

Implications of Multiple Procurement Regimes: a Case Study of Ghana and the Specific Issue of Correction of Errors in Tenders

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Abstract

Foreign aid donors usually require the use of their procurement rules for the implementation of funded projects in developing countries. This approach is motivated largely by unreliable systems in recipient countries which provide little assurance on the proper use of donor funds. However, these donors' procurement rules are considered external to the aid recipient country, which becomes applicable in addition to existing domestic rules on procurement. The above situation creates multiplicity and parallel application of different sets of procurement rules within the recipient country. This conference paper uses Ghana as a case study to examine the possible policy implications for applying multiple procurement rules, with a focus on the specific area of correction of errors in tenders once submitted tenders have been opened. In analysing procurement procedures of some donors including the World Bank, the paper questions the justification for the current aid arrangements.

Introduction

Developing countries often rely on foreign aid to undertake major development projects. Many African states have been beneficiaries of foreign aid and indeed Africa has consistently remained a top destination for EU external aid.¹ Ghana in particular has become a preferred destination for several donors as well as private sector businesses that are capable of providing the government's procurement needs. This development could largely be attributed to the country's relative socio-political stability. Foreign aid plays a significant role in Ghana's development agenda, representing about 17% of GDP and about 80% of tax revenue.² Presently, Ghana receives Official Development Assistance (ODA) from over 32 donors, with their support focussed on 11 sectors; but most notably in the health and education sectors.³

Many states including developing countries have enacted procurement legislations that are applicable to procurement funded with national resources. However, foreign aid to developing countries such as Ghana is predicated on a number of conditions,⁴ notably, the requirement to follow procurement rules and procedures provided by the donor. This requirement by donors is intended to ensure the proper use of its funds. The requirement to use donor rules may be justified especially where domestic systems are unreliable in safeguarding the proper use of funds. Unreliable domestic

¹ EU Donor Atlas 2012, <http://development.donoratlas.eu/> (accessed 20 February 2014).

² World Bank, 2008, Ghana 2007 External Review on Public Financial Management, Vol. 2, Public Procurement Assessment Report.

³ OECD Statistics, www.oecd.org/dac/stats (accessed 20 February 2014).

⁴ For more information on aid conditionalities in general, see A. La Chimia, *Tied Aid and Development Aid Procurement in the Framework of Eu and Wto Law: The Imperative for Change* (Hart Publishing, 2011).

systems may constrain donors in achieving the desired outcome of projects and also ensuring accountability to their lenders and taxpayers.

The argument for the use of donors' procurement rules becomes controversial especially in developing countries such as Ghana, that are reforming their domestic procurement systems, perhaps with the help and recommendation of donors, based on recognised international standards such as those provided in the UNCITRAL Model Law. Procurement rules of Donors are directly applicable and operate as additional rules to the existing domestic ones on procurement. Consequently, multiple procurement rules are in fact, applicable in Ghana; the use of individual donor's rules on its funded projects in addition to domestic rules when procurement is funded from national resources.

The above situation may pose challenges for procurement officers who are required to apply these rules. These procurement officers are usually regular civil servants who may have other duties under the domestic system. Significantly, the same procurement officers are usually responsible for the implementation of both domestic and donor-funded procurement rather than states having officers specialised in conducting either only domestic or only donor-funded procurement.⁵ Given that these procurement officers are already constrained in terms of capacity due to the country's decentralisation programme as will be seen below, having the same officers to navigate through the multiple procurement rules, exacerbates their constraints. This is a problem that is inherent in many other developing countries.⁶ The use of donors' rules in addition to the domestic rules in Ghana raises issues of interaction with possible gaps and overlaps in the rules which could have potential policy implications.

This conference paper draws on the author's on-going research thesis, which aims to analyse the issue of multiple procurement regimes in Ghana and its policy implications. Analysis in the thesis focuses on selected donor organisations; the World Bank, the EU external aid and some US aid agencies, who make up the largest donors in Ghana. It is acknowledged that analysing data from just 3 donors may not be representative. However, the practices of these major donors largely reflect those of other donor regimes in Ghana. For example, the World Bank's rules have served as a model for other donors such as the African Development Bank (AfDB) which also provides development aid to Ghana. The UNCITRAL Model Law regime provides a unique aspect of interaction as a non-donor organisation that provides a model law on procurement which is widely recognised and accepted as an international standard.⁷ The UNCITRAL Model Law has served as a model for the procurement rules in Ghana and many other African countries for the purposes of their domestic regulation. In this regard, the Model Law will serve as a reference point for analysing the domestic procurement rules.

The research relies on the examination of both primary and secondary sources of information, including official government policy documents, reports and policy papers by the aforementioned donor organisations. Also, enquiries and clarifications were sought from procurement officers and

⁵ Information obtained by author during fact finding discussions with some procurement officers in Ghana.

⁶ P. Trepte, "Building Sustainable Capacity in Public Procurement," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. S. Arrowsmith and R. Anderson (Cambridge University Press, 2011). Ch. 12.

⁷ S. Arrowsmith and G. Quinot, *Public Procurement Regulation in Africa* (Cambridge University Press, 2013).

practitioners in Ghana to assist in identifying the text of provisions and to confirm practices as identified in the provisions. Elements of comparative analysis are also employed to aid understanding of the extent to which the various procurement regimes differ or cohere. As noted earlier, the research is in the preliminary stages and this paper presents a case study on the issue of multiple procurement regimes in one specific area that has been selected for the conference. In this respect, the focus is on the specific area of correction of errors in tenders once submitted tenders have been opened. However, the issues identified in this paper are applicable to other areas of procurement regulation.

The importance of this specific issue of correcting tenders lies mainly in the complexity of the process which offers different approaches that could be adopted by procurement officers to obtain similar results. It is also a highly technical stage that could be exposed to significant potential for abuse. The procurement officer is required at this stage, to take several factors, perhaps simultaneously into consideration such as the objectives and principles of the procurement. For the supplier, it is a critical stage in determining its success or failure to remain in the pursuit for the contract. In Ghana for example, tenderers often contact the procurement entity to check the progress of evaluation or to provide unsolicited clarifications.⁸

The paper first outlines the domestic context of procurement in Ghana with its objectives and purpose of regulation. Discussions will then focus on how correction of errors is made in Ghana with reference to the UNCITRAL Model Law. Correction of errors under the World Bank and under EU external aid regimes respectively, will subsequently be discussed. Next, issues on the interaction of the regimes in achieving national policy objects will be discussed and then concluding with some comments.

Domestic Context of Procurement Regulation

Ghana is one of the many African countries undergoing procurement reforms, largely motivated by the inherent inefficiencies prevalent since its independence in 1957.⁹ A significant achievement in this respect is the enactment of the Public Procurement Act (Act 663) of 2003, a legal instrument enacted by an Act of Parliament which is a legally binding procurement law for the purpose of domestic regulation.¹⁰ Procurement is regulated at the central level of government with a designated body referred to as the Public Procurement Authority (PPA) to supervise and coordinate procurement activities.¹¹ Procurement is carried out in line with the decentralised system of administration in Ghana and supported by the central regulation. This means that purchasing is carried out at a local level by the officers who need the goods, works, and services without reference

⁸ Public Procurement Authority Manual section 4.14

⁹ S. Arrowsmith and G. Quinot, *Public Procurement Regulation in Africa* (Cambridge University Press, 2013); Benon Basheka, "Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction," in *International Handbook on Public Procurement*, ed. Khi V. Thai (2009); D. N. Dagbanja, *The Law of Public Procurement in Ghana; Law, Policy and Practice* (Lambert Academic Publishing, 2011); A. Anvuur, M. Kumaraswamy, and S. Male, "Taking Forward Public Procurement Reforms in Ghana," (CIB, 2006).

¹⁰ The Public Procurement Act of Ghana (Act 663), 2003.

¹¹ For more information on the PPA, see <http://www.ppbghana.org/> (Accessed 20 February 2014).

to anyone else within the contracting authority. The effect of this is that procurement responsibility is placed on public entities and officers, many of whom were not necessarily prepared for this role and are consequently facing capacity challenges.

Objectives of domestic regulation of procurement in Ghana

The objectives of regulating procurement in Ghana have been motivated mainly by domestic concerns, perhaps as a result of the inherent inefficiencies that initiated the reform process. These objectives contained in the procurement law, are not independently stated but are rather reflected in the objectives for establishing the PPA as the procurement oversight body in Ghana. Section 2 of the Public Procurement Act provides that, the purpose is “to harmonise the processes of public procurement in the public service to secure a judicious, economic and efficient use of state resources in public procurement and ensure that public procurement is carried out in a fair, transparent and non-discriminatory manner”. A closer examination of this provision could highlight a number of objectives for regulating procurement in Ghana.

Firstly, the aim “to secure a judicious, economic... use of state resources” refers to the objective of obtaining “value for money” or “maximising economy” in procurement. Value for money entails acquiring goods and services on the best possible terms and of a quality that is fit for purpose.¹² In this regard, products obtained may not always be at the lowest price but essentially the best available price in relation to the value to be derived from the product. Obtaining value for money may be the major objective of the procurement system due to its high ranking on the list of objectives.¹³ The UNCITRAL Model Law, on which the procurement law in Ghana and many of the African regimes are closely modelled,¹⁴ clearly states the maximisation of economy as the first of its objectives in its preamble.

Secondly, the requirement “to secure... efficient use of state resources” highlights efficiency as an objective for regulating procurement in Ghana. Efficiency requires that procurement is conducted in a timely and cost-effective manner. This means that the procurement process should not be unduly delayed and resources should be used in a manner that reduces waste. According to Arrowsmith, “whatever the goal pursued, rules on procurement will always take account of the objective of efficiency...”¹⁵

Thirdly, the “fair... and non-discriminatory” manner in which procurement shall be conducted suggests an objective of fairness and non-discrimination. Fairness requires not taking advantage of any of the parties in the procurement process. Non-discrimination requires impartiality except where otherwise justified by law. Discrimination occurs if the procurement procedure is such that it treats

¹² P. Badcoe, "Best Value - a New Approach in the UK," in *Public Procurement: The Continuing Revolution*, ed. S. Arrowsmith and M. Trybus(Kluwer Law International, 2003).p.197.

¹³ D.N. Dagbanja, "The Regulatory Framework for Public Procurement in Ghana," in *Public Procurement Regulation in Africa* ed. S. Arrowsmith and G. Quinot(Cambridge University Press, 2013).p.80.

¹⁴ Ibid

¹⁵ Arrowsmith. Note 19 below, p.10.

differently any potential bids that are identical in every commercially relevant respect.¹⁶ Non-discrimination rules are directed mainly at procurement officials possessing some discretion in decision making. This may not be far different from fairness in that they both relate to how parties are treated.

Fourthly, transparency as an objective in Ghana denotes openness where expectations and requirements of the process are clear and accessible to parties. This means that all information including procurement opportunities must be made known to interested parties. In this regard, transparency is a key element in achieving value for money and may be relevant to a large extent in achieving other objectives of procurement in Ghana.¹⁷

In addition to the above, specific provisions in the Procurement Act suggest the likely existence of other objectives not explicitly included in the statement of objectives of the PPA. Particularly, section 3(t) of the Procurement Act requires the Public Procurement Authority to “assist the local business community to become competitive and efficient suppliers to the public sector”. This provision, in addition to the use of some specific criteria for the award of contracts suggests the pursuit of industrial and social policy objectives. The industrial and social policy entails giving preference to local products in the award of contracts where for example specified domestic content may be required for the award of contracts¹⁸.

The above objectives may be relevant when applying the domestic rules on specific procurement matters including those on the correction of tenders. In this regard, it may be necessary for the procurement entity to decide at the outset of the procurement process on which policy objectives to pursue. Consideration may also be given to objectives of procurement funded by donors, which raises further concerns as to whether or not donors’ objectives conflict or supplement the pursuit of domestic concerns.¹⁹

Correction of errors under the domestic system in Ghana

As a general rule according to the Procurement Act, tenders shall meet requirements set out in the tender documents as pre-disclosed to tenderers.²⁰ In this respect, “no change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.”²¹ This position generally, prohibits correction of errors as a possible away of deterring suppliers from making mistakes in tenders to

¹⁶ S. J. Evenett and B. M. Hoekman, "Transparency in Government Procurement: What Can We Expect from International Trade Agreements?," in *Public Procurement: The Continuing Revolution*, ed. S. Arrowsmith and M. Trybus (Kluwer Law International, 2003), p.272.

¹⁷ S. Arrowsmith, "Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization," *Journal of World Trade* 37, no. 2 (2003). p.287-303.

¹⁸ Public Procurement Act, (Act 663), article 60.

¹⁹ For a comprehensive analysis of the possible harmony or conflict between national and international procurement objectives, see S. Arrowsmith, "National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict," in *Public Procurement: Global Revolution*, ed. S. Arrowsmith and A. Davies (Kluwer Law International, 1998).

²⁰ Public Procurement Act, (Act 663), article 58(1).

²¹ *Ibid* article 57(2).

ensure maximum compliance with the rules. However, considering the pursuit of other policy objectives, the provision distinguished between changes that affect the substance of tenders from those not affecting the substance of tenders as discussed below.

As an exception to the general rule, correction of errors is permitted in two main situations:

- **Correction of arithmetic errors:**²² arithmetic errors such as omissions or inconsistency of figures could create ambiguities and may become the subject of legal challenge if accepted without correction. The Procurement Act provides that “notwithstanding subsection 2 (on prohibiting changes to tenders), the procurement entity shall correct purely arithmetical errors that are discovered during the examination of tenders”.²³ This provision clearly allows changes to tenders to be made and limits the scope of such changes to specific types of errors; the requirement to correct purely arithmetic errors. These are usually those errors not affecting the responsiveness of tenders since responsiveness appears to be determined prior or perhaps during the correction of any arithmetic errors as will be seen below. In this respect, correction of errors cannot make a nonresponsive tender become responsive.

A systematic study of the Standard Tender Documents provides some clarification on the scope of correcting arithmetic errors, stating that “(i). If there is a discrepancy between the unit price and the total price..., the unit price shall prevail and the total price shall be corrected. (ii). If there is a discrepancy between words and figures, the amount in words will prevail.”²⁴ Thus it appears that, if the error is not obvious in the sense that it is not clear what the right figure should be, inconsistencies shall be considered and corrected in the manner prescribed above. Such narrow scope for correction limits the discretion of the procurement entity in making judgements and ensures some certainty in application of the rules. This may perhaps, be relevant in developing countries like Ghana where procurement officers with the best of intentions could still misuse such discretion due to its limited skills in procurement.

- **Errors or oversights capable of being corrected:**²⁵ these relate to errors or oversights such as the omission of sections of the tender document, which may be corrected to meet the formal requirements of the tender without affecting its content or substance. The procurement entity may also waive such minor errors, which allows the tenders to be regarded as responsive despite the deviations.²⁶ In such cases, the deviations shall be quantified to the extent possible and taken into account during evaluation.²⁷ This provision could encourage maximum participation of suppliers to ensure competition. An essential criterion is that such correction shall not touch on the substance of the tender.²⁸ However, there is little guidance and therefore open to different interpretations on what it means for

²² Ibid article 57(3).

²³ Ibid.

²⁴ Standard Tender Document (Information to Tenderers), clause 26.2.

²⁵ Public Procurement Act, (Act 663), article 58(2).

²⁶ Ibid.

²⁷ Public Procurement Act, (Act 663), article 58(3).

²⁸ Public Procurement Act, (Act 663), article 58(2).

corrections to touch on the substance of tenders. As will be discussed below, this situation provides scope for misinterpretation and perhaps potential for abuse.

It could be argued that corrections not touching on the substance of the tender may be allowed to affect the subject matter so long as such corrections do not change the tender to become responsive.²⁹ For example, supposing a tender contains an error in stating the capacity of a classroom as “0” in a contract for the construction of a classroom, where only the price is the award criteria. Subsequent clarification from the tenderer indicated an intended classroom capacity of “30”. In this case, correction of the tender may be allowed since it does not affect the substance of the tender though touching on the capacity of the classroom as the subject matter. However, supposing the capacity of the classroom is also an award criteria, correction in this case may not be allowed since the correction does not only affect the subject matter but also touches on the substance of the tender.

The argument above, considers the effect on the award criteria in determining whether or not the substance of the tender is affected. Thus where correction does not affect the award criteria, it could perhaps be considered as not touching on the substance of the tender and therefore may be permitted. This provides a wide scope for correcting errors though little room for abuse could be envisaged. The benefits could be a fair treatment of tenderers, which allows a wide participation to ensure competition, with the potential for obtaining value for money.

The 2011 version of the UNCITRAL Model Law serves as the current version of the Model Law on which the domestic procurement law in Ghana was modelled.³⁰ The 2011 Model Law also provides limited scope for correcting faulty tenders where similar wordings of the text of the provisions to those under the domestic law are identified. In this regard, the Model Law permits correction in the two situations outlined above.³¹

However, correction of errors under the Model Law does not apply to all cases where arithmetic errors are detected but depends, to some extent, on the method of procurement. As clarified in the Guide to enactment of the Model Law, the procurement entity is not permitted to correct arithmetic errors where firstly, such correction introduces substantive change to a tender, particularly where a nonresponsive tender will otherwise become responsive.³² Secondly, correction of arithmetic errors is not permitted under some methods of procurement including request for quotation and request for proposal methods.³³

In Ghana, the domestic law is not clear on whether or not the method of procurement could have any effect on correction of arithmetic errors. It appears that correction of arithmetic errors is generally permitted under all methods of procurement in Ghana though allowing some flexibility for

²⁹ S. Arrowsmith, “Public Procurement Regulation: An Introduction” (University Of Nottingham, 2010), P.70.

³⁰ The procurement law in Ghana was modelled on the 2004 version of the UNCITRAL Model Law. The Model Law has subsequently been updated in 2011 to include current developments and international best practices.

³¹ UNCITRAL Model Law on Public Procurement, (2011), article 16(2); 43(b).

³² Guide to Enactment of the UNCITRAL Model Law, article 16 para 6.

³³ Guide to Enactment of the UNCITRAL Model Law, article 16 para 5.

the tender documents to determine the manner in which correction will be carried out as seen above.³⁴

Correction of error under World Bank Projects

The rules on correction of bids³⁵ under the World Bank are provided in the Procurement Guidelines and the Consultant Guidelines.³⁶ Generally, bids are required to be substantially responsive, thus containing no material deviations and bidders shall neither be permitted nor invited by the procurement entity to correct or withdraw material deviations once bids have been opened.³⁷ The Guidelines make a distinction between material and non-material deviations and clearly prohibits changes to be made to material deviations. This provision is quite different in wording but appears rather similar in substance and content to the provision under the domestic law in Ghana as will be seen below.

The difference in the wording of the provisions is seen through the emphasis on the extent of deviation in tenders from all requirements, rather than the effect on the substance of the tender. As a result, differences in the actual outcome of the rules could be envisaged though largely uncertain. This uncertainty lies mainly in the use of quite vague terms such as “substance of a tender” or “material deviation” under the multiple regimes. There is little clarification on their exact intended meaning, which provides scope for misinterpretations and perhaps potential for abuse as indicated above. For example, it is unclear what constitutes the substance of a tender and whether or not correction that affects the award criteria could be considered as affecting the substance of the tender as illustrated above. Interpretation of these terms may vary under each procurement procedure and it allows procurement officers to adopt perhaps slightly different interpretations even under the same procedure, which may lead to differences in the outcome of the rules.

However, the Guidelines permit correction of errors in certain situations. Specifically, it provides that “the bid price read out at the bid opening shall be adjusted to correct any arithmetical errors. Also... adjustments shall be made for any quantifiable non-material deviations or reservations”.³⁸ In requiring correction of errors, the provision limits the scope of such corrections firstly, to arithmetic errors and secondly, to other types of errors that do not materially deviate from the requirements. The latter perhaps provides wide scope for correction as a result of the uncertainties in the use of the terms “material deviation” as discussed above. It provides some potential for abuse perhaps without the Bank’s control and oversight. Moreover, the Bank’s provisions impose a duty on procurement officers to correct tenders under both situations thereby preventing the use of discretion as to when correction could be made as explained below.

³⁴ Public Procurement Act, Manual, section 6.11 point 1.

³⁵ The terms bids and tenders, which corresponds with bidders and tenderers, are used interchangeably in this paper to denote the different terminologies adopted by the different regimes under review.

³⁶ Guidelines on Procurement under IBRD Loans and IDA Credits (January, 2011) covering procurement of goods, works and non-consulting services and Guidelines on the Selection and Employment of Consultants by World Bank Borrowers (January, 2011) covering procurement of consultant services.

³⁷ World Bank Procurement Guidelines para 2.48.

³⁸ World Bank Procurement Guidelines para 2.50.

These provisions, as a matter of content, are identical in many respects to those under the domestic law in Ghana where the scope of correction is narrowly defined as seen above. Firstly, both regimes require correction of arithmetic errors. Secondly, correction of other types of errors that is minor in nature and expressed as non-material deviations and do not touch on the substance of the tender, are allowed. For example, the submission of 2 copies of tenders instead of the required 3 copies may be considered as non-material deviations that do not touch on the substance of the tender. In this respect, such permitted corrections may be those affecting formal requirements with little effect on the tender itself.

However, it may be hard to tell, though likely, whether similarities in the content of the rules or the appearance thereof, could lead to the achievement of identical results. This uncertainty is largely due to the lack of clarity in the rules as indicated above, in addition to the degree of discretion that is available to procurement officers. The uncertainties in interpretation of the rules and whether or not it is accompanied by a discretion or duty to correct errors, may determine the approach of each individual procurement officer in arriving at different or identical results.

The World Bank's Guidelines are silent on the possibility of notifying bidders of any corrections or whether bidders shall give consent to corrected bids. The former is envisaged since according to the Guidelines, clarification may be sought to assist in bid evaluation.³⁹ In the case of the latter, the absence of the opportunity for bidders to give their consent on corrected bids or the lack of clarity thereof, could result in a bidder rejecting an award offer based on its dissatisfaction with corrected bid as will be discussed below. Given the large scale of World Bank funded projects in Ghana,⁴⁰ and for that matter, the frequent use of the its rules, the possibility of not seeking the consent of bidders on corrections may become the norm and adopted by procurement officers for even procurement funded from national resources. In this regard, procurement officers are likely to apply the Bank's possible standards to procurement funded from national resources though such standards go against domestic provisions where clear obligation to seek consent of bidders is imposed.

Correction of error under EU External Aid

EU external aid to Ghana is funded mainly from the European Development Fund (EDF), a specific budget composed of contributions from member states, which is made available to Ghana through the ACP-EU Partnership Agreement of Cotonou as amended in Ouagadougou.⁴¹ Rules on correction of tenders are provided in the Practical Guide (PRAG),⁴² a document with detailed explanation of the

³⁹ Ibid, para 2.47.

⁴⁰ In 2013, the World Bank implemented more than 200 funded projects in Ghana with Central Government Administration sector benefiting the most. For more information, see http://www.worldbank.org/projects/search?lang=en&searchTerm=&countryshortname_exact=Ghana (accessed 20 February 2014).

⁴¹ The ACP-EC Partnership Agreement signed in Cotonou on 23 June 20005 as revised first time by the Agreement signed in Luxemburg on 25 June 2005 and second time by the Agreement signed in Ouagadougou on 22 June 2010 (OJ 2010 L287/3).

⁴² Practical Guide to Contract Procedures for EU External Actions (PRAG), applicable from 14th March 2013. Publicly available at <http://ec.europa.eu/europeaid/prag/document.do?locale=en> (accessed 20 February 2014).

rules as a compilation of the severally scattered legal instruments applicable to procurement under EU external aid.

According to the PRAG, tenders are required to comply with three distinct categories; 1) Administrative compliance,⁴³ 2) technical compliance⁴⁴ and 3) financial compliance.⁴⁵ All three categories shall be satisfied and “where the content of a tender is incomplete or deviates substantially from one or more of... (requirements set out above), laid down in the tender dossier, the tender will be automatically rejected”.⁴⁶ Notwithstanding the strict appearance of the above provisions, only substantial deviations shall be rejected, which is similar in wording to those found under World Bank and also identical to those under the domestic law in Ghana as seen above. Particularly, the domestic provisions permit the waiver of non-material deviations⁴⁷ which could have identical effects as non-substantial deviations as provided under the EU external aid regime and the World Bank regime.

As an exception to the general rule above, correction of errors is permitted in specific situations where the evaluation committee is firstly, required to “correct any obvious arithmetic errors without penalties to the tenderer”.⁴⁸ Secondly, other minor formal and technical errors may be considered by the evaluation committee.⁴⁹ The former creates a requirement to correct errors and limits the scope of correction to obvious arithmetic errors. The latter provides a waiver of minor formal and technical errors at the discretion of the procurement entity, where tenders may be accepted despite not satisfying all requirements. The rules explicitly provide for correction under situations described above. However, it is unclear how other minor errors falling outside the categories explicitly provided may be treated. For example, it appears that arithmetic errors that are not obvious, thus where it is not clear on the face of it as to what the right figure should be, corrections in such cases may be prohibited. However, inconsistencies for example in the unit and total prices or ambiguities resulting from arithmetic errors are required to be corrected by seeking clarification from the bidder.⁵⁰

These provisions are identical to those found under the domestic system in Ghana with regards to the degree of discretion for correcting errors that are minor in nature. This presents one of the rare situations where the procurement officer could actually apply donors’ rules in an identical manner as those under the domestic system, though the objective of the regimes for adopting the identical approach may not necessarily be the same. This situation effectively reduces the confusion of the procurement officer and may further support the achievement of national policy objectives.

⁴³ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 3.3.10.3 part 1.

⁴⁴ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 3.3.10.3 part 2.

⁴⁵ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 3.3.10.4.

⁴⁶ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 3.3.10.3 part 2.

⁴⁷ See note 30 above.

⁴⁸ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 3.3.10.4; section 4.3.9.5; section 5.3.9.5.

⁴⁹ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 3.3.10.3 part 1 para 1; part 2 para 2.

⁵⁰ *Tideland Signal Ltd v Commission of the European Communities* (T-211/02) [2002] E.C.R. II-3781 (CFI (1st Chamber)); also see analysis of the case, P. Kalbe, “EC-external aid: some comments on the Tideland case”, 12(2) *Public Procurement Law Review*, 2003, NA22-NA27.

Contrary to the domestic rules in Ghana however, only the successful tenderer under EU funded projects is notified of corrections, if any, in its tenders, which is communicated in the award notice.⁵¹ The situation above is likely to create confusion for the procurement officer who is responsible for procurement under both regimes. One could argue that this approach has perhaps similar effects as those under the domestic system where corrections are made with prompt notice and in agreement with the tenderer. A tenderer under EU external aid regime may reject a contract award offer based on dissatisfaction with corrections made in its tender which had not been communicated earlier. In such cases the evaluation committee could have had the chance of rejecting the tender whose correction has not been accepted at an earlier stage of the process to allow its comparison of only accepted tenders, a result perhaps of an efficient system. The benefits of such an approach however, could be the elimination of any opportunity for the tenderer to communicate its updated price with the potential for preventing abuse in ensuring integrity.

Irrespective of the possible similar effects of the rather different approaches, the very minor nature of differences in procedures may complicate the burden and confusion for procurement officers to deal with.

Nature of interaction and policy considerations

The application of the multiple rules and procedures in Ghana as outlined above, presents significant issues of interaction between the rules, with particular emphasis on the procurement duty to be performed usually by the same procurement officer as indicated above. It is required of the procurement officer to carefully identify even the very minor differences in the applicable rules and take all factors into account in order to effectively apply them whenever it assumes functions under the various regimes. Significantly, some policy issues could be identified which may have potential implications as outlined below.

Scope of error correction

The rules in all regimes under review generally provide limited scope for correcting errors which means only specific types of errors may be corrected. A clear distinction in most cases is made between arithmetic errors and other general types of errors that are minor in nature and do not substantially deviate from requirements of the tender. The limited scope for error corrections could be seen as a way of seeking a balance between the policy objectives of the different regimes. An outright prohibition of correcting errors on one hand could ensure compliance with laid down requirements in promoting transparency and equal treatment. Allowing a limited scope for correction on the other hand provides the potential for obtaining value for money, particularly where the corrected tender offers best value as a paramount objective of the domestic system in Ghana as indicated above. The limited scope for correction could also serve as a motivation for tenderers - who may not be unduly penalised for committing minor errors - to participate in future tenders with the effect of ensuring wide participation and competition in the system.

Nevertheless, some differences exist in the regimes in the degree of the limited scope for correction. Some regimes impose even further limitation on correction through the provision of detailed rules

⁵¹ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 3.3.12.

and clarifications which further narrow the scope of options for correcting errors. This may relate to how much discretion should be given to the procurement officer, even within the already limited scope for correction. For example, unlike the World Bank regime, the domestic system and the EU external aid regimes limits the scope of arithmetic errors that are required to be corrected. This is done with specific reference to, for example, obvious arithmetic errors under the EU external aid regime but also to purely arithmetic error with further guidance as to how inconsistencies in the arithmetic shall be treated under the domestic system as seen above. This limited scope with the accompanied duty for correction ensures some degree of certainty in the provisions, a measure that substantially limits the discretion of the procurement entity in preventing abuse. The application of the donors' rules under consideration, with such precise definition of what and how it must be corrected supports the position in Ghana by possibly eliminating any confusion for procurement officers and promoting transparency and equal treatment as national policy objectives. However, some other donor regimes applicable in Ghana, who are not under review in this paper, provide less precise rules with little guidance, particularly on the scope and duty for correction. These other donor rules impose standards that are different from what procurement officers usually apply under the domestic system, which could cause some difficulty or uncertainty with the potential for limiting the national system from placing the desired emphasis on transparency and equal treatment as national objectives.

Imposition of a duty to correct errors

The issue of whether or not an obligation to correct errors is imposed on the procurement entity is approached differently in the regimes under consideration. Some regimes impose an outright obligation, thus no discretion whatsoever to correct errors identified within the limited scope provided. The World Bank regime is an example, where the procurement officer is under a duty to correct any arithmetic errors but also other minor deviations as indicated above and do not have any discretion to correct errors in any cases. In this respect, the procurement entity has no discretion in deciding whether or not to correct errors once identified. For example, supposing the procurement entity receives a total of 7 bids. 3 of the bids conform to all requirements and are regarded as responsive whilst the remaining 4 bids contain some form of minor deviations which is considered as not materially departing from the terms of the solicitation document. In this case, the procurement entity under the World Bank regime has a duty to first consider and correct the errors in the 4 bids containing minor deviations, though it already has 3 other conforming bids from which best value bid could be selected. This approach could impose some constraints on efficiency and its application in Ghana to some extent, may not support the achievement of efficiency in the domestic system as an essential policy objective, particularly where bids with minor deviations do not offer best value even after being corrected. However, these policy options perhaps, places more emphasis on achieving competition through equal opportunity for bidders and ensures that all bids with or without minor deviations are equally considered. For the procurement officer, failure to identify and comply with such an obligation which is otherwise discretionary under the domestic system may have significant consequences including possible loss of funds.

Some other regimes adopt a "combined" approach by creating a duty to correct errors in some cases but also allowing the use of discretion for correction in some other cases. Essentially, the decision on whether or not to impose a duty is guided by the possibility of abuse envisaged. In this respect, an

obligation is imposed on the correction of purely arithmetic errors where the scope for abuse envisaged is limited. On the other hand, it is at the discretion of the procurement entity to decide whether or not to correct other types of errors or oversights where the possibility for abuse is much difficult to determine. The procurement entity is under no obligation whatsoever to correct errors in the latter case. This approach is adopted under the domestic system in Ghana as modelled on the UNCITRAL Model Law and also adopted under the EU external aid regime. Under these regimes, whilst there is a duty to correct arithmetic errors, there is no obligation but merely allowing the correction of other types of errors and oversights not touching on the substance of the tender as seen above. For example, considering the illustration above, the procurement entity, who already have 3 conforming bids, could decide to choose the winning bid from only the conforming bids and disregard those with minor deviations. The procurement entity may only correct minor deviations as a matter of necessity, perhaps where the corrected tender could offer best value or where failure to correct errors may render all tenders non responsive which otherwise could lead to a re-tender process with time and cost implications for the procurement entity. This approach has the potential to secure the objective of efficiency and value for money through time and cost savings for the procurement entity.

Relevant to the duty to correct errors is the issue of whether such a duty creates an obligation towards tenderers who may have deliberately or otherwise created the error.⁵² This issue is relevant in addressing potential litigations where a tenderer may rely on the duty to correct errors that the procurement entity became aware of or should have become aware of during examination. Though imposing such duties on procurement entities could prevent contractual consequences such as rendering the contract void, it may be relevant for states to consider the extent to which such a duty imposes an obligation towards tenderers.

Conclusion

This paper has sought to highlight some similarities and differences between the multiple rules in Ghana and the potential policy implications including the difficulties that could arise when domestic procurement officers are compelled to apply several different and complex rules on correction of errors based on the source of funds.

It has been pointed out that the scope for correction is significantly limited with some regimes providing for the correction of even more precise and specific types of errors which further narrows the scope for correction with the result of providing little room for abuse. This is often achieved through the provision of very detailed rules and clarifications. This is contrary to the case in some other regimes where the scope for correction is not so limited and with less detailed rules.

The differences in the regimes with regards to the imposition of an obligation to correct errors were also highlighted. Whilst some regimes including the World Bank impose an outright duty to correct errors with no discretionary decisions to be made, the EU and the domestic regime adopts a combined approach with a duty to correct specifically arithmetic errors, but also permit, with no obligation, the correction of other types of errors that are more difficult to precisely define.

⁵² S. Arrowsmith, "Public Procurement Regulation: An Introduction" (University Of Nottingham, 2010), P.81.

Most importantly, the paper has shown how the rather insignificant differences in the multiple rules could create confusion and perhaps unnecessarily burden domestic procurement officers. This confusion may often result in a possible over reliance on donors for clarifications on the applicable procedures where procurement officers become cautious in avoiding the consequences of noncompliance with donor rules. The possibility of undue reliance on donors for clarifications may limit the opportunity for domestic procurement officers to develop their expertise and take initiatives in developing innovative approaches to procurement under the domestic system, with the possible effect of limiting the achievement of value for money as an essential policy objective. In this respect, the domestic system is left with limited capacity and policy space to implement national policy objectives.

Whilst any similarities in the approach of the various regimes may reinforce international best practices and lend itself to harmonisation of procurement practices, differences in the regimes could provide useful insights into the diverse regulatory approaches that could be adopted to achieve similar results, particularly under complex and technical situations as the one under discussion.

However, in the context of Ghana and most likely in other developing countries where the same procurement officer is burdened with, perhaps simultaneously, conducting procurement funded both by donors and from national resources, arguments for the benefits of the differences in the rules and procedures are weaker. For a procurement expert, even with the requisite skills, it becomes an enormously daunting task to clearly identify these, perhaps insignificant differences as to what it can and cannot do in each specific situation. However, failure to identify and comply with any minor differences could result in rather significant consequences for the procurement including delays and litigations or even cancelation of procurement funds.