

REGULATION OF ELECTRONIC PROCUREMENT FRAMEWORK IN INTERNATIONAL ORGANIZATIONS

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ABSTRACT

Electronic procurement enhances many objectives. Some among many are efficiency, transparency, cost reduction, cross-border commerce, protection of health and safety, tracking of expenditure and revenue, corruption control just to mention a few. This paper analyses the regulation of electronic procurement framework in international organizations by employing the doctrinal legal method through analyzing the various legal documents like journals and various research papers, websites and blog.

The objective was to check out the best practices of electronic procurement framework by some of the international organizations. The World Trade Organization (WTO), the United Nations Commission on International Trade Law and the European Union (EU) have earmarked as the representatives of other international organizations.

The author has reviewed the 2012 Agreement on Government Procurement of the World Trade Organization (WTO), the Model Law on Public Procurement of the United Nations Commission on International Trade Law (UNCITRAL Model Law) and the 2014 Public Procurement Directives of the EU to offer the example of how successfully electronic government procurement is implemented.

The study has revealed that both the international organizations assessed recognize electronic procurement. They have frameworks that allow the digitalization of public procurement as source of transparency, non-discrimination, equal treatment, competition and the efficiency.

With above views, the author recommends to all international organizations and governments worldwide yet to recognize e-procurement if any to either amend or repeal and re-enact their

traditional paper-based procurement regulatory framework into e-procurement framework in order to comply with advancement of digital technology but also to achieve effective, efficient and adequate regulatory framework of electronic procurement.

Keywords: e-Procurement, The World Trade Organization (WTO), the United Nations Commission on International Trade Law (UNCITRAL Model Law) and the Public Procurement Directives of the EU.

INTRODUCTION

The adoption of ICT has rendered different states and international organizations globally to make legal framework regulating e-procurement as the best method for the public procurement. The core legislative requirements for electronic procurement and e-commerce recognize electronic procurement as being of same level with manual procurement. Likewise, mandating the use of electronic procurement as per phasing plan, amendments to bid document conditions to suit electronic procurement and commanding to online vendor registration as a requirement for participating in procurement and for submission of bid.

This study reviewed the legal framework on electronic procurement of the WTO, the United Nations Commission on International Trade and the European Union and lastly provided for the conclusion.

Methodology

The author employed the doctrinal legal method by visiting and analyses the various legal documents like books, journals, research papers such as theses and dissertations, articles and relevant websites and blog.

Objective

The objective of this paper was to examine the best practices of electronic procurement framework by some of the international organizations.

Principles for Public Procurement Systems

Public procurement refers to the purchase of goods, services and works by government and state-owned enterprises. Therefore, government carries out procurement with high standards of conduct in order to ensure high quality of service delivery and safeguard the public interestⁱ. The aim is to achieve overall objective that is to meet the value for money to the ministries, agencies and local governments by ensuring that public funds are spent in a transparent, efficient and fair mannerⁱⁱ. The use of information technology by government especially internet in conducting their procurement of works, goods and consultancy services by the public sector is referred as e-government procurementⁱⁱⁱ. In whatever a case, either paper-based procurement or electronic procurement, the public procurement system shall be based on globally accepted universal procurement principles which are value for money, economy, integrity, fit for purpose, efficiency, transparency and fairness^{iv}. These principles are the foundations of public procurement and govern the framework for a code of conduct for public procurement practitioners and all other officials directly or indirectly associated with the public procurement process. Many government entities globally struggle to meet unrelenting budget constraints; government downsizing; public demand for increased transparency in public procurement; and greater concerns about efficiency, fairness, and equity and even policy makers have increasingly used public procurement as a tool to achieve socioeconomic goals^v. The World Bank policy on procurement in investment project financing and other operational procurement matters defines these principles to include^{vi};

1. Value of money: This refers to effective, efficient and economic use of resources that requires an evaluation of relevant costs and benefits; assessment of risks, non-price attributes and or life cycle costs.
2. Economy: This entails the consideration of factors like sustainability, quality and non-price attributes that support value for money.
3. Integrity: Means the use of funds, resources assets and authority according to planned purposes and public interest in which principles of governance are subject in all parties involved in the procurement process while observing the highest standard of ethics and refrain from fraud and corruption.

4. Fit for purpose: This applies to the intended outcomes and the procurement arrangement in determining the most appropriate approach to meet development objectives and outcomes by considering the risk, value and complexity of the procurement
5. Efficiency: This is underlying to the procurement processes value and risks of the project activities and also time sensitive and avoids delays.
6. Transparency: This details that the relevant procurement information should be made publicly to all interested parties and in timely manner with appropriate reporting of procurement activities' and use of confidential provisions in contracts where necessary
7. Fairness: It refers to equal opportunity and treatment for bidders and consultants: including equitable distribution of rights and obligations between and credible mechanisms for addressing procurement complaints and providing recourse.

The above principles are consistent with European Union (EU) Procurement Directive 2014/24/EC that requires freedom of establishment and the freedom to provide services plus equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Also, the United Nations Commission on International Trade Law on Public Procurement (UNCITRAL)^{vii} emphasizes on contributing to the achievement of a harmonized and modern legal framework for public procurement that promotes economy, efficiency and competition in procurement and the same time fosters integrity, confidence, fairness and transparency in the procurement process.

LEGAL FRAMEWORK FOR ELECTRONIC PROCUREMENT BY INTERNATIONAL ORGANIZATIONS

The following are highlights of legal framework on electronic procurement of the WTO, the United Nations Commission on International Trade and the European Union;

The World Trade Organization (WTO) Agreement on Government Procurement 2012

The World Trade Organization (WTO) is international organization that deals with the global rules of trade between nations with main role of ensuring the trade flows smoothly, predictably and freely^{viii}. On 30 March 2012, the WTO made revise of its agreement on government

procurement and came up with general principles on government procurement. These general principles inter alia recognized the importance of using and encouraging the use of electronic means for procurement in following;

First of all, the Agreement provided the definition of electronic auction as an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices or new values for quantifiable non-price elements of the tender related to the evaluation criteria or both resulting in a ranking or re-ranking of the tenders^{ix}

The general principles provided by WTO Agreement insisted on use of electronic to conduct procurement as provided;

“when conducting procurement by electronic means, a procuring entity should ensure that the procurement conducted using information technology systems and software, including those related to authentication and encryption of information that are general available and interoperable with other general available information technology systems and software. Also, should maintain mechanisms ensured the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access”^x.

The WTO Agreement furthermore provides for technical specifications and tender documentation. On technical specifications the Agreement state that;

“A procuring entity shall not prepare adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles”^{xi}.

On tender documentation, the WTO Agreement state that;

“A procuring entity shall make available to suppliers’ tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders”. Unless provided in the notice of intended procurement, and such documentation shall include a complete description of; the procuring entity to conduct the procurement by electronic means, any authentication and encryption requirements or other requirements related to the submission

of information by electronic means. Where the procuring entity hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, the auction conducted, any other terms or conditions, including terms of payment and any limitations on the means by which tenders submitted, whether on paper or by electronic means and any dates for the delivery of goods or the supply of service^{xii}.

The Agreement permits reduction of time-periods for tendering for a procuring entity to be below 40 days under the following circumstances;

- (a) The notice of intended procurement is published by electronic means
- (b) All the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement and
- (c) The entity accepts tenders by electronic means^{xiii}

The Agreement provides further the requirement for electronic auctions that, where a procuring entity conduct a procurement using an electronic auction, the entity provide each participant before commencing the electronic auction with; the automatic evaluation method, including the mathematical formula based on the evaluation criteria set out in the tender documentation and use it in the automatic ranking or re-ranking during the auction. The results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender and any other relevant information relating to the conduct of the auction^{xiv}.

Briefly, the World Trade Organization (WTO) Agreement on Government Procurement 2012 has contributed a lot in improving procurement by providing some general principles that recognize the importance of using electronic means for procurement in order to build competition, transparency, efficiency, equal treatment of bidders and integrity.

The United Nations Commission on International Trade Law (UNCITRAL Model Law) on Public Procurement 2011

According to the World Bank, the UNCITRAL Model Law on public procurement 2011 contains procedures and principles that aimed at achieving value for money and avoidance of abuses in the procurement process while promoting objectivity, fairness, participation,

competition, integrity and transparency^{xv}. The 2011 Model Law replaced the 1994 UNCITRAL Model Law on procurement of goods, Construction and services that recognized as an important international benchmark in procurement law reform.

In 2004 the Commission agreed that the 1994 Model Law would benefit from being updated to reject new practices in particular those resulting from the use of electronic communication in the public procurement. This came by the experience gained in the use of that Model Law, as a basis for Law Reform and does not changed the principles and main procedures from the 1994 text^{xvi}. Therefore, the conditions to be met for any use an electronic reverse action was provided in the UNCITRAL Model law on public procurement as follows;

- (i) The conditions for use an electronic reverse action;

According to the provisions of the chapter VI of the UNCITRAL Model Law on Public Procurement 2011; a procuring entity that may engage in procurement by means of electronic reverse action if shall fulfil the following conditions;

- (a) It is feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement
- (b) There is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse action and that there is ensured effective competition and
- (c) The criteria used by the procuring entity in determining the successful submission are quantifiable and expressed in monetary terms.

Additionally, a procuring entity may use an electronic reverse auction as a phase preceding the award of the procurement contract in a procurement method as appropriate and use an electronic reverse auction for award of a procurement contract in a framework agreement procedure with the second–stage competition^{xvii}.

- (ii) The electronic reverse action is a standard-alone method of procurement^{xviii}.

The law provides that, the procurement regulation should assist the procuring entity in the assessment of the circumstances that would necessitate the pre-auction ascertainment of

qualifications of bidders or examination and or evaluation of initial bids. For example, for procurement of off-the-shelf subject matter, there is almost no risk that bids will turn out to be unresponsive and little risk of bidders being unqualified^{xxix}. Also, the procurement regulation establishes requirements that included in the solicitation in addition to those listed in article, to specify the media and means of publication of the invitation to the auction, including that ensured effective access by suppliers and contractors located overseas and should list for ease of reference all grounds for the rejections of initial bids^{xx}.

(iii) That electronic reverse action is a phase preceding the award of the procurement contract.

This demands that when an electronic auction is used as a phase preceding award of the procurement contract in procurement method or in a framework agreement procedure with second-stage competition, the procuring entity should notify suppliers or contractors when first soliciting their participation in the procurement proceedings. Also, an auction held including the mathematical formula used in the evaluation procedure during the auction and how the auction is accessed^{xxi}. Similarly, before the electronic reverse auction is held, the procuring entity shall issue an invitation to the auction to all suppliers or contractors remaining in the proceeding with specifying the deadline the suppliers or contractors must register for the registration and requirement for registration. Others are the date and time of the opening auction and requirements for identification of bidders at the opening of the auction; criteria governing the closing of the auction and other rules for the conduct of the auction like information available to the bidders during auction and the conditions which the bidders will be able to be bid^{xxii}. Furthermore, where an evaluation of initial bids has taken place, each invitation to the auction which should be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed^{xxiii}.

(iv) The conditions on the registration for the electronic reverse auction and the timing of the holding of the auction;

The law provides the confirmation of registration for the electronic reverse auction should be communicated promptly to each registered supplier or contractor. In case the number of suppliers or contractors registered for electronic reverse auction are insufficient for effective

competition, the procuring entity may cancel the auction but the cancellation should be communicated to each registered supplier or contractor. The period between the issuance of the invitation to the electronic reverse auction and the auction shall be sufficient to allow suppliers or contractors to prepare for the auction while considering the reasonable needs of the procuring entity^{xxiv}

(v) The requirements during the electronic reverse auction;

The law outlines that where the procurement contract awarded the lowest-priced bid or the most advantageous bid shall be the base. The disclosure of identity of bidders during and after the auction must be prohibited. Any operator of the auction system on behalf of the procuring entity must be bound by the rules for conducting the auction for example non-disclosure by any means of identity of bidders before, during and after the auction^{xxv}.

(vi) Requirements after the electronic reverse auction

The law describes the guidelines on the options the procuring entity must consider if the winner turns out to be unqualified or its bids unresponsive or rejected as abnormally low. It needs the next lowest priced or next most advantageous bid at closure of the auction provided the bid is ascertained to be responsive and the supplier or contractor submitting is ascertained to be qualified^{xxvi}. Although the Model law is not binding on any country but it offers, useful backdrop to procurement reform in countries around the world and allow for greater participation in the procurement systems of other countries^{xxvii}. In that regard therefore, the UNCITRAL Model law has assisted many nations to reform and modernize their laws on procurement procedure and hence ensuring competition, transparency, fairness and buy goods and services in efficiency.

Public Procurement Directives of European Union 2014

The background of the Public Procurement Directives of European Union originated in 2014. It is time when the European countries transposed to a package of three directives that set out the EU legal framework for procurement. These are the Concessions Contracts Directive 2014 (Directive 2014/23/EU); the Directive on Public Procurement (the Directive 2014/24/EC) and the directive on procurement by entities operating in water, energy, transport and postal service

sectors known as the Public authorities and utilities 2014(Directive 2014/25/EU). These directives became nation law in order to provide the necessary guidance on public procurement under the EU Member states^{xxviii}. These current rules simplify public procurement procedures and make them more flexible, promote the free movement of goods and services that result to contracting authorities obtain better value for money as well as electronic self-declaration for bidders which pave a way for digitalization of public procurement and hence increase the efficiency of the public procurement system^{xxix}. These three directives repealed the directives 2004/18/EC and 2004/17/EC.

The brief details are as follows;

(i) The concession contracts directive (Directive 2014/23/EU)

This directive arises from two commission interpretative communications on concessions under community law 2000/C/121/02 of April 2000 and Commission interpretative communication on the application of community law on public procurement and concessions to institutionalized public-Private Partnerships 2008/C91/02 of April 2012. This directive is the major innovation of the new European package on public procurement and foresees the basic principle of free administration by the public authorities and principle of equal treatment, non-discrimination and transparency^{xxx}. Additionally, the subjective cope of application of the directive based on distinction between contracting authorities and contracting entities in which the contracting authorities comprehend the classic public law bodies governed by public law like state, regional or local authorities^{xxxii} while the contracting entities cover the bodies that pursue one of the activities exercised by contracting entities^{xxxii}.

Regarding to the award procedure, this is another innovation of electronic procurement which is based on principle of freedom of choice which is aimed at the conclusion of a concession contract must be available electronically^{xxxiii}. This intends to meet a goal that achieve with measure, to greatly simplify the publication of concessions and increase the efficiency, speed and transparency of concession award processes and also the directive foresees the selection and qualitative assessment of candidates and the award criteria^{xxxiv}. Moreover, this directive consists of rules on the performance on contract concessions^{xxxv} including things like modification of contracts during their term termination of concessions and monitoring and

reporting procedure^{xxxvi}. The backbone of this directive is Agreement of the European Member States through the European Parliament and the Council of the European Union which provided;

“Electronic means of information and communication simplify the publication of concessions and increases the efficiency, speed and transparency of concessions award processes. They could become the standard means of communications and information exchange in concession award process as they enhance the possibilities of economic operators to participate in concession award procedures across the internal market”^{xxxvii}.

(ii) The Public Procurement Directive (Directive 2014/24/EU)

This directive repeals the directive 2004/18/EU and form two major changes; one is the existence of a new kind of award procedure alternatively known as innovation partnership and two is the existence of the rules of the performance on contracts.

On the innovation partnership or award procedure the contracting authority is required to identify the need for innovative product or service or works through a contract notice that can't be made by purchasing products, services or works already available on the market. The framework indicates which elements define the minimum requirements to be met by all tenderers and also contracting authority shall negotiate with tenders the initial and all subsequent tenderers submitted by them except for the final tender in order to improve the content thereof that means award procedure and rules on the contract performance.

As per the award procedure, the same is named as open procedure and the directive foresees a competitive procedure with negotiation while the rules on the contract performance which provides the circumstances for subcontracting and modification of contracts during their term. According to Cuatrecasas^{xxxviii}, modification may be done; where the modifications have provided for in initial procurements documents; for additional works, services or supplies by the original contractor. Similarly, where a change of contractor can't be made for economic or technical reasons or would cause significant inconvenience or substantial duplication of costs for the contracting authority. The modification allowed in case the need for modification brought by circumstances that a diligent authority could not foresee, if the modification does

not alter the overall nature of the contract and if the increase in price is not higher than 50% of the original contract or framework agreement.

Additionally, the Directive 2014/24/EU recognizes a new technique and aggregated procurement, electronic auctions and electronic catalogues as per Articles 33, 35 and 36 of the directives respectively. However, the origin of this directive came from Agreement of EU Member States whereas stated;

“Electronic means of information and communication simplify the publication of contracts, increase the efficiency and transparency of procurement processes. They should become the standard means of procurement procedures as they enhance the possibilities of economic operators to participate in procurement procedures across the internal market. For that purpose, electronic communication meaning communication by electronic means at all stages of the procedure including the transmission of request for participation and in particular the transmission of tenders (electronic submission) should be mandatory and Member States should not be obliged contracting authorities to carry out electronic processing of the tenders nor mandate electronic evaluation or automatic processing”^{xxxix}.

(iii) Public Procurement on Utilities Directive (Directive 2014/25/EU)

This directive repealed directive 2004/17/EC and established the rules on the procedures for procurement by contracting entities with respect to contracts, design contests and service contracts. The contracting entities are contracting authorities or public activities which pursue one of the activities referred in accordance to Articles 8 to 14 of the Directive 2014/25/EU which include, gas and heat, electricity, water, transport services, ports and airports, postal services and extraction of oil and gas and exploration or extraction of coal and other solid fuels. However, Agreements No. 63 and 64 of EU of Member States have contributed a lot into formation of this directive. For example, Agreement 63 stipulates;

“Electronic means of information and communication simplify the publication of contracts, increase the efficiency, and transparency of procurement processes. They should become the standard means of procurement procedures as they enhance the possibilities of economic operators to participate in procurement procedures across the internal market. For that purpose,

transmission of notices in electronic form, electronic availability and fully electronic communication, meaning communication by electronic means at all stages of the procedure, including the transmission of requests for participation and in particular, the transmission of tenders (electronic submission) should be made mandatory. Additionally, it is mandatory for contracting entities to carry out electronic process of tenders nor it mandate electronic evaluation or automatic process. Furthermore, no elements of the public procurement process after the award of the contract should be covered by the obligation to use electronic means of communications nor initial communication within the contracting entity^{xi}, whereas, Agreement 64 details that; “contracting entities should use electronic means of communications which are non-discriminatory, generally available and interoperable with ICT products in general use and do not restrict economic operators` access to the procurement procedure. The use of such means of communications should take accessibility into due account. Obligation to use electronic means that require specialized tools or file formats that are not generally available nor communication concerned could be handled using specialized office equipment. The contracting entity should not oblige to require the use of electronic means of communication in the submission process in certain cases which must be listed exhaustively^{xli}.

Briefly, major innovations done by this new directive came out with the existence of a new award procedure alternatively known as innovation partnership^{xlii}. Other innovations include rules on the contract performance, use of electronic auctions by contracting entities and the electronic catalogues in tender^{xliii}. These become the new instruments for electronic procurement, aggregated procurement and the grounds for exclusion and selection of candidate’s criteria.

Therefore, the Procurement Directives of European Union 2014 meant to simplify public procurement procedures and promote the free movement of goods and services that result to contracting authorities in order to obtain better value for money and recognition of electronic procurement for bidders of tenders for contracts. They are frameworks that pave a way for digitalization of public procurement and hence increase transparency, non-discrimination, equal treatment, competition and the efficiency as principles of the public procurement system.

CONCLUSION

The study has reviewed that the international organizations like the World Trade Organization (WTO) through Agreement on Government Procurement 2012, the United Nations Commission on International Trade Law (UNCITRAL Model Law) on Public Procurement 2011 and the Public Procurement Directives of European Union 2014 have recognized electronic procurement. With introduction of ICT globally, many governments and organizations apply electronic procurement to enhance efficiency, transparency and cost reduction. Additionally, it has been learnt that, the superlative principles of procurement framework aim at achieving value for money and avoidance of abuses in the procurement process including promotion of objectivity, fairness, participation, competition, integrity and transparency. Therefore, for the effective procurement, the different global organizations and governments are recommended to either to amend or repeal and re-enact their traditional paper-based procurement regulatory framework into e-procurement framework in order to comply with advancement of digital technology but also to achieve effective, efficient and adequate regulatory framework of electronic procurement.

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