of the civil society in the procurement and contract management process.
 - Propose for the Procurement Policy Office to be given an independent status as the Regulatory Authority pertaining to procurement.

6.3 Recommendations for implementation by ministries and other public bodies

- (i) Implement the Public Sector Anti-Corruption Framework which is being spearheaded by the ICAC.
- (ii) Place anti-corruption messages on respective websites.
- (iii) Annual publication of request for tenders and list of companies securing contracts for enhanced transparency in the direct procurement process (threshold value less than Rs 500,000).
- (iv) Provide information on contracts awarded for works or supplies in cases of 'emergency' to eliminate perception of corruption. Ex Publication of list of suppliers after emergency period.
- (v) Ensure that contract management and 'certification for payment' procedures are followed, documented and conducted in all transparency.
- (vi) Encourage whistle blowing of corruption or malpractices to the relevant authorities.
- (vii) Ensure compliance to code of conduct to promote ethical behaviour. Ex Public officials to refrain from soliciting gratification.
- (viii) Project Plan Committee, Ministry of Public Infrastructure, National Development Unit, Land Transport and Shipping to ensure effective and regular review of progress on investment projects.

6.4 Recommendations for implementation by private sector companies

It is proposed that private sector companies:

- (i). Join the Private Sector Anti-Corruption Task Force (PACT) and sign up for the 'Integrity Pledge' proposed.
- (ii). Private large construction companies (Large contractors) to adhere to an 'Integrity Pact' for bidders and public bodies to promote integrity and ensure level playing field.
- (iii). Ensure employees' compliance to company's code of conduct / ethics. Example: to refrain from offering a gratification to public officials
- (iv). Place anti-corruption messages on company website for the attention of external stakeholders. For example: We do not do business with businesses which are involved in unethical practices or debarred. (See Debarred Construction Companies on PPO Website)
- (v). Encourage whistle blowing of malpractices in the organization. (Internal whistle blowing line or to the ICAC or Competition Commission). Transparency International (Mauritius) and the

Mauritius Institute of Directors have set up a whistle blowing Council which would promote whistle blowing in the private sector.

- (vi). Develop and implement anti-corruption programme to prevent corruption within the company and in dealings with public officials.
- (vii). Adopt procurement procedures of International standards such as the Organisation for Economic and Co-operation Development (OECD) Guidelines for Multinational Enterprises, International Federation of Consulting Engineers (FIDIC) Procurement Guide, and Construction Industry Development Board (CIDB) International Standards for Construction procurement.

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7.0 CONCLUSION

Sound legal frameworks for public procurement and anti-corruption are important pillars in the fight to reduce corruption. Both are prerequisites for a transparent, competitive and objective procurement system. Respect for the rule of law is essential. Experience has shown, however, that legislation alone is not sufficient to prevent corruption in public procurement. It is essential that legal frameworks be supported by other efforts to ensure qualities such as transparency, accountability and integrity. Various additional strategies have proven to be particularly useful in fighting corruption in public procurement. Some of these have already been implemented such as debarment of corrupt companies or are forthcoming such as E-procurement. Others are proposed to reinforce the integrity framework.

7.1 Integrity of public officials and bidders

Both the public sector and the private sector must ensure that only professional, honest, reliable and skilled staffs who demonstrate integrity are involved in procurement activities. Staff must be appropriately informed and trained on how to navigate through complex legal frameworks, such as public procurement and anti-corruption laws. A robust compliance programme that includes a code of conduct is considered important, to provide contractors and potentially public agencies a framework for following the law.

7.2 Collective action

Collective action, which is a collaborative and sustained process of cooperation of like-minded stakeholders, has become a concrete policy issue in the fight against corruption. This is particularly true in the area of public procurement, where private companies, governments, international organisations, civil society, academia, etc. join forces to limit the opportunity for corruption in the business environment. The goal of this collective action is to create a level playing field for companies competing for public contracts. Public procurement processes should be transparent and exclusively based on market economic criteria, such as price, quality and innovation, so that the best bidder is awarded the contract and not the bidder who, for instance, paid the highest bribe. Collective action seeks to put this principle into action and to ensure that bidders competing for public contracts are not disadvantaged for acting honestly and ethically. All actors involved are required to build an alliance and to act collectively in the fight against corruption.

Procurement processes should be conducted in a transparent and competitive manner, based on objective criteria. Companies competing for public contracts should implement effective compliance programmes in order to prevent corruption. Civil society, in a watchdog role, should monitor the efforts the government and companies are making in order to fight corruption.

8.0 References and relevant definitions

8.1 References

- (i). *Guidebook on Anti-corruption in public procurement and the management of public finances, United Nations Office on Drugs and Crime (UNODC) 2013*
- (ii). *United Nations Commission on International Trade Law (UNCITRAL) Model law on Public Procurement*
- (iii). *Integrity in procurement. Good Practice from A to Z, Organisation for Economic Co-operation and Development (OECD) 2007*
- (iv). *Handbook: Curbing corruption in public procurement. Transparency International 2006*
- (v). *Improving delivery: Realising best practice in procurement and contract management. Confederation of British Industry (CBI) Nov. 2006*
- (vi). *Public Procurement Act 2006, Mauritius*
- (vii). *Public Procurement Regulations 2008, Mauritius*
- (viii). *Investment Project Process Manual 2006, Ministry of Public Infrastructure, National Development Unit, Land Transport and Shipping*

8.2 Definitions

- (i) World Bank defines terms related to fraud and corruption in procurement as follows:

“corrupt practice” is the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party;

“fraudulent practice” is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation;

“collusive practice” is an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party;

“coercive practice” is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;

“obstructive practice” is deliberately destroying, falsifying, altering, or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation. Bids

from bidders involved in corrupt, fraudulent, collusive, coercive or obstructive practices are rejected.

8.3 Competition Act 2007

Section 42 of Competition Act 2007 states the circumstances whereby bid rigging can happen:

- (i) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if one party to the agreement
 - (a) agrees not to submit a bid or tender in response to an invitation for bids or tenders; or
 - (b) agrees upon the price, terms or conditions of a bid or tender to be submitted in response to such a call or request.
- (ii) Subject to subsection (3), any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.
- (iii) This section shall not apply to an agreement the terms of which are made known to the person making the invitation for bids or tenders at, or before, the time when any bid or tender is made by a party to the agreement.

8.4 Prevention of Corruption Act (PoCA) 2002

(i) In PoCA 2002 " gratification"

- (a) means a gift, reward, discount, premium or other advantage, other than lawful remuneration; and
- (b) includes -
 - (i) a loan, fee or commission consisting of money or of any valuable security or of other property or interest in property of any description;
 - (ii) the offer of an office, employment or other contract;
 - (iii) the payment, release or discharge of a loan, obligation or other liability; and
 - (iv) the payment of inadequate consideration for goods or services;
- (c) the offer or promise, whether conditional or unconditional, of a gratification;

(ii) Section 4 of PoCA ' Bribery by public official 'reads as follows :

- (1) Any public official who solicits, accepts or obtains from another person, for himself or for any other person, a gratification for -
 - (a) doing or abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties;

- (b) doing or abstaining from doing, or having done or abstained from doing, an act which is facilitated by his functions or duties;
- (c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties;
- (d) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official, in the execution of the latter's functions or duties;
- (e) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, another person in the transaction of a business with a public body,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

- (2) Notwithstanding Section 83, where in any proceedings against any person for an offence, it is proved that the public official solicited, accepted or obtained a gratification, it shall be presumed, until the contrary is proved, that the gratification was solicited, accepted or obtained for any of the purposes set out in subsection (1)(a) to (e)

(iii) Section 12 of PoCA 2002 -Bribery for procuring contracts reads as follows:

- (1) Any person who gives or agrees to give or offers a gratification to a public official in consideration of that public official giving assistance or using influence in -

- (a) promoting, executing, or procuring a contract with a public body for the performance of a work, the supply of a service, or the procurement of supplies;
- (b) the payment of the price provided for in a contract with a public body;
- (c) obtaining for that person or for any other person, an advantage under a contract for work or procurement,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

- (2) Any public official who solicits, accepts or obtains from any other person, for himself or for any other person, a gratification for giving assistance or using influence in -

- (a) promoting, executing, or procuring a contract with a public body for the performance of a work, the supply of a service, or the procurement of supplies;
- (b) the payment of the price provided for in a contract with a public body;
- (c) obtaining for that person or for any other person, an advantage under a contract for work or procurement,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

9.0 LIST OF MEMBERS OF THE SUBCOMMITTEE

- (i). *Mr. I. Jheengut, Director, Corruption Prevention and Education Division (CPED), ICAC-Chairperson*
- (ii). *Mr R. Sonea, Deputy Permanent Secretary, Ministry of Public Infrastructure, National Development Unit, Land Transport and Shipping*
- (iii). *Mr S. Tahalooa, Member, Procurement Policy Office (PPO), Ministry of Finance and Economic Development*
- (iv). *Mr P. Dursun, Acting Director, Mauritius Employers Federation (MEF)*
- (v). *Mr S. Pentayah, Manager, Procurement and Supply, Procurement Policy Office (PPO), Ministry of Finance and Economic Development.*
- (vi). *Mr P. Nastili, Chief Corruption Prevention Officer, ICAC*
- (vii). *Mr A. Maharaje, ex Executive Secretary, Mauritius Institute of Directors (MIoD) replaced by Mr N. Bhoyrul and Mrs J. Valls, CEO*
- (viii). *Ms F. Ibrahimshah, Communication Manager, Mauritius Chamber of Commerce and Industry (MCCI)*
- (ix). *Mr R. Bablee, Executive Director, Transparency International (Mauritius)*
- (x). *Mr A. Noorah, Senior Accounting Technician, Office of Public Sector Governance (OPSG)*

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