

Administrative review systems in public procurement and their potential for anti-corruption impact: Kenya, Uganda and Tanzania in a comparative perspective

Annika Engelbert, Ruhr-University Bochum

Abstract: Public procurement is highly vulnerable to corruption especially in developing countries where financial resources are limited and government contracting represents most attractive business opportunities. Regulatory frameworks therefore include a number of deterrence and redress mechanisms aiming to curb corruption in procurement. This paper argues that administrative review systems can be effective anti-corruption tools under the condition that they offer favorable conditions for bidders and sufficient incentives for use. By means of a comparative case study of the respective systems in Kenya, Uganda and Tanzania, it shall be explored whether they fulfill the requirements for a suitable anti-corruption tool, focusing on their accessibility for bidders. Besides national laws and international procurement standards, the analysis is based on reports of procurement authorities and expert interviews conducted onsite in May and June 2013.

1. Introduction: The nexus of development, corruption and public procurement

Curbing corruption has become one of the central issues in development cooperation as recent agreements on aid effectiveness reflect: "Corruption is a plague that seriously undermines development globally, diverting resources that could be harnessed to finance development, damaging the quality of governance institutions, and threatening human security."¹ Empirical studies provide evidence that developing countries are more affected by corruption than industrialized countries, even though the determination of cause and effect within the correlation of corruption and development remains subject to scientific debate. Both recipient and donor states are directly concerned with lowering corruption in developing countries: Whereas national governments need to take measures against the devastating effects of corruption on the social and economic development of their countries, development partners have a strong self-interest in safeguarding their own funds spent in corruption-prone environments. Against this background, anti-corruption has become both an objective as well as a condition for development assistance.

¹ Art. 33 Busan Partnership for Effective Development Co-operation, <http://www.oecd.org/dac/effectiveness/busanpartnership.htm>.

Public procurement is highly vulnerable to corruption. The close interaction between the public and the private sphere facilitates „the misuse of public power for private gain“,² relatively high contract volumes generate high returns in bribe, and complex administrative procedures offer many gateways and low risk of detection to corrupt actors. Corruption in public procurement, however, is particularly damaging to developing countries because of the high proportion of procurement in government expenditure, leading to important losses of scarce financial resources through corruption. Furthermore, developing countries have a special need for public investment in areas such as education and health, whereas corruption favors the misallocation of public funds in capital intensive procurement like large infrastructure projects or defense. Transparent procurement procedures and efficient organizational structures are therefore essential.

The introduction of the concept of ‘good governance’ by international financial institutions in the 1990ies resulted in a number of public sector reform programs in developing countries, among them assessments of national public procurement systems.³ Following thorough legislative reform processes, the majority of procurement systems nowadays largely comply with international standards:⁴ Public procurement is to be regulated in a way that basic principles such as economy and efficiency, participation free of discrimination, competition, equality, fairness, integrity, transparency and public confidence in the procurement process can be achieved. In order to ensure application of procurement rules to make the systems effective, appropriate enforcement mechanisms are needed. Therefore, procurement legislations provide for a range of monitoring tools such as audits, investigations and criminal prosecutions, as well as for administrative and judicial review systems.⁵

This paper argues that administrative review systems in public procurement are crucial elements of the regulatory frameworks in developing countries as they can be an effective anti-corruption tool under the condition that they offer favorable conditions for bidders and sufficient incentives for use. Chapter 2 explores on a theoretical basis the preventive potentials of administrative review systems in relation to other anti-corruption elements in public procurement. By means of a comparative case study of the administrative review systems in Kenya, Uganda and Tanzania, chapter 3 shall explore how the respective systems are designed with regard to international standards, and whether they fulfill the

² Senturia, Joseph J. (1931): “Corruption, Political”, in: Encyclopedia of the Social Sciences, pp. 448-452; p. 449.

³ Cf. World Bank projects on public procurement reform, <http://go.worldbank.org/8HE37SPEJO>.

⁴ The main reference for developing countries is the UNCITRAL Model Law on Public Procurement (2011), http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html, and, depending on the time of enactment of the new domestic procurement laws, the preceding UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html.

⁵ Gordon, Daniel I. (2006): „Constructing a bid protest process: The choices that every procurement challenge system must make“, in: Public Contract Law Journal, Vol. 35, No. 3, pp. 427-445; p. 429.

requirements for a suitable anti-corruption tool. Special focus shall be laid on legal provisions determining the degree of accessibility for bidders to reviews. Chapter 4 concludes.

2. The anti-corruption effects of review systems

Review systems, i.e. the “legal mechanisms that allow suppliers to challenge public procurement decisions and to obtain relief where it can be shown that procurement rules were not adhered to”⁶, are considered an important compliance mechanism in general and a crucial anti-corruption instrument in particular. The preventive effect of review procedures arises from consciousness of procuring entities and tenderers that procedures can be monitored ex-post by independent authorities. Procurement officers under potential scrutiny of a review body are more reluctant to behave unlawfully.⁷ In short, “the very availability of challenge procedures to those with the strongest motivation to enforce the rules and the best opportunities to spot breaches increases the risk of non-compliance for procuring entities and thus improves deterrence.”⁸ This chapter shall elaborate on the potentials of review systems in highly corrupt environments in relation to other anti-corruption instruments, focusing on the determinant of their accessibility for bidders.

Compliance and integrity of public procurement systems are supervised and controlled through different means: The national regulatory authorities usually provide self-assessment or benchmark tools to procuring entities, allowing them to evaluate their own performance and to better prepare for audits. These audits, conducted by the regulatory authorities in a second step, assess the performance of individual procuring entities against a set of compliance indicators.⁹ Where audit findings reveal substantial grounds for suspected corruption during a procurement procedure, further investigations are needed. Usually regulatory authorities are mandated to pre-investigate alleged corruption cases themselves and refer the matter to the anti-corruption agency¹⁰ in charge, in case legitimate reasons

⁶ Quinot, Geo (2013): “A Comparative Perspective on Supplier Remedies in African Public Procurement Systems”, in: Arrowsmith, Quinot (Eds.): *Public procurement regulation in Africa*, Cambridge, UK; New York: Cambridge University Press, pp. 308-335; p. 308.

⁷ Cf. Gordon 2006, p. 431; cf. Zhang, Xinglin (2007): “Supplier review as a mechanism for securing compliance with government public procurement rules: A critical perspective”, in: *Public Procurement Law Review*, No. 5, pp. 325–351; p. 329.

⁸ Arrowsmith, Sue (2003): *Government Procurement in the WTO*, The Hague; Boston: Kluwer Law International, p. 402.

⁹ As an example, cf. Public Procurement Regulatory Authority (Tanzania): “A summary Report of Procurement Audits in One Hundred and Twenty One Procuring Entities FY2011/2012”, annex 3; <http://www.ppra.go.tz/index.php/e-library>

¹⁰ Anti-corruption agencies can take different institutional forms, cf. Hussmann, Karen; Hechler, Hannes; Penailillo, Miguel (2009): *Institutional arrangements for corruption prevention: Considerations for the implementation of the United Nations Convention against Corruption Article 6*. Bergen: U4 Issue 4 (Edited by Chr. Michelsen Institute).

exist. However, audit and investigation procedures have certain shortcomings with regard to fighting corruption: Firstly, due to resource restrictions in terms of financing and staffing of the monitoring bodies, compliance checks do not cover all procurement procedures, but are typically based on stratified sampling. They are hence targeted at measuring the overall compliance level of the procurement system, whereas the detection of corrupt activities is rather a 'byproduct' of auditing. Furthermore, a compliant system is not necessarily corruption-free; typical distortions in procurement such as price fixing or tailor-made specifications are difficult to unfold by assessing the conformity of procurement records against legal provisions. In order to strengthen the anti-corruption capacity of audit systems, red-flag indicators to measure the probability of corruption can be applied.¹¹ Secondly, where corruption is systemic and endemic, monitoring agencies are exposed to influences from the higher-level authority, in most cases the Ministry of Finance. A lack of political will to fight corruption in procurement, channeled through ministerial structures, can rig audit outcomes and considerably restrict independent decision making of the regulatory authorities despite of their autonomous status guaranteed by law. Furthermore, the authorities themselves might have a less strong interest in pursuing corruption than in making their audit records look good. Procurement audits are hence suitable to monitor compliance broadly and regularly, but they remain at the surface of procurement records. Corruption, however, rarely manifests in official documents – the capacity of audits as an anti-corruption tool is therefore insufficient.

Tackling the secretive nature of corruption in procurement, most countries have established whistleblowing mechanisms where the opportunity is offered to anonymously report corruption. As the approach is very low-threshold, whistleblowing considerably increases the risk of detection for corrupt actors, even in big corruption cases. On the other hand, granting anyone the possibility to accuse anyone, paired with full protection of the identity of the whistleblower, entails a high probability of abuse of the system. Therefore, whistleblowing mechanisms require thorough investigations on the actual grounds for accusation, consuming a lot of resources. Chronically underfinanced regulatory authorities in developing countries will not have the capacities to go into a potentially high number of hints received through whistleblowing. Contrary to audits, whistleblowing is targeted at detection of corruption only and not at other deviations from standard procedures - yet it does not offer continuous monitoring. The decision to report corruption remains entirely with the whistleblower; the mechanism is therefore not a reliable detection tool.

¹¹ E.g. the Public Procurement Due Diligence Tool by Transparency International, <http://gateway.transparency.org/tools/detail/24>.

In many regards, administrative and judicial review systems are more suitable to serve as effective anti-corruption tools than audits and whistleblowing. Most importantly, aggrieved bidders have the strongest interest in disclosing corruption: Unlawful decision making in procurement has an immediate economic effect on disadvantaged bidders, whereas the motivation to ensure integrity in procurement for auditing bodies is purely bureaucratic. The reasons for whistleblowers to report corruption cases, on the other hand, cannot be specified as they are usually not expressed and highly individual. Compared to external monitoring, bidders are directly involved in the procurement process and have therefore an advantage both in terms of time and information.¹² Based on their own experience, they can react instantly to irregularities they consider unlawful, whereas audits and whistleblowers are forced to rely on procurement records and rather arcane information sources respectively. Furthermore, the problem of fragmentary control concerning audits does not apply for reviews as every procurement procedure is potentially subject to challenge; review systems reach thus maximum control coverage. The advantage of the review system compared to other anti-corruption mechanisms in public procurement is hence the role of the bidder as initiator of the process: the bidder has stronger incentives to report corruption and better access to information on corrupt activities than external actors. As the effectiveness of the review system is entirely dependent on its actual use, two variables are decisive: the individual willingness of bidders to start review processes and the institutional framework of the system itself, defining under which circumstances reviews can be requested.¹³

As Gordon and Quinot have discussed in detail, review systems have to balance two conflicting objectives: On the one hand, public procurement aims at achieving value for money, i.e. at acquiring goods and services at best quality and lowest price in a short time frame with minimum transaction costs. Requests for review interrupt the procurement procedure and can, by considerably delaying contract execution, undermine the efficiency of the process. It can therefore be argued that access to reviews should be restricted in order to ensure continuity. On the other hand, the anti-corruption rationale outlined above requires review systems to be as open as possible: "In a protest system, the overarching tension can be viewed as the tension between the desire to exhaustively investigate any complaint, on the one hand, and the need to let the procurement process move forward, on the other."¹⁴ Review systems vary in the degree of accessibility they grant to potential claimants, depending on the specific circumstances they operate in. In the context of development and corruption, a focus on efficiency seems a better short-term option for implementing procurement projects. Especially when budget execution is chronically uncertain, overly rigid

¹² Cf. Zhang 2007, p. 330.

¹³ However, the system ultimately fails when collusion among bidders is widespread (cf. Gordon 2006, p. 430).

¹⁴ Gordon 2006, p. 430.

administrative rules are perceived as a hindrance factor to economic development.¹⁵ However, in systems where corruption is widespread, where procurement systems are still immature and suffer from a lack of professional expertise, and where a general reluctance to go to court prevails, emphasis should be laid on opening up rather than limiting participation in review processes – even if it comes at the expense of efficiency.¹⁶

Bidders are first and foremost economic players aiming to maximize their own business opportunities. Entering into a long and costly review procedure will therefore only be an option if the outcome is potentially favorable for the bidder. Different factors come into play in this cost-benefit analysis, covering considerations on the length and cost of the procedure, retaliation risks for future tender opportunities, general trust in the impartiality of the review authority, available remedies, and tendencies of the review bodies to uphold or reject applications for review, allowing conclusions on the general prospects of success. Restricting access to review systems would negatively influence the decision of bidders to challenge a procurement procedure or not.¹⁷ Considering the fact that the idea of corruption in procurement as a violation of the general public interest is of subordinate importance to bidders, focus should be laid on low-threshold accessibility criteria for bidders.

3. The accessibility of review systems in Kenya, Uganda and Tanzania

In Kenya, Uganda and Tanzania, a considerable percentage of the annual budget is spent through public procurement.¹⁸ At the same time, the countries are highly affected by corruption: Kenya ranks 136, Uganda 140 and Tanzania 111 out of 177 countries (score 27, 26 and 33 and on a scale from 0 (highly corrupt) to 100 (very clean)) in the Corruption Perceptions Index 2013 published by Transparency International.¹⁹ Considering the rationale laid down in the introductory chapter of this paper, the three countries have strong incentives to foster anti-corruption in their public procurement systems. Their first regulatory frameworks were established following a reform process in the late 1990ies heavily supported by the international donor community, spearheaded by the World Bank, and are based on the UNCITRAL Model law on Procurement of Goods, Construction and Services (1994). The

¹⁵ As a recent example on the new Ugandan procurement law, see <http://www.busiweek.com/index1.php?Ctp=2&pl=666&pLv=3&srl=68&spl=107&cl=10>.

¹⁶ Cf. Gordon 2006, p. 436.

¹⁷ Cf. Gordon 2006, p. 432 f.; Zhang 2007, p. 335.

¹⁸ Cf. Akech, J.M. Migai (2006): "Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid", in: NYU Journal of International Law and Politics, Vol. 37, No. 4, pp. 829–868; p. 831.

¹⁹ <http://cpi.transparency.org/cpi2013/results/>

domestic procurement acts and regulations²⁰ are currently undergoing legislative reform: Tanzania has enacted a new procurement act in 2011 that came into effect end of 2013 when the corresponding regulations were issued; Uganda's new procurement act was enacted as an amendment to the former legislations on March 3rd, 2014; and Kenya is required to revise its current procurement laws until 2014 at the latest according to the new constitution from 2010. It is hence to be expected that the domestic procurement systems will start operating on the basis of the new laws during the next months. Although showing remarkable similarities both in structure and content of the procurement system, the respective approaches applied on review mechanisms and their effect on anti-corruption differ to a considerable degree in terms of accessibility for complainants. The following chapter shall set out, in a comparative perspective, the main patterns of the systems and assess their potential to curb corruption. Besides national laws and international procurement standards, the analysis is based on reports of procurement authorities and expert interviews conducted onsite in May and June 2013.

3.1 Set up of review systems

Art. 9 (1) (d) United Nations Convention against Corruption (UNCAC) requires signatory states to set up at least a two-tier challenge system for public procurement, consisting of an administrative and a judicial review stage.²¹ The UNCITRAL Model Law, on the other hand, covers a three-tier system consisting of an (optional) application for reconsideration to the procuring entity, a request for review to the independent review body and an appeal to court.²² All three procurement systems analyzed in this paper provide for judicial review with the respective courts of competence; a focus shall be laid on the different approaches on the organizational setup and provisions on entry requirements of their administrative reviews, contributing to the general anti-corruption capacity of the particular procurement systems.

²⁰ Kenya: Public Procurement and Disposal Act, No. 3 of 2005 (in the following: PPA-K), Public Procurement and Disposal Regulations, 2006 (Legislative Supplement No. 53) (in the following: PPR-K); Uganda: Reprint of the Public Procurement and Disposal of Assets Act, No. 1 of 2003 (in the following: PPA-U), Public Procurement and Disposal of Public Assets (Administrative Review) Regulations 2014 (Supplement No. 3) (in the following: PPR-U (Administrative Review)), Public Procurement and Disposal of Public Assets (Contracts) Regulations 2014 (Supplement No. 3) (in the following: PPR-U (Contracts)), Tanzania: Public Procurement Act, No. 9 of 2011 (in the following: PPA-T), Public Procurement Regulations 2013 (Supplement No. 48) (in the following: PPR-T).

²¹ UNCAC, Article 9. *Public procurement and management of public finances*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia: [...] (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed; [...] ²² Art. 64 (2) and 66 UNCITRAL Model Law on Public Procurement, 2011. ²³ Section 90 PPA-U; section 96 PPA-T.

²² Art. 64 (2) and 66 UNCITRAL Model Law on Public Procurement, 2011. ²³ Section 90 PPA-U; section 96 PPA-T.

In Uganda and Tanzania, requests for reviews are to be lodged in the first instance with the accounting officer of the respective procuring entity.²³ The establishment of a preliminary stage as part of the review system refers to the dilemma of procurement objectives discussed above: In terms of efficiency, it can be argued that an additional review tier delays the procurement process and withdraws resources from procuring entities whose main function is not to review their own decisions, but to execute procurement. On the other hand, low-scale issues on deviations from standard procurement procedures might be solved faster between the parties directly concerned than seeking review with a specialized, potentially overburdened body.²⁴ With regard to anti-corruption, reconsideration by the procuring entity will have no redress or deterrent effect. Within the common theoretical frame of a principal-agent-client relationship, the procuring entity is inevitably involved in corrupt activities - leaving instances of collusion aside - and has no incentives to investigate on corruption. There is hence need for a controlling body outside the corrupt network.²⁵

Where corruption in procurement is steered by political and economic elites and where people tend to refrain from litigation,²⁶ independence and impartiality of review bodies are crucial. If bidders perceive review authorities as subordinates of corrupt political decision makers, they will not trust in their neutrality and consequently abstain from bringing alleged corruption cases to the attention of the review system. Despite their autonomous status guaranteed by law,²⁷ the review bodies of the three systems analyzed in this paper are part of the bureaucratic structure and administratively embedded in the respective Ministries of Finance. It is therefore important to identify potential conflicts of interest within the review bodies and possible channels through which undue influence can be exerted.

The Tanzanian Public Procurement Appeals Authority (PPAA) is institutionally separated from the Public Procurement Regulatory Authority (PPRA).²⁸ In the previous public procurement act from 2003, administrative review in Tanzania was a three-tier process with PPRA as the first and PPAA as the second escalation stage, following preliminary review by the accounting officer. The double function of PPRA acting both as regulatory and review body had led to complaints from bidders. In some instances, PPRA had given advice to

²³ Section 90 PPA-U; section 96 PPA-T.

²⁴ Udeh, Kingsley T. (2013): "A critical appraisal of Kenya's supplier review system in the light of international standards", in: *Public Procurement Law Review*, No. 5, pp. 183–203, p. 189; cf. Gordon 2006, p. 433.

²⁵ Cf. Nicholas, Caroline (2009): "Remedies for breaches of procurement rules and the UNCITRAL Model Law on Procurement" in: *Public Procurement Law Journal*, No. 4, pp. 151–159; p. 157.

²⁶ Cf. Quinot 2013, p. 313; Expert interviews with procurement authorities, review bodies and bidders as well as with external stakeholders like academics, lawyers, donor organizations and civil society organizations in Kenya, Uganda and Tanzania have revealed that judicial review remains an exception. Kenya has had around 40 court cases on procurement since 2007, whereas five cases were quoted for Uganda and eight cases for Tanzania.

²⁷ Sections 91G, 91H, 91O-R PPA-U; section 88 (1) PPA-T.

²⁸ Section 88 PPA-T.

bidders during the tender procedure, but when it came to an appeal on the very same topic, PPRA had decided contrary to the previously made recommendations. This administrative review stage had therefore been removed from the text of the recent new public procurement act. In Kenya, given the fact that the review system does not make provisions for protests with the procuring entities directly, the Public Procurement Administrative Review Board (PPARB) is the only administrative review stage.²⁹ Accordingly to the Tanzanian system, the Kenyan Public Procurement Oversight Authority (PPOA) is not involved in the review procedures conducted by PPARB. However, the procurement act stipulates that PPOA provides administrative services to PPARB,³⁰ inter alia paying allowances to PPARB members and providing secretariat services; furthermore, the board's executive secretary is to be selected from among PPOA staff.³¹ Requests for review are hence received and registered by PPOA and forwarded to PPARB.³² This is at least a concern for reviews launched against PPOA as a procuring entity, as the respondent party itself is in charge of forwarding the claim to the board. Despite their formal segregation, it is almost impossible for bidders to distinguish between the two bodies that share one common secretariat, one address and even one office space. Nevertheless, the situation reflects practical considerations of two underfunded institutions rather than a lack of political will to establish an entirely independent review board.

In contrast to PPAA and PPARB, the former Ugandan Complaints Review Board was not a separately established body, but operated as an ad hoc committee of the Public Procurement and Disposal Assets Authority (PPDAA). The committee was composed of PPDAA's heads of department; it therefore used to be the least independent body of the three countries. Under the new procurement act of 2014, however, the review system was restructured. Contrarily to the Tanzanian decision to reduce the number of administrative review stages from three to two, Uganda has opted for the exact opposite and has added the Public Procurement and Disposal of Public Assets Appeals Tribunal (PPDAAT) to the review system as a third instance following reviews by the procuring entity and the regulatory authority. The tribunal is a quasi-judicial body mandated with powers similar to courts of law, including taking evidence on oath, ordering costs and summoning witnesses.³³ The Ugandan administrative review system has hence developed from weak structures as integral parts of the regulatory authority to a much elaborated three-tier mechanism with strong enforcement powers. It remains to be seen, however, how effective and operational the complex system will eventually be.

²⁹ Udeh 2013, p. 188.

³⁰ Section 25 (3) PPA-K.

³¹ § 68 (3) PPR-K.

³² Section 94 PPA-K; § 73 (3) PPR-K.

³³ Section 91K PPA-U.

Concerning the composition of the Tanzanian review boards, appointment and termination of membership remain exclusively in the field of competence of the President and the Minister of Finance.³⁴ Similarly in Uganda, members of the newly established PPDAAT are appointed and dismissed by the Minister and must have a relevant professional background from the private sector.³⁵ The Kenyan system involves different business associations or trade organizations that nominate six out of nine PPARB members, including the Chairman of the board. The remaining three members are appointed by the Minister of Finance at his own preference.³⁶ Considering the fact that the majority of board members are proposed by external organizations, independence from ministerial structures seems greater on first sight. However, PPARB can decide by simple majority with a quorum of three members including the Chairman;³⁷ thus, constellations of three members chosen by the Minister of Finance overruling the Chairman are possible.³⁸ With regard to impartiality, it would be desirable to nominate all board members by external organizations. Furthermore, board members are not employed by the authorities – which is preferable to safeguard their independence from the Ministry. However, tight provisions on conflicts of interest for members are necessary prohibiting decision making on matters related to vested interests.

3.2 Grounds for objection and standstill periods as influencing factors of accessibility

As discussed in chapter 2 of this paper, accessibility is a major factor influencing the willingness of bidders to initiate procurement reviews on the one hand. If entry requirements are few and low-threshold, more tenderers will request reviews and therewith exercise a corruption controlling function. On the other hand, legal provisions stipulate whether or not access to review is granted, irrespective of the individual intention of bidders. Many features of legal frameworks regulate access to review systems, among them the amount of administrative fee to be paid by bidders, the language in which documents are issued, the geographical distance between the bidder and the review body and the general level of professional capacity in public procurement. In the following, provisions on formal exemptions from grounds for objection and on standstill periods will be discussed with regard to their effect on granting or preventing access to administrative review systems.

³⁴ Third Schedule PPA-T.

³⁵ Sections 91B and 91C (3) PPA-U.

³⁶ § 68 (1) PPR-K.

³⁷ § 69 PPR-K.

³⁸ Westen, Laurence M. (2012): Das Vergaberecht als Mittel der Korruptionsbekämpfung in den Entwicklungsländern Subsahara-Afrikas am Beispiel Kenia, Baden-Baden: Nomos; p. 141.

3.2.1 Exempted grounds for objection

In all three countries, grounds for objection in the review process are one or several breaches of the procurement acts or regulations. However, the laws in Kenya and Tanzania exempt some stipulations from being challengeable, hence limiting the access to review in certain cases.

In Kenya, only “candidates” who have actually submitted an offer to the procuring entity are eligible to request a review.³⁹ The definition of a claimant is stricter under Kenyan law than stipulated in the UNCITRAL Model Law 2011 that provides access to review for all parties or potential parties to the procurement proceedings,⁴⁰ including suppliers and service providers merely interested in participating.⁴¹ The Kenyan provision discriminates against those parties unlawfully prevented from bidding, e.g. due to a lack of neutrality in the specifications of the subject matter, customized in a way that only one bidder could respond to the tender. The manipulation of specifications or terms of reference, however, is a common means to carry out corrupt agreements between the procuring entity and the bidder as the risk of detection is relatively low.

The issue of limiting the right to review to candidates only is closely related to further exemptions from grounds for review: the choice of procurement method from review and the rejection of all offers. None of the two is challengeable in Kenya.⁴² Deviations from the standard procurement method and rejection of all tenders are often used, however, to manipulate the process in order to award the contract to one preferred bidder. Contrary to the provisions in all three systems on open tendering as the default method to maximize competition, a procuring entity involved in corrupt activities aims at awarding the contract directly to the favored supplier or service provider by means of emergency or single tendering.⁴³ Bidders aggrieved by the wrong choice of method should therefore have the right to request a review in order to prevent favoritism. Secondly, the repeated rejection of all offers can lead to a manipulated tender result as well. In case of an unwanted tender outcome, the procedure can be cancelled and repeated by the procuring entity up to the point when tender participation eventually decreases and the contract can be awarded to the only remaining bidder – with whom a corrupt agreement exists and who is then contracted to inflated prices. The rejection of all tenders should therefore be challengeable at least when done repeatedly for the same tender.

³⁹ Section 93 (1), Section 3 (1) PPA-K.

⁴⁰ Art. 64 (1) and 2 (t) UNCITRAL Model Law on Public Procurement 2011.

⁴¹ Udeh 2013, p. 190.

⁴² Section 93 (2) PPA-K.

⁴³ Cf. Udeh 2013, p. 190.

Tanzanian law, in accordance with UNCITRAL Model Law 2011, allows all suppliers participating or intending to participate in a procurement proceeding to seek for review in case of a breach of duty by the procuring entity.⁴⁴ The choice of procurement method is not challengeable,⁴⁵ whereas the exemption of rejection of all tenders has been dismissed in the new procurement act. The differing provisions in the Kenyan and Tanzanian legislations reflect the development of the UNCITRAL Model Law. The Kenyan Public Procurement Act from 2003 is based on the former UNICTRAL Model Law of 1994 that stipulated exclusion of several matters from review, amongst them the choice of a procurement method and the rejection of all tenders.⁴⁶ The time of enactment of the new Tanzanian procurement legislation end of 2013, on the other hand, allowed reference to the new UNCITRAL Model Law 2011 where exclusions of procurement matters were deleted.⁴⁷ The most disputed exemption was certainly the exclusion of the choice of procurement methods. Under the UNCITRAL Model Law 1994, it was argued that making the choice of method contestable would limit the discretionary power of the procuring entities in a way that economic and efficient procurement processes could not be guaranteed.⁴⁸ Practicing lawyers argue, however, that the choice of method is indeed contestable when provisions on the use of it have been flouted, e.g. the conditions for use of an alternative method to open tendering, as this would represent a breach of the procurement act.

In contrast to the other two countries, the Ugandan procurement system does not make provisions on exemptions from the right to review. Measuring the respective rules against their openness of reviews to bidders, one can conclude that the Ugandan legislation offers strongest support to the use of review mechanism compared to the other systems; access to review is most restricted in Kenya. However, the numbers of requests for review tell the exact opposite, with the Kenyan board handling by far more review cases than Tanzania and Uganda.⁴⁹ Thus, excluding certain grounds for objection from review cannot be the decisive factor for the actual use of the systems by bidders.

⁴⁴ Sections 95 (1) and 3 PPA-T.

⁴⁵ Section 95 (2) (a) PPA-T.

⁴⁶ Nicholas 2009, p. 153 f.; Quinot 2013, p. 310; see also Article 52 (2) UNCITRAL Model Law on Procurement of Goods, Construction and Services 1994.

⁴⁷ Cf. Nicholas 2009, p. 158; Udeh 2013, p. 191; Appeals can only be dismissed due to missing the deadline, lack of standing and lack of merit, see Article 67 (6) (a) and (b) UNCITRAL Model Law on Public Procurement 2011.

⁴⁸ Nicholas 2009, p. 154.

⁴⁹ In 2012, the Kenyan review board heard 73 cases, the Ugandan Complaints Review Board 18 cases and the Tanzanian review system (appeals authority and regulatory authority) 22 cases.

3.2.2. Standstill periods

Whereas the disqualification of certain grounds for objection makes it impossible for bidders to request a review, standstill periods facilitate lodging a request for review by interrupting the procurement process between notification of tender outcome and contract signature. Challenging a procurement decision that has already resulted in a contract is much less attractive for bidders than seeking review of a procurement procedure that has been put on hold. Bidders are primarily interested in doing business, not in being compensated for lost business opportunities. Also in terms of efficiency, contesting a procurement process which is already in the contract execution phase, potentially leading to contract annulation and retendering, is highly undesirable. The Kenyan and Ugandan procurement laws therefore explicitly exclude from review procurement procedures that have resulted in a signed contract in order to secure the efficient and uninterrupted contract execution.⁵⁰ In contrast to that, complaints concerning concluded contracts are possible in Tanzania, but skip the preliminary review stage and are reviewed by the appeals authority only.⁵¹ In order to give bidders the opportunity to lodge their requests for review before the procurement contract has entered into force and, at the time, to prevent procuring entities from rushing into contract conclusion with the possible intention to foreclose reviews by bidders, standstill periods between the decision on the tender result and the actual contract signature are stipulated in all three countries.⁵²

In Kenya, the standstill period begins with the notification of tender outcome and lasts for at least 14 days,⁵³ covering the entire timespan bidders are given for submitting a request for review;⁵⁴ consequently, no procurement contract can be signed before the submission deadline for requests for review has elapsed. Upon receipt of a request for review, the procurement procedure is automatically put on hold until a review decision is taken. The Kenyan law provides thus both for sufficient time for bidders to claim their right to review, and for uninterrupted contract execution at the same time. However, it is unclear how the notifications of tender outcome are to be dispatched to the bidders. The Act merely stipulates that the contract award notification has to be sent to all concerned suppliers and that the standstill period begins when notification has been *given*.⁵⁵ It is not substantiated by law and

⁵⁰ Section 93 (2) (c) PPA-K; § 2 PPR-U (Administrative Review); Cf. Arrowsmith, Sue; Linarelli, John; Wallace, Don (2000): *Regulating Public Procurement: National and International Perspectives*, The Hague; Boston: Kluwer Law International, p. 785; Udeh 2013, p. 192.

⁵¹ Sections 96 (5) and 97 (3) PPA-T.

⁵² Udeh 2013, p. 192.

⁵³ Section 68 (2) PPA-K.

⁵⁴ § 73 (2) (c) PPR-K.

⁵⁵ Sections 67 and 68 (2) PPA-K.

hence left to argument whether *giving* refers to *sending* or *receiving* of the notification.⁵⁶ Supposing that *giving* notification means *sending* and not *receiving*, the time span for reaction and submission of a request for review could be reduced considerably by creating artificial delivery delays.

The Ugandan procurement regulations stipulate a standstill period of ten days between the notice of best evaluated bidder and contract award.⁵⁷ Bidders have a total of ten *working* days, however, for submitting their request for review to the accounting officer.⁵⁸ Upon receipt thereof, the procurement process is automatically suspended.⁵⁹ The different timeframes for submission of request for review submission and for contract signature seem very inconsistent considering the fact that procedures that have resulted into a procurement contract cannot be subject to review.⁶⁰ The problem of informing bidders about the outcome of the tender procedure and the beginning of the standstill period discussed in the case of Kenya is solved by stipulating that notices must be sent with proof of receipt.⁶¹

Whereas the former Tanzanian procurement act did not contain any provisions on standstill periods, the issue has been integrated in the new legislation. Upon completion of evaluation and issuance of a notice of intention to award the contract to all tenderers, a 14 day standstill period is stipulated for submission of complaints.⁶² Only when the standstill period has passed without receiving any requests for review, a notice of acceptance is issued to the successful tenderer which implies the entry into force of the contract.⁶³ Since bidders can generally request a review within 28 days after they became aware of the circumstances,⁶⁴ the submission deadline is not entirely covered by the standstill period of 14 days. It is therefore not guaranteed that a bidder timely submitting a request for review challenges an ongoing tender procedure as the contract might have already been signed. As mentioned above, only the appeals authority is mandated to hear these cases, yet it remains at its discretion to interrupt contract performance.⁶⁵ It is hence in the very interest of bidders to contest a procurement decision within the 14 days of the standstill period, which increases the importance of timely receipt of the notice to award the contract. However, similarly to the situation in Kenya, it remains unclear if *issuing* a notice of intention means *sending* or *receiving* it. It would therefore be favorable to either adapt the submission deadline for

⁵⁶ Udeh 2013, p. 193.

⁵⁷ § 4 (3) (d) PPR-U (Contracts).

⁵⁸ Section 90 (1a) (b) PPA-U.

⁵⁹ Section 90 (2) (a) PPA-U.

⁶⁰ § 2 PPR-U (Administrative Review).

⁶¹ § 4 (4) PPR-U (Contracts).

⁶² Section 60 (3) PPA-T.

⁶³ Section 60 (5) and (11) PPA-T.

⁶⁴ Section 96 (4) PPA-T.

⁶⁵ Section 100 (1) and (4) PPA-T.

requests of review to the standstill period or to provide clearer definitions on the delivery mode of notices to award the contract.

4. Conclusion

In comparison with other anti-corruption tools in public procurement such as audits conducted by oversight authorities and whistleblowing, review structures offer two main advantages: First, they subject potentially all procurement procedures to challenge and exercise hence a maximum controlling function. Second, they have the potential to disclose corruption cases which cannot be detected by merely monitoring compliance performance based on procurement records. Aggrieved bidders have an informational and time wise advantage compared to external controlling institutions and can therefore bring obscure practices to the attention of authorities. Since the risk of detection rises when bidders, namely those with the strongest incentive to unfold and with the best insight into corrupt practices are monitoring procurement procedures, review system have a deterrent effect on corrupt actors. The anti-corruption effect of a review system, however, depends ultimately on its use by bidders. Accessibility is therefore a decisive factor for the success of administrative review systems as anti-corruption tools.

The administrative review systems in Kenya, Uganda and Tanzania are designed according to international standards and considered thus as effective challenge mechanisms. Nevertheless, they restrict accessibility for disadvantaged bidders to different degrees: The Ugandan system offers bidders, including potential bidders, the possibility to challenge a procurement decision, and requires one or several breaches of the procurement law as a condition to claim a review without excluding any grounds for objection. With regard to the very recent introduction of a quasi-judicial administrative tribunal as a third administrative review stage, the institutional structure has reached the highest degree of independence from potentially unduly influencing ministerial bodies. At the same time, the new tribunal has been granted stronger enforcement powers compared to other review bodies. Kenya, on the other hand, restricts access to reviews to those bidders having actually submitted an offer, discriminating against suppliers and service providers who have been barred unlawfully from tendering. Kenyan procurement law also stipulates the most extensive possibilities to exclude certain matters from review; the choice of procurement method and the rejection of all tenders are often used, however, to manipulate the tender process in order to award the contract to one preferred bidder and should therefore be contestable. Standstill periods, i.e. the time span between the outcome of tender evaluation and contract signature offering bidders the opportunity to lodge a request for review before the procurement contract has entered into force, are an important means to preserve the legal right to seek remedy. In

Tanzania, provisions on the standstill period are insufficient to guarantee bidders to claim their right in time.

However, the impact of accessibility of administrative review systems on the actual level of corruption in procurement is not directly measureable. Even numbers of review procedures of the last years tell a different story than it could be assumed from the analysis: Although Kenya appears to be the less open system of the three countries, its review processes outnumber by far those in Uganda and Tanzania. Other factors have to be taken into account when assessing the effectiveness of review systems with regard to anti-corruption, such as their efficiency, prospects of success for bidders and general credibility. Furthermore, review systems are limited to a purely preventive anti-corruption effect. Administrative remedies have no teeth to bite corruption; collaboration between review bodies and anti-corruption agencies vested with investigative and prosecutorial powers is thus crucial to allow for sanctioning corrupt practices in public procurement. Yet, none of the major corruption cases related to public procurement in Kenya, Uganda and Tanzania has been convicted by a court of law.

Bibliography

Secondary literature

Akech, J.M. Migai (2006): "Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid", in: NYU Journal of International Law and Politics, Vol. 37, No. 4, pp. 829–868.

Arrowsmith, Sue (2003): *Government Procurement in the WTO*, The Hague; Boston: Kluwer Law International.

Arrowsmith, Sue; Linarelli, John; Wallace, Don (2000): *Regulating Public Procurement: National and International Perspectives*, The Hague; Boston: Kluwer Law International.

Gordon, Daniel I. (2006): „Constructing a bid protest process: The choices that every procurement challenge system must make“, in: Public Contract Law Journal, Vol. 35, No. 3, pp. 427-445.

Hussmann, Karen; Hechler, Hannes; Penailillo, Miguel (2009): *Institutional arrangements for corruption prevention: Considerations for the implementation of the United Nations Convention against Corruption Article 6*. Bergen: U4 Issue 4 (Edited by Chr. Michelsen Institute).

Nicholas, Caroline (2009): "Remedies for breaches of procurement rules and the UNCITRAL Model Law on Procurement" in: Public Procurement Law Journal, No. 4, pp. 151–159.

Quinot, Geo (2013): "A Comparative Perspective on Supplier Remedies in African Public Procurement Systems", in: Arrowsmith, Quinot (Eds.): *Public procurement regulation in Africa*, Cambridge, UK; New York: Cambridge University Press, pp. 308-335.

Senturia, Joseph J. (1931): "Corruption, Political", in: *Encyclopedia of the Social Sciences*, pp. 448-452.

Udeh, Kingsley T. (2013): "A critical appraisal of Kenya's supplier review system in the light of international standards", in: Public Procurement Law Review, No. 5, pp. 183–203.

Westen, Laurence M. (2012): *Das Vergaberecht als Mittel der Korruptionsbekämpfung in den Entwicklungsländern Subsahara-Afrikas am Beispiel Kenia*, Baden-Baden: Nomos.

Zhang, Xinglin (2007): "Supplier review as a mechanism for securing compliance with government public procurement rules: A critical perspective", in: Public Procurement Law Review, No. 5, pp. 325–351.

International legal sources

Busan Partnership for Effective Development Co-operation (2011),
<http://www.oecd.org/dac/effectiveness/busanpartnership.htm> (last accessed: 07.05.2014)

UNCITRAL Model Law on Public Procurement (2011),
http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html
(last accessed: 07.05.2014)

UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994),
http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html
(last accessed: 07.05.2014)

United Nations Convention Against Corruption (2003),
<https://www.unodc.org/unodc/en/treaties/CAC/> (last accessed: 07.05.2014)

National legislations

Kenya:

The Public Procurement and Disposal Act, No. 3 of 2005 (PPA-K)

The Public Procurement and Disposal Regulations, 2006 (Legislative Supplement No. 53) (PPR-K)

Uganda:

Reprint of the Public Procurement and Disposal of Assets Act, No. 1 of 2003 (PPA-U)

The Public Procurement and Disposal of Public Assets (Administrative Review)

Regulations 2014 (Supplement No. 3) (PPR-U (Administrative Review))

The Public Procurement and Disposal of Public Assets (Contracts) Regulations 2014
(Supplement No. 3) (PPR-U (Contracts))

Tanzania:

The Public Procurement Act, No. 9 of 2011 (PPA-T)

The Public Procurement Regulations 2013 (Supplement No. 48) (PPR-T)

Other sources

East African Business Week: Technocrats tear into procurement,
<http://www.busiweek.com/index1.php?Ctp=2&pl=666&pLv=3&srl=68&spl=107&cl=10> (last
accessed: 07.05.2014)

Public Procurement Regulatory Authority (Tanzania): “A summary Report of Procurement Audits in One Hundred and Twenty One Procuring Entities FY2011/2012”, annex 3;
<http://www.ppra.go.tz/index.php/e-library> (last accessed: 07.05.2014)

The World Bank: Projects on public procurement reform,
<http://go.worldbank.org/8HE37SPEJ0> (last accessed: 07.05.2014)

Transparency International: Corruption Perceptions Index 2013,
<http://cpi.transparency.org/cpi2013/results/> (last accessed: 07.05.2014)

Transparency International: Public Procurement Due Diligence Tool,
<http://gateway.transparency.org/tools/detail/24> (last accessed: 07.05.2014)