

THE NATURE OF MULTIPLE
PROCUREMENT RULES AND THE POLICY
ISSUES ARISING FROM MULTIPLICITY OF
RULES: A CASE STUDY OF GHANA

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Abstract

Many African countries such as Ghana have adopted rules and procedures that regulate the conduct of public procurement. These developing countries usually rely on foreign aid, which is disbursed through public procurement, to undertake major development projects. However, unreliable domestic systems contribute to the motivation of donors who usually require beneficiary countries to apply procurement rules and procedures set out by the donor for the implementation of development projects funded by the donor. Different rules of donors are applicable to procurement in addition to existing rules under the domestic regime, which results in the application of multiple procurement rules.

Adopting a doctrinal approach, this thesis examines the issues of multiple procurement regimes using Ghana as a case study. It seeks to analyse the manner of interaction between the rules of the different regimes and to identify and elaborate the policy issues arising from the application and interaction of the different sets of rules.

The thesis concludes that policies of the multiple procurement rules are almost the same but rather expressed in different terminologies. However, implementation of the multiple rules may have negative implications not only for the achievement of domestic policies such as value for money and simplification of procedures, but also for policies of the development partners that seek to promote domestic development on issues such as corruption and local capacity development. Particularly, the significant complexity created in the system, may work against other policies on domestic development.

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Chapter 1: Introduction

1.1 Context of Research

This thesis examines the issue of multiple procurement regimes and the policy implications arising from the multiplicity of regimes using Ghana as a case study. Multiple regimes refer to the application of different sets of procurement rules and systems including institutions set by donors in addition to existing domestic rules on procurement. The research focuses on issues arising from the interaction of the several sets of procurement rules and systems applicable to procurement conducted in Ghana.

Several reasons underpin the regulation of public procurement. Public procurement holds a significant share of the domestic market in Africa which is estimated between 9% and 13% of GDP¹ and in Ghana, public procurement alone represents about 17% of GDP.² Regulation of public procurement allows a fair balance between the interest of the different stakeholders such as those of taxpayers and suppliers. Regulation also allows the achievement of specific policy objectives such as those targeted at disadvantaged groups in the society.

Ghana is among many other African countries that over the last decades are reforming their procurement systems which involve the adoption of public procurement rules and procedures for the implementation of development projects.³

Major development projects in Ghana and in many African countries are financed by external partners through foreign aid. Aid is an important component of government expenditure in Africa and funded more than 40% of government expenditure over the period of 20 years.⁴ Aid funds are spent on goods and services needed for domestic development projects. To secure these goods and services, public procurement rules are followed. This involves buying goods and services from international or domestic markets which offer the best value for aid funds. Public procurement rules are therefore essential in disbursing aid funds in an efficient and strategic manner to achieve policy objectives. Moreover, public procurement regulation is relevant in foreign aid, given the large volume of business it generates and the usually complex nature of development projects with diverse international actors.

However, several reasons, including unreliable domestic systems, limits the disbursement of aid funds through domestic management systems. The public sector in Ghana and many African countries are usually plagued with corruption and fraudulent acts. Aid funds are sometimes channelled away from projects for which they were

¹ W. Odhiambo and P. Kamau, *Public Procurement: Lessons from Kenya, Tanzania and Uganda*, OECD Working Paper 208 (2003), p.10.

² World Bank, *Ghana: 2007 External Review on Public Financial Management*, Vol. 2, World Bank Public Procurement Assessment Report (2008), p.2.

³ S. Arrowsmith and M. Trybus (eds), *Public Procurement: The Continuing Revolution* (Kluwer Law International, 2003), p.14.

⁴ D. Brautigam and S. Knack, 'Foreign Aid, Institutions, and Governance in Sub-Saharan Africa', (2004) 52 *Economic Development and Cultural Change* 255. Note that the percentage of expenditure may be higher in specific countries.

provided. Donors have increasingly grown dissatisfied and generally lack confidence in national procurement systems of many African countries.

The ineffective spending of aid funds has motivated donors to step in and become involved in procurement regulation. Donors are accountable to their tax-payers and those providing funds for development projects. In order to fulfil these accountability requirements, donors expect efficient and transparent procurement regulation in disbursing aid funds. Though procurement procedures for aid funded projects are usually conducted by the recipient country, donors have assumed a supervisory role over the procurement process. Donors lay down their own procurement rules and procedures which must be followed for aid funded projects.

Both major bilateral and multilateral development partners have all developed their own sets of procurement rules as attempts to achieve desired transparency and accountability in the conduct of procurement. The use of donor's procurement rules has become a common practice in development assistance and encouraged other smaller donors to develop their own sets of rules. The rules of donors are occasionally modified to reflect best practices through donor experiences developed along the procurement process.

The existence of national procurement rules in addition to those of many donors, each with its own set of procedures, have led to a proliferation of procurement rules. The rules often use different terminologies relating to similar processes and objectives within the field of development assistance. For instance, the World Bank procurement rules refers to a supplier as a bidder while the national procurement rules of Ghana refers to the same supplier as a tenderer.

As a result, the domestic system faces laborious and time-consuming procurement processes where the same procurement officer may be responsible for multiple procurement projects. At the same time, several project reports are submitted to multiple review and oversight bodies, which cause duplication in the system and places unnecessary burden on the capacity needs of domestic systems.

1.2 Aims and Objectives

The issue of multiple procurement regimes has been mentioned in a book on public procurement in Africa edited by Arrowsmith and Quinot⁵. However, like many other issues specific to Africa and other developing countries, it has not been analysed in detail, which is not surprising given the relative dearth of work on procurement in developing countries, including in Africa. Some other literature provides the basic rules generally adopted by states for regulating procurement including the domestic rules in Ghana⁶ and the detailed rules of external regimes.⁷ However, this literature does not

⁵ A. La Chimia, 'Donor's Influence on Developing Countries' Procurement Systems, Rules and Markets: A Critical Analysis' in G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), Ch. 11.

⁶ D.N. Dagbanja, *Law of Public Procurement in Ghana* (Lambert Academic Publishers, 2011). This is the only book on Ghana which describes the regulatory framework.

deal in detail with the issue of multiple regimes and their policy implications in specific contexts.

This thesis provides an analysis of the specific issues created by the operation of multiple regimes, in the sense of multiple regulatory rules applying to the award of public procurement contracts, using Ghana as case study. This issue has not been examined in detail before, either in general or in the context of any specific countries. Challenges observed in Ghana may be of wider importance to many African countries. This is not to assert that Ghana is representative for the entire African continent. However, the issue of multiple regimes is a phenomenon in many African countries and findings from the context of Ghana may also be relevant for these other countries.⁸

In this regard, the research, first, aims to examine the nature of interaction between different regimes operating in Ghana, namely the domestic regime and various regimes imposed by external funders of development projects – for example, as regards the hierarchy between the regimes and the use of one regime to fill gaps in another.

Secondly, the research aims to identify and elaborate the policy issues arising from the existence of these multiple regimes, in light of the relationship between them.

The research has two main objectives. Firstly, it will provide information on the issue of multiple regimes and the policy implications that could assist policy making in steering procurement reforms. The practice of multiple regimes may create unintended policy implications which could work against the achievement of specific policy objectives. Findings of this study will further understanding and inform the approach of policy makers and development partners to procurement policy reform in developing countries such as Ghana.

Secondly, the research will enhance understanding on the nature of interaction between multiple regimes and provide potential directions for further research. Given the exploratory nature of this research in clarifying the nature of multiple regimes and the possible policy implications, this study sheds light on the problems of multiple regimes. Understanding the issues will provide essential indications of potential problems which will then inform specific focus on issues to be addressed in the future. For example, if the research identifies the use of different rules on issues, such as procurement methods, then a future research could evaluate the extent to which the differences actually increase costs for procurement, whether through delays in the process or the lack of skills to manage complexities created by the multiple rules.

⁷ S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell 2005); J. Cibinic, R. C. Nash and C. R. Yukins, *Formation of government contracts* (4th edn, Wolters Kluwer 2011); S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International, 2000); P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP, 2004).

⁸ La Chimia, (note 5 above). Also, many other themes discussed in the edited book, including the introductory chapter and study on the specific countries highlight the existence of multiple regimes in Africa; OECD-DAC, *The Mali Donor's Public Procurement Procedures: Towards Harmonisation with the National Law* (OECD, 2000).

1.3 Choice of Regimes for the Case Study

Several multilateral and bilateral development partners operate in Ghana. Currently, Ghana alone receives development assistance from over 32 donors who operate within 11 sectors including the health and education sectors.⁹ However, analysis in this thesis focuses on the major multilateral and bilateral development partners operating in Ghana based on their volume of funding and the level of activities relating to development assistance. The following regimes have been identified as the major external regimes operating in Ghana and will be examined in this research.

Multilateral development partners

- The World Bank
- The European Union (EU)

Bilateral development partners

- The United States of America (US)

The choice of these specific regimes for the study is motivated by several reasons. The World Bank is the largest donor in Ghana and its policies serve as a model and influences those of other donors such as the African Development Bank. The EU and the US are also significant and their policies are not modelled directly on the World Bank but adopt different policy approaches which is useful to illustrate the issues under discussion. The detailed reasons for the choice of these regimes are explained in the later chapters.¹⁰

China has also been identified as one of the major bilateral development partners in Ghana. However, China has not been included in this analysis due to a number of considerations; there is little information on the rules and procedures of procurement funded by China in Ghana. Moreover, procurement funded by China is conducted in China and does not involve the domestic regime. There is limited information on the applicable procedures to procurement funded by China in Ghana. By allowing little engagement of the domestic regime in its funded procurement, China offers some form of relief on the already weak capacity of in the domestic regime as will be discussed. However, this has the potential of discouraging the much needed skills and capacity development of domestic personnel and encourages reliance on external consultants for the implementation of development projects in Ghana.

1.4 Research Method

The thesis takes mainly a doctrinal approach involving the analysis of primary legal materials and secondary literature.

The thesis is split into two parts.

⁹ OECD Statistics, www.oecd.org/dac/stats (accessed 3 March 2016).

¹⁰ See discussions in section 4.1; section 5.1; section 6.1.

Part I consist of a case study analysis of each regime, outlining the procurement rules and systems relevant for the issues of multiplicity. This part seeks to describe and evaluate the different regimes that are applicable. It does not seek to describe the very detailed content of the procurement rules (these have already been covered by other research scholarship¹¹) but focuses on the manner in which external regimes operate in Ghana and their interaction with each other but, referring to the detailed content of the rules only in so far as necessary for the purpose of the thesis.

Part II sets out an analysis of possible policy implications of issues arising from the case study analysis in Part I. This part identifies and elaborates on the various policy issues arising from multiple regimes.

Analysis in both parts, as mentioned, takes a doctrinal approach. The aim was to identify those policy issues that can be observed from such a doctrinal analysis. The doctrinal nature of the analysis means that it is not possible to draw specific factual conclusions – for example, as to the relative and absolute importance of the different problems identified – but it was not possible to undertake empirical research that would be necessary within the time scale of the present project. These issues could, however, be the subject of further research.

As regards the sources of materials, legal texts such as the Constitution of Ghana and the procurement legislation of Ghana were used. The thesis also examined soft law such as guidance notes issued by policy makers, the UNCITRAL Model Law, the World Bank guidelines and other rules of external regimes. Soft law has a normative nature with non-binding and non-enforceable character but have practical effects that are comparable to hard law. Studies have also shown that soft law in the form of declarations and hard law in the form of treaties are complied with largely to the same extent.¹² In addition, there was analysis of literature which provides an understanding of practical problems that may not be easily identified in the primary sources.

There was the opportunity to interact with procurement practitioners in Ghana in order to obtain doctrinal information where such information could otherwise not be accessible. Doctrinal materials such as administrative guidelines on Ghana are not readily available in books or on the internet and sometimes needed to be accessed within relevant policy departments through interaction with procurement experts. Though no formal interviews or questionnaires were used, the interaction with practitioners also contributed to understanding of the practical context and identifying problems faced in the application of the rules.

1.5 Outline of the Study

Apart from this introductory chapter, Part I of this thesis consists of Chapters 2-7 which involves a case study of each regime. Chapter 2 sets out the general framework for public procurement in the context of Ghana. It introduces the broad administrative

¹¹ See discussions in section 1.2.

¹² H. Hillgenberg, 'A fresh look at soft law', (1999) 10 *European Journal of International Law*, p.502.

context of governance both on the domestic system and on development partners and also provides an overview of the procurement environment in Ghana which is relevant for the operation of the different procurement regimes in Ghana.

Chapter 3 outlines the framework of public procurement in Ghana specifically for the purposes of domestic regulation. The chapter identifies the domestic regime of Ghana as one of the regimes that interact with other procurement regimes in Ghana. It focuses on how public procurement is regulated domestically when external procurement regimes are not involved.

Chapter 4 provides an outline of the framework for regulating procurement funded by the World Bank with reference to its application in Ghana. The chapter identifies and examines the World Bank procurement regime as one of the multiple procurement regimes operating in Ghana.

Chapter 5 outlines the regulatory framework of procurement funded by the EU in Ghana. Analysis in this chapter focuses on the European Development Fund (EDF) as the main funding instrument relevant for the specific context of Ghana. The chapter identifies and examines the rules and procedures under EU funded procurement in Ghana as one of the multiple regimes applicable in Ghana.

Chapter 6 examines the regulatory framework for procurement funded by the US with reference to its application in Ghana. The management of procurement funded by US regime is usually carried out by different agencies, each with its distinct rules and procedures. For the purposes of US funded procurement in Ghana, USAID has been identified and examined in this chapter as the main US agency operating in Ghana. Analysis of USAID's rules forms the applicable rules under US regime as one of the distinct donor regimes operating in Ghana.

In order to closely analyse the issue of multiple regimes, Chapter 7 provides a case study in one specific area – correction of errors in tenders once accepted tenders have been opened. This chapter illustrates the sort of issues that arise when applying different rules in relation to the conduct of different stages of the procurement process. This case study is particularly useful since it is not possible to deal in equal detail with all the areas in this context.

Part II of the thesis is covered in Chapter 8 which draws on previous discussions in part I to analyse the themes arising from the nature of interaction between the regimes and to highlight some of the possible policy implications resulting from multiplicity of regimes. Analysis in this chapter provides understanding on the policy issues arising from multiple regimes.

Finally, Chapter 9 provides concluding remarks which draw on the findings discussed in parts I and II.

The thesis will show that a system with multiple procurement rules is characterised by significant complexity which arises mainly from the application of different sets of largely

similar rules but with different terminologies and ways of doing basically the same things. It will be seen that multiplicity could also frustrate the effectiveness of policies aimed at dealing with the inherent lack of capacity in developing countries. In this regard, a system with multiple rules imposes rather unnecessary administrative burden on procurement officials and potential suppliers which could work against development policies such as efficiency and simplification of procedures.

Chapter 2: The General Framework for Public Procurement Regulation in Ghana

2.1 Introduction

Ghana is among many developing countries embarking on public procurement reforms.¹ This chapter examines the general regulatory framework of procurement in Ghana. Its role is to provide an overview of the procurement environment² which is relevant for all the different regimes operating in Ghana.

The chapter begins with a brief introduction to the administrative system of governance. The structural framework for procurement regulation will then be discussed, focusing on the institutions involved. Measures on preventing corruption and issues of capacity development will then be considered, followed by the role of development partners in regulating public procurement in Ghana.

2.1.1 Ghana in Context

Public procurement in Ghana constitutes a large proportion of government expenditure, representing about 17% of GDP and about 80% of tax revenue in 2007.³ Procurement is administered by policy formulation and regulation at the central level of government. Implementation of procurement is in line with the decentralised system of administration 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 to anyone else. It will be seen that this has placed procurement responsibility with capacity challenges on public entities, many of whom were not prepared for this role.

2.2 Coverage of Procurement

The Public Procurement Act, as the fundamental legislation on public procurement in Ghana provides the coverage of procurement for domestic purposes of regulation. Discussions in this section will focus on the institutions involved in procurement that are also relevant for the operation of other regimes in Ghana. Other aspects of procurement covered for the purposes of domestic regulation will be discussed in chapter 3.

2.2.1 Institutions Involved in Procurement in Ghana

The main institutions involved are the Public Procurement Authority, Procurement Entities, Tender Committees, Tender Evaluation Panel and Tender Review Boards. An important institution involved in procurement whose role has not been articulated is the

¹ B. Basheka, 'Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction' in K. V. Thai (eds), *International Handbook on Public Procurement* (CRC Press, 2009), Ch. 6; J. M. Akech, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2004) 37 *New York University Journal of International Law and Politics* 829; A. Anvuur, M. Kumaraswamy and S. Male, *Taking Forward Public Procurement Reforms in Ghana* (CIB, 2006).

² S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International, 2000), p.18-22; R. Dibley, 'Public Sector Management Policies in Sub-Saharan Africa' in A. K. Kalu (eds), *Agenda Setting and Public Policy in Africa* (Ashgate publishing, 2004), p.87-113.

³ World Bank, *Ghana: 2007 External Review on Public Financial Management*, Vol. 2, World Bank Public Procurement Assessment Report (2008), p.2.

Parliament of Ghana. The nature and duties of these institutions are discussed in subsequent sections.

Firstly, procurement rules become legally binding and enforceable when they are enacted by Parliament with the assent of the President. Indeed, the Public Procurement Act is a legislative instrument enacted by Parliament and all its provisions are legally binding for domestic purposes of regulation. Since its enactment ten years ago, the Procurement Act has not yet seen any amendment. There is however a proposed amendment bill currently before Parliament and the relevant structural changes proposed in the bill will be highlighted where relevant. Parliament is also responsible for granting approval on procurement conducted with loans to which the Government of Ghana is a party.⁴

2.2.1.1 The Public Procurement Authority

Public Procurement Authority (PPA), formerly known as the Public Procurement Board, is the institution with the regulatory and oversight responsibility.⁵ Following an Executive instrument (E13), the formerly Procurement Board was renamed Procurement Authority in 2007. The Procurement Authority however maintains a nine member governing board appointed by the President with members from both the public and the private sectors.⁶ The secretariat of the board, led by the Chief Executive Officer is responsible for the day to day operation of the institution.⁷ Other African countries including Kenya, Uganda and Nigeria have also established similar procurement oversight authorities.⁸ Though the names and hierarchical location of the oversight bodies vary in these countries, they generally retain a supervisory duty as discussed below.

2.2.1.1.1 Functions of the Public Procurement Authority

PPA was established specifically to exercise direct regulatory and oversight authority over procurement in Ghana.⁹ The functions of PPA are broadly outlined as follows:

Policy-making and regulatory function: PPA develops policy proposals, reviews policies for amendment and steers the overall procurement policy aimed at the achievement of national objectives.¹⁰ PPA plays a key role for example in initiating the current proposal for amendment to the Procurement Act through consultation with stakeholders including development partners. Duties of PPA are performed in consultation with the Head of the Ministry responsible for finance. This approach is similar in other African countries including Kenya and Uganda where the policy making and regulatory functions of the oversight body are performed in consultation with the Minister responsible for finance.¹¹ In Tanzania however, there is clear separation

⁴ Constitution of the Republic of Ghana, (1992), art. 181 (5).

⁵ Ghana, *Public Procurement Act*, (2003), s. 1(1), (Hereinafter Ghana Procurement Act)

⁶ Ibid, s. 4.

⁷ Ibid, s. 2.

⁸ G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), country studies in Part I.

⁹ Ghana, Procurement Act, s. 3.

¹⁰ Ibid, s. 3(a).

¹¹ See discussions in section 2.2.1.1.

between the policy making authority and the regulatory authority which is assigned to separate bodies.¹² Such separation can be useful in ensuring some level of autonomy based on institutional resource capacity.

Monitoring and advisory function: PPA has the duty to monitor the procurement system and track compliance with procurement standards.¹³ With assistance from the World Bank, PPA developed the Public Procurement Model of Excellence (PPME), which is a web-based tool that allows both qualitative and quantitative measurement of procurement activities and enhances PPA's monitoring duty.¹⁴ PPA also works closely with development partners to identify innovative and best practice standards that could enhance efficiency in the domestic system. For example, PPA works with partners in Switzerland in adopting sustainable procurement policies in Ghana.¹⁵

PPA also advises stakeholders on the functioning of procurement in Ghana. For example, PPA advises the Government of Ghana on procurement policies.¹⁶ PPA also provides regular guidance to entities and also publishes general information on its website.¹⁷

Information management and capacity building function: PPA is responsible for managing procurement information including implementation and maintenance of an information system.¹⁸ It also requires keeping accurate record of information to facilitate accountability.¹⁹ PPA has implemented a procurement management tool which allows entities to generate management reports and plan procurement activities.²⁰ The tool could facilitate procurement record keeping as an essential means of verifying compliance. The procurement records can also provide research information to identify potential areas for reform.

PPA also has the duty to build procurement capacity not only for entities but also the capacity of suppliers to bid on government contracts.²¹ This requires identification of capacity priorities of the domestic system and facilitating capacity development programmes for the domestic system. It also involves coordinating capacity building programmes of development partners.²²

¹² Tanzania, *The Public Procurement Act* (2011), s. 6; s. 7, (hereinafter the Tanzania Procurement Act).

¹³ Ghana, Procurement Act, s. 3(d).

¹⁴ Ghana Public Procurement Authority, *Electronic Bulletin* (June 2013), Vol. 4(3).

¹⁵ T. Liebert, *Swiss-Ghana Project on Sustainable Public Procurement* (IISD, 2012), available at http://www.iisd.org/pdf/2012/spp_swiss_ghana.pdf (Accessed 3 March 2016).

¹⁶ Ghana, Procurement Act, s. 3 (l).

¹⁷ Ghana Public Procurement Authority, *Electronic Bulletin* (June 2013), Vol. 4(3).

¹⁸ Ghana, Procurement Act, s. 3(f).

¹⁹ *Ibid*, s. 3(g).

²⁰ Ghana Public Procurement Authority, *Electronic Bulletin* (Sep-Oct 2012), Vol. 3(5).

²¹ Ghana, Procurement Act, s. 3(j), (k), (t).

²² *Ibid*, s. 3(n).

Enforcement function: PPA also has the duty to enforce compliance with domestic procurement rules through administrative review procedures.²³ PPA has explicit powers to investigate procurement misconducts and require compliance with the rules.²⁴

The functions of PPA are not limited to those explicitly written in the Procurement Act as outlined above. PPA has much broader functions which include any incidental function necessary for the achievement of the overall procurement objectives as will be discussed in Chapter 3.²⁵ The broad mandate of PPA could be explained by the generally inadequate capacity of domestic institutions to allow efficient resource allocation and separation of powers.

2.2.1.1.2 Structure of the Public Procurement Authority

PPA is a legal entity with the capacity to engage in any activity relating to its duties.²⁶ Member of PPA governing board are drawn from public and private sectors as a requirement with explicit experience and skills in procurement.²⁷ This ensures diverse knowledge and experience are drawn in arriving at decisions. Members are appointed by the President in consultation with the council of state.²⁸

PPA operates as an agency under the Ministry responsible for finance (the Ministry) and reports to the Head of the Ministry. For example, PPA's policy proposals and annual reports shall be submitted through the Ministry.²⁹ Expenses of PPA are usually provided directly by Parliament but any other source of funding for PPA shall be approved by the Ministry.³⁰ This arrangement has implications for the autonomy of PPA and its supervisory responsibility may be compromised.

In other African countries such as Gambia, the oversight body reports directly to cabinet which provides autonomy for the oversight body.³¹ Significantly, Gambia's position highlights a useful approach that countries such as Ghana could adopt. Where PPA reports directly to cabinet, it could ensure the independence of PPA and reinforce its coordinating ability to harmonise procurement activities in Ghana.

2.2.1.2 Procurement Entities

The term "Procurement entities" refers to the institutions conducting public procurement.³² Entities are responsible for carrying out procurement in accordance with the regulatory requirements.³³ Procurement entities are divided into two main groups; 1) central government institutions, which are made up of Central Management Agencies (CMAs) and Government Ministries, Departments and Agencies (MDAs); 2) government

²³ Ibid, s. 80.

²⁴ Ibid, s. 3(m); s. 80.

²⁵ Ibid, s. 3(u).

²⁶ Ibid, s. 1(2); Tanzania Procurement Act, s. 7(2)(b); Zambia, *The Public Procurement Act* (2008), s. 5(2), (hereinafter the Zambia Procurement Act).

²⁷ Ghana, Procurement Act, s. 4(1).

²⁸ Ibid, s. 4(2).

²⁹ Ibid, s. 3(i); s. 13(1).

³⁰ Ibid, s. 10.

³¹ Gambia, *Public Procurement Act* (2001), s. 13(1)(b), (hereinafter the Gambia Procurement Act).

³² Ghana, Procurement Act, s. 98.

³³ Ibid, s. 15.

para-statal institutions which are either statutory bodies or state owned enterprises. In accordance with the Local Government Act of 1993 (Act 462), central government institutions were decentralised which led to the creation of local governments, made up of the Metropolitan, Regional and District Assemblies, each with procurement responsibility for their own needs. The decentralised procurement system means that as a matter of general rule, all procurement entities, including smaller entities at the decentralised level of government, usually conduct their own procurement. In effect, procurement functions particularly at the decentralised level are diffused in administrative functions due to the lack of skilled procurement personnel and this places greater demand on procurement coordination both at the central and local levels as discussed in section 2.4 below.

Domestic procurement rules in Ghana have no explicit provisions on central purchasing authorities nor joint procurement by entities or whether large entities may conduct procurement on behalf of smaller entities. The rules are also silent on the use of third party procurement agents. In practice however, some entities, particularly in the educational sector, are piloting procurement of common user items on behalf of other entities as will be discussed below.³⁴ Essentially, these entities are not central purchasing authorities. Moreover, some other entities use third party procurement agents for the conduct of procurement as the case particularly under donor funded procurement. For example, Crown Agent Ghana Limited and the Ghana Supply Company Limited (GSC) are agents regularly contracted in Ghana for the procurement of goods and services including common user items and training programmes.³⁵

The Procurement Act provides two main criteria that determine which entities must comply with its provisions;³⁶ 1) procurement financed by public funds,³⁷ either in part or in whole; 2) functions relating to procurement including the description of requirement, preparation and award of contracts and the phases in contract administration. Both criteria must be met and the Minister responsible for finance may declare any person or institution as procurement entity.³⁸ The Procurement Act further provides a list of identified entities that meet the set criteria as follows:³⁹

- *Central management Agencies (CMA)*: These are the central agencies of government administration. For example, the Office of the President and the Public Service Commission.
- *Government Ministries, Departments and Agencies (MDA)*: These are the national ministries and departments. For example, Ministry of Education and Department of Feeder Roads.

³⁴ This information was obtained in a correspondence with a Procurement Official at the Public Procurement Authority in Ghana. The information is on file with the author.

³⁵ For more information, see <http://www.crownagents.com/Ghana.aspx> (accessed 3 March 2016).

³⁶ Ghana, Procurement Act, s. 14(1).

³⁷ Public funds are defined by the Ghana Procurement Act to include the Consolidated Fund, the Contingency Fund and such other public funds as may be established by Parliament.

³⁸ Ghana, Procurement Act, s. 16(1).

³⁹ Ibid, s. 14(2).

- *Sub-vented Agencies:*⁴⁰ These are agencies set up by the government with the aim of providing public service. For example, Ghana Library Board and its procurement is financed by public funds allocated by parliament.
- *Governance Institutions:* These are institutions such as the Regional Coordinating Councils and District Assemblies that are created to facilitate governance and administration of the state.
- *State Owned Enterprises (SOE)* to the extent that they utilise public funds. For example, the Ghana Water Company and Electricity Company of Ghana.
- Public universities, public schools, colleges and hospitals.
- The Bank of Ghana and financial institutions such as public trusts, pension funds, insurance companies and building societies which are wholly owned by the State or in which the State has majority interest.
- Institutions established by Government for the general welfare of the public or community.

However, the list of procurement entities is non-exhaustive and other entities not on the list may have to comply with the rules if they fall within the criteria outlined above. It implies that the list is by way of illustration and does not intend to provide the full range of entities that must comply with the rules.

The guide to enactment of the 1994 UNCITRAL Model Law suggests states consider defining procurement entities with the extent to which they utilise public funds for procurement purposes.⁴¹ However, the approach has not been uniformly applied in African systems. In Gambia for example, the rules cover public sector institutions with little reference to their use of public funds.⁴² In Tanzania and Uganda, the rules apply to all entities that use public funds.⁴³ In the case of Nigeria, the law explicitly provides a minimum of 35 per cent use of public funds as the cut-off point for the procurement rules to apply.⁴⁴

An important exception to the application of the Procurement Act is provided for loan funded procurement including procurement funded by development partners. Significantly, the exception applies to procurement conducted with loans obtained by the state, the details of which will be discussed further below in section 2.5.1.

Procurement entities in Ghana have an appointed heads of entity with overall responsibility for compliance with the rules including approval of procurement decisions

⁴⁰ Ibid, section 98 defined a sub-vented agency as an agency set up by Government to provide public service and financed from public funds allocated by Parliament in the annual appropriation.

⁴¹ UNCITRAL, *The UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994)*, Guide to Enactment, Commentary on art. 2 para. 2.

⁴² Gambia, *Procurement Act*, s. 2.

⁴³ Tanzania, *Procurement Act*, s. 2(1)(b); Uganda, *The Public Procurement and Disposal of Public Assets Act (2003)*, s. 2, (hereinafter *Uganda Procurement Act*).

⁴⁴ Nigeria, *The Public Procurement Act (2007)*, s. 15(1)(b), (hereinafter *Nigeria Procurement Act*).

within allocated threshold value.⁴⁵ Each entity is required to have a number of committees responsible for various stages of the procurement as outlined below.

2.2.1.2.1 Tender Committee

Entities are required to establish a Tender Committee with the responsibility to ensure every stage of the procurement process complies with procedures in the rules.⁴⁶ Tender Committees are usually led by heads of entity and have the responsibility to review and approve tender awards and annual procurement plans of entities. The Committee reviews tenders and approves recommendation on evaluated tenders for the award of contracts below allocated value threshold.⁴⁷ For Procurement decisions above its approval threshold, the Committee is responsible for securing concurrent approval, thus a “no objection” from the relevant Tender Review Board prior to making any contract award decision.⁴⁸

2.2.1.2.2 Tender Evaluation Panel

Entities are also required to establish Tender Evaluation Panels with the duty to conduct the technical and financial evaluation of tenders and make recommendations for the award of contracts.⁴⁹ The complexity of the procurement is vital in determining the number of expert evaluation personnel required.⁵⁰

Tender Evaluation Panel usually evaluates tenders and presents its award recommendations to the Tender Committee who makes the final award decision by either approving or rejecting the award recommendation. The Tender Evaluation Panel acts solely as advisory organ of the Tender Committee by making recommendations that assist the Tender Committee in reaching award decisions. Unlike Tender Evaluation Panels, Tender Committees are permanent Committees within entities and members of Tender Committees shall not serve on Tender Review Panels.

Some other African systems including Kenya and Uganda also adopted similar approach where an independent advisory body assists the decision making body.⁵¹ A different model is used in Gambia where the committee responsible for making procurement decisions also has the responsibility to evaluate tenders. The latter model could create opportunities for abuse where procurement decision making is left in the hands of few personnel who may lack the necessary technical expertise.

2.2.1.2.3 Procurement Unit

Procurement units are established within entities with the duty of undertaking and coordinating all the detailed procurement activities for the entity. The unit liaises with end-users who initiate the procurement process and also provides technical

⁴⁵ Ghana, Procurement Act, s. 15.

⁴⁶ Ibid, s. 17.

⁴⁷ Ghana, Procurement Act, s. 17(1)(b); s. 17(1)(c).

⁴⁸ Ibid.

⁴⁹ Ibid, s. 19.

⁵⁰ Ibid, s. 19(1); Uganda, Procurement Act, s. 37(4).

⁵¹ Kenya, *The Public Procurement and Disposal Act (2015)*, s. 46(4), (hereinafter Kenya Procurement Act); Uganda, Procurement Act, s. 37.

procurement services to the Tender Committee with responsibilities including arranging the publication of notices and maintaining procurement records.⁵² It acts as the secretariat to the Tender Committee and prepares tender documentation.

2.2.1.3 Tender Review Board

Tender Review Boards are located outside the procurement entity and they provide a “no objection” approval on tenders that are above Tender Committee threshold value.⁵³ Tender Boards are also responsible for reviewing appeals on complaints handled by entities.⁵⁴ In practice however, the review function has been neglected as discussed in section 3.11.4. Tender Review Boards are established at four different decentralised levels of administration as follows;

- **Central Tender Review Board:** The Board will usually approve tenders from any entity which has tender value above the threshold for the Ministerial Tender Review Board.
- **Ministerial/Headquarters Tender Review Board:** The Board will generally approve tenders from entities which have tender values above the threshold for the Regional Tender Review Board but within its own allocated threshold value.
- **Regional Tender Review Board:** This Board will usually approve tenders from entities with tender value above the threshold for the District Tender Review Board but within its own allocated threshold value.
- **District Tender Review Board:** This Board will usually approve tenders from entities with tender value above the threshold for entity Tender Committees but within its allocated threshold value.

In practice, the model in Ghana has encountered several inefficiencies. Meetings are significantly delayed due mainly to the compositional structure of the Board. Delegated decisions at the decentralised levels tends to be bureaucratic where for example, high value procurement from District Assemblies still require approval from the Central Tender Board whiles complaints at the District Assemblies are often referred directly to PPA and does not provide the required autonomy for the decentralised institutions.

The guide to enactment of the 1994 Model Law suggests states could locate decision making authorities either within or outside the procurement entity and this seems to be the approach adopted in many African systems. Botswana has a model similar to that in Ghana where the decision making authority is located outside the entity.⁵⁵ Some other

⁵² Ghana, Procurement Act, s. 98.

⁵³ Ibid, s. 20(2).

⁵⁴ Ibid, s. 20(2)(e).

⁵⁵ Botswana, *Public Procurement and Asset Disposal Act* (2001), s. 37; s. 64(3), (hereafter Botswana Procurement Act).

African systems including Gambia, Kenya and Tanzania adopted a different model where decision making authorities are located within the entities.⁵⁶

The current amendment bill on the procurement law in Ghana seek to give greater autonomy to local governments in procurement matters where final decision making authority will be vested in the local government. The bill, if approved, will reduce the current four levels of the Tender Review Board to two levels; one for the central government and another for the local government, each with different composition of its members. The amendment will also see significant increase in threshold values for entities in order to speed up decision making and minimise delays.

2.3 Measures on Preventing Corruption

Ghana is among many other developing countries undergoing major reforms, sometimes with assistance from donors, in the fight against corruption.⁵⁷ Ghana enacted a number of anti-corruption legislations including the Whistle-blowers Act 2006 of Ghana (Act 720) which offers protection for witnesses and informants on corrupt practices from prosecution and victimisation. The Procurement Act also criminalised corruption as defined under Ghana's Criminal Code and provides sanctions for the offer or receipt of any form of bribe or the use of public office for private gain.⁵⁸ However, available data indicates that there is still wide spread corruption in Ghana.⁵⁹ Transparency of domestic procurement procedures is still affected by challenges of enforcement, capacity and resources which make public procurement highly vulnerable to corruption. The vulnerability lies mainly in the weak domestic institutional framework which exposes the uncoordinated strategies with the lack of independence of regulatory institutions. For example, the weak institutional resources including low salaries and poor working conditions as well as the lack of independence of PPA and other anti-corruption agencies such as the Economic and Organised Crime Office (EOCO) places an impediment on their enforcement capabilities.⁶⁰ Conflict of interest rules for public officials including asset disclosure requirements also lack institutional mechanisms to monitor and enforce compliance.⁶¹

As will be seen below, many donors in Ghana, particularly the World Bank, implements policies aimed at supporting domestic efforts on combating corruption. However, these policies are usually implemented separately by the individual donors rather than a coordinated anti-corruption policy. For example, the Ghana Anti-corruption Coalition (GACC) which is a coalition of both public and private sector anti-corruption institutions has received technical and financial support from different donors at different stages of

⁵⁶ Gambia, Procurement Act, s. 48(1); Kenya, Procurement Act, s. 46; Tanzania, Procurement Act, s. 31(1).

⁵⁷ S. Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures* (Hart Publishing, 2012); F. Anechiarico and J. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (University of Chicago Press, 1996).

⁵⁸ The Criminal Code of Ghana (1960) Act 29, art. 245; art. 252.

⁵⁹ This is the finding of the 2011 Global Integrity Report. The information is available at <https://www.globalintegrity.org/global/report-2011/ghana/> (3 March 2016).

⁶⁰ See discussions in section 2.2.1.1; also see M. Chene, Overview of Corruption and Anti-corruption in Ghana (2010) U4 Anti-Corruption Resource Centre Report, p.6.

⁶¹ Ibid, p.5.

its existence.⁶² However, there is no single anti-corruption strategy or a single focal point for the delivery of an anti-corruption strategy but rather there are fragmented anti-corruption strategies as developed with assistance from individual donors as will be discussed.⁶³

2.4 Capacity Development

The lack of capacity is an inherent problem in Ghana and more generally also in other developing countries.⁶⁴ Adequate level of capacity is important not only to ensure quality implementation of projects but also to minimise opportunities for abuse of power. In Ghana, the ability to generate national revenue for example, is hampered by low resource capacity among tax collection agencies and misapplication of exemption laws while poor working conditions including low salaries provide opportunities for corruption.⁶⁵ The capacity constraint in Ghana became more evident after the implementation of Ghana's decentralisation programme where procurement entities including even smaller entities at the district and municipal level became responsible for the procurement of their own needs without reference to any other entity.⁶⁶ Many of the smaller entities in particular, do not have the required capacity and resources to conduct their own procurement.

Capacity development for the purposes of procurement funded with domestic resources has been on the agenda of PPA in whom responsibility for capacity development lies.⁶⁷ By the first decade of its existence, PPA has organised a number of capacity development workshops, seminars and has trained over 20,000 public officials and other civil servants involved in procurement.⁶⁸

However, the impact of capacity building efforts of PPA appears to be minimal, perhaps without support from donors. For example, PPA's ability to coordinate capacity building programmes across the country is constrained by the lack of its own resources and institutional capacity.⁶⁹ PPA does not have coordinating offices in other regions of the country apart from its head office in the nation's capital city.⁷⁰ Moreover, the absence of reliable modern communication through technology in Ghana's procurement environment limits PPA's ability to reach out and support capacity development of entities particularly in other regional and rural communities.

⁶² A. Doig et al, Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia (2005), (U4 Anti-Corruption Resource Centre Report, p.60.

⁶³ Ibid.

⁶⁴ P. Trepte, 'Procurement Regulation and Emerging Economies: The Examples of Laos and Bhutan' in S. Arrowsmith and A. Davies (eds), *Public Procurement: Global Revolution* (Kluwer Law International 1998), Ch. 6; World Bank, An Independent Review of World Bank Support to Capacity Building in Africa: The Case of Ghana, (2005); W. A. Wittig and H. Jeng, *Challenges in Public Procurement: Comparative Views of Public Procurement Reform in Gambia* (PrAcademics Press, 2005), p.24-28.

⁶⁵ Ghana Integrity Initiative, *GII Alert: Quarterly Newsletter* (March 2011) issue 27.

⁶⁶ See discussions in section 2.2.1.2.

⁶⁷ See discussions in section 2.2.1.1.1.

⁶⁸ Ghana Public Procurement Authority, *Electronic Bulletin* (August 2014), p.4.

⁶⁹ Information obtained by the author in an interview with an official at the PPA head office in Ghana who wishes to remain anonymous.

⁷⁰ Ibid.

As indicated earlier, many donors in Ghana provide support for capacity development in different ways. Donors may provide financial and technical support for training workshops and seminars for officers engaged in procurement funded by the donor. In such cases, capacity building is directed specifically at addressing issues on procurement funded by donors. For example, the World Bank usually finances capacity building workshops in Ghana which offers training on the Bank's procurement procedures to ensure officers comply with requirements under the Bank's funded procurement.⁷¹ This form of capacity building has been the focus of many donor funded capacity development programmes in Ghana and also in many African developing countries.⁷² However, it tends to be unsustainable and may provide little benefit for the domestic system in the long term as will be discussed below.

In some other cases, donors may support capacity building programmes that are not directed at funded procurement but rather aimed at encouraging reforms in the domestic system. This form of support is usually uncoordinated, fragmented and sometimes duplicating as indicated above. It is usually in the form of non-financial support but donors usually provide some financial commitments towards the project as will be explained below. For example, US aid regime under the MCC agency, financed the development of study curricular, modules and lecture notes for procurement education in Ghana which is intended to develop professionalism and provide career path for procurement in Ghana.⁷³ The curricular and modules also serve as the basis and template for a similar project funded by the World Bank in Liberia which is likely to be used in other African countries.⁷⁴

2.5 Development Partners and Procurement

Developing countries such as Ghana rely on foreign aid to finance major developments in the domestic economy. Foreign aid forms an important component of government expenditure in Ghana which is estimated at 39% of government expenditure in 2009.⁷⁵ This proportion is comparable to those in many other African countries such as Malawi and Zambia.⁷⁶ Foreign aid to Ghana supports several development projects; from capital intensive such as building infrastructures to low value and basic needs such as educational materials and clean drinking water which domestic resources are usually inadequate to finance.

Aid funds are used to acquire the goods and services needed for the implementation of development projects. In the process of securing these goods and services, public procurement rules are followed. This involves buying goods and services that offer the

⁷¹ Information obtained by the author in an interview with Procurement Specialists at the World Bank Ghana country office who wishes to remain anonymous.

⁷² P. Trepte, 'Building Sustainable Capacity in Public Procurement' in S. Arrowsmith and D. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011), p.378.

⁷³ Ghana Public Procurement Authority, *Electronic Bulletin*, (August 2014), p.8.

⁷⁴ This information is available at <https://www.mcc.gov/pages/press/release/pressrelease-0530-13mcc-world-bank-mida> (3 March 2016).

⁷⁵ Ghana, *Public Expenditure and Financial Accountability Report* (2009), p.81.

⁷⁶ D.A. Bräutigam and S. Knack, 'Foreign Aid, Institutions, and Governance in Sub-Saharan Africa' (2004) 52 *Economic development and cultural change* 255, p.257.

best value for aid funds from the markets. Public procurement rules are therefore essential in spending aid funds in an efficient and strategic manner to secure specific objectives.

Donors finance development projects in different ways which underlies the modalities of transferring aid funds to the domestic economy. The diversity in aid modalities allows donors to target the achievement of specific policy objectives as will be seen below. In Ghana, donors usually provide aid through two major modalities. Firstly, there is budget support approach, where aid is channelled directly through the government's budget. This approach usually relies on domestic resource allocation and accounting systems including the domestic public procurement rules for the acquisition of the required goods and services. Donors usually attach conditions to granting aid through budget support and require reform of domestic policies such as good governance, fiscal adjustment and strengthening of national institutions. However, these reform conditions appear to have limited impact, perhaps due to other policies imposed by donors as will be seen. This perhaps creates some reluctance among donors to finance development projects through budget support. Despite this situation, budget support approach does not necessarily result in multiplicity of regimes and will therefore not be considered in this research.

Secondly, there is also the project aid approach, which finances specific development projects with limited budget, timeframe and objectives. This process is usually supervised by donors and the approach is based on identified areas of intervention with defined project results. Project aid also comes with a number of conditions including the requirement to apply procurement rules set out by donors as will be discussed below. This approach raises many of the issues of multiplicity which this research seeks to highlight. Indeed, many donors in Ghana adopt this financing approach and a significant proportion of aid to Ghana is financed through project aid which is estimated at 46% in 2010.⁷⁷ This implies that any small reduction in project aid and its conditionality could have a significant impact on the level of duplication in the domestic system.

The nature of interaction between policies of development partners and those of the domestic regime could have significant policy implications for development in the domestic system. The policy approach of development partners can be classified into two major forms. Firstly, there are policies directed specifically at loan funded procurement and secondly, there are other general policies targeted at reforming procurement systems in developing countries. Both policy procedures are discussed below.

2.5.1 Loan Funded Procurement

As indicated earlier, development partners provide funds in the form of loans and grants for development. The fiduciary duty to ensure funds are used for the purposes intended has often led donors to engage in regulating the procurement process. Donors usually

⁷⁷ This information is available at <http://stats.oecd.org> (accessed 3 March 2016).

require application of specific procurement procedures in order to guarantee the proper use of its funds. Loan funded procurement refers to the application of procurement rules and systems set by donors to the implementation of development projects. Donors may require the use of either procurement rules applicable under the domestic regime or other external rules as set by donors.

For the purposes of procurement funded by donors, several rules other than the domestic rules are usually applicable as set by donors. When donors provide funds for development, they usually lay down certain conditions to be fulfilled by the domestic regime. One of these conditions is the use of procurement rules and systems that are developed and set by the donor for the implementation of donor funded projects. Donors have significantly developed their own sets of rules and procedures which they require aid recipient countries such as Ghana to apply whenever the donor provides funds for procurement. An example is the World Bank guidelines and its standard documents which have been developed and extensively used for projects funded by the Bank.

Other donors including the EU and the different US aid agencies have also developed their individual sets of procurement rules which are usually applicable when they provide funds for development. Some donors simply adopt procurement rules of other donors with modifications to reflect their own objectives. For example, the African Development Bank (AfDB) and the Millennium Challenge Corporation (MCC) adopted the World Bank procurement guidelines with some modifications as will be discussed.

Application of the separate sets of procurement rules developed by donors is by origin, external to the domestic system. The application of domestic procurement rules in addition to external procurement rules as set by individual donors, each with its own set of procurement rules, has led to the proliferation of procurement rules in Ghana. This means that several different procurement rules may be applicable to similar or different procurements. In some cases, the same donor has different procurement rules for different types of projects it implements. It also means that different rules may be applied at the same time by a single or several procurement officials.

There are several reasons for the application of different procurement rules which are generally intended to ensure the proper use of funds. A major drive, particularly under the World Bank regime is the need to eliminate corruption in donor funded procurement as will be discussed. Developing countries such as Ghana often experience high levels of corruption which presents unprecedented risks to donor funding activities. The use of donors' procurement rules may be preferred since domestic rules may not have adequate mechanisms to detect and prevent corrupt practices. Another argument holds that domestic systems such as the public finance management and institutional capabilities are unreliable and under less optimal conditions. The domestic systems do not guarantee adequate monitoring and accountability for the use of funds which donors require in order to remain accountable to their lenders and tax payers.

However, the argument for applying donors' procurement rules rather than those of the domestic regime becomes controversial especially in developing countries such as Ghana where domestic procurement systems are undergoing major reforms with the assistance and recommendation from donors which is usually based on recognised international best practice standards such as those provided under the UNCITRAL Model Law. Nevertheless, procurement rules of donors are applicable in Ghana and operate as additional rules to the existing domestic rules on procurement.

The obligation to apply procurement rules set by donors is reinforced by the introduction of specific exemption clauses into domestic procurement legislation. The Public Procurement Act of Ghana provides that the "Act applies to procurement with funds or loans taken or guaranteed by the State and foreign aid funds except where the applicable loan agreement, guarantee contract or foreign agreement provides the procedure for the use of the funds".⁷⁸ The rules further state that "notwithstanding the extent of the application of this Act to procurement, procurement with international obligations arising from any grant or concessionary loan to the government shall be in accordance with the terms of the grant or loan".⁷⁹ These provisions exclude application of domestic procurement legislation to donor funded procurement and allow donors to determine the applicable rules which is often those set by themselves. In other words, the obligation to apply procurement rules set by donors is not unilaterally imposed by donors but rather, domestic procurement legislation emphatically allows application of donors' procurement rules in Ghana.

The use of specific exemption clauses to allow application of procurement rules set by donors is also the case in many other African countries particularly those undergoing procurement reforms with assistance and perhaps some influence from development partners.⁸⁰ This is the case under procurement rules of Liberia and Tanzania.⁸¹ These exemption clauses are based on the UNCITRAL Model Law which exclude application of domestic procurement legislation to international agreements such as those entered into between a state and international financial institutions.⁸² These exemption clauses provide legal legitimacy for the application of procurement rules set by donors and these will have precedence over domestic procurement rules.

2.5.2 Other General Policies Aimed at Procurement Reform

Apart from policies directed specifically at loan funded procurement, development partners also implement other general policies aimed at steering procurement reform in developing countries. In Ghana, such reform programmes are usually drawn up as part

⁷⁸ Ghana, Procurement Act, s. 14(1)(d).

⁷⁹ Ibid, s. 96.

⁸⁰ A. La Chimia, 'Donor's Influence on Developing Countries' Procurement Systems, Rules and Markets: A Critical Analysis' in S. Arrowsmith and G. Quinot (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), p.219.

⁸¹ Liberia, *Public Procurement and Concessions Act* (2005), s. 3(a), (hereinafter Liberia Procurement Act); Tanzania, Procurement Act, s. 4.

⁸² 2011 UNCITRAL Model Law on Public Procurement, art. 3.

of an overall public sector reform initiative.⁸³ Development partners will often identify weaknesses in domestic procurement systems and adopt specific policies to encourage reform in the system. For example, the MCC agency as part of US aid regime, identified the lack of procurement capacity and skilled personnel in Ghana and adopted specific policies on professionalising the procurement function in Ghana as will be discussed in chapter 6.

Reform policies of development partners may involve information sharing or transfer of technical skills to assist domestic authorities in the implementation of reforms. This form of assistance is essentially non-financial and does not necessarily involve donors providing monetary funds. However, some financial commitments are usually made by development partners towards the implementation of the policies. For example, development partners may pay for consultants to undertake law reforms as the case in Ghana where the World Bank financed consultants to assist in drafting Ghana's procurement legislation. Development partners may also pay for training sessions organised for local procurement officers to ensure that officers are well equipped to implement law reforms.

Policies of other external regimes such as trade regimes that are not necessarily donors could also encourage reforms in the domestic system. Policies of good procurement regimes such as those of UNCITRAL and the Government Procurement Agreement (GPA) that have gained international recognition could also encourage reforms in domestic systems. Regimes such as the UNCITRAL are by no means a funding organisation and do not provide financial assistance. However, these regimes have gained acceptance as generally good with well formulated procurement model and usually recommended by development partners for adoption.

⁸³ World Bank, *Ghana - 2007 External Review of Public Financial Management* (2008), Report of World Bank Public Procurement Assessment.

Chapter 3: Framework for Domestic Regulation of Public Procurement in Ghana

3.1 Introduction

Procurement rules set out by States are often applicable to procurement within domestic territories when there is no interference from external procurement regimes. This chapter outlines the framework for public procurement in Ghana for domestic purposes of regulation, focusing on situations where external regimes are not involved. The role of the chapter is to identify the domestic regime as one of multiple regimes operating in Ghana.

The chapter first looks at a brief background to the development of the current regulatory system. The chapter then sets out the objectives of regulating procurement for domestic purposes. Discussions will then move on to the types of contracts regulated in Ghana. Tender documentation and record keeping will be highlighted before moving on to methods of procurement allowed in Ghana. Discussions will continue on the procurement procedures used in Ghana and elaborating on those issues relevant for interaction with other regimes before examining the remedies system.

3.1 Reform of the Domestic System

Prior to enactment of the public procurement act, there was no one law for regulating public procurement in Ghana.¹ The rules on procurement were fragmented and the procurement of services was not regulated.² There were no requirements for publication of contracts.³ Some major shortcomings of the system include loose legal framework, weak capacity of procurement officials and unclear institutional arrangements which led to widespread inefficiencies.⁴

The need to improve public procurement as part of recommendations from the World Bank appears to coincide with government efforts at reforming public sector finance management system.⁵ However, technical assistance from the World Bank served as a major stimulation to begin the reform process. Following the creation of a procurement oversight group in 1999, a reform proposal was prepared which included a draft Public Procurement Bill.⁶ Following parliamentary consultations, the draft bill was passed into law in 2003 and referred to as the Public Procurement Act, Act 663.

¹ Two major reports, Country Procurement Assessment Reports (CPARs) published in 1996 and 2003 by the World Bank provides a comprehensive assessment regarding the state of the procurement system in Ghana. Both reports revealed significant shortcomings of the procurement system in Ghana and made recommendations for reforms.

² Ibid, p.15.

³ Ibid, p.17.

⁴ Ibid, p.11.

⁵ D. N. Dagbanja, *The Law of Public Procurement in Ghana; Law, Policy and Practice* (Lambert Academic Publishing 2011), p.45; K. Osei-Afoakwa, 'The Antecedents and the Prospects of Public Procurement Regulation in Ghana' (2013) 3(1) *Developing Country Studies (IISTE)*, p.127; A.B. Adjei, Message from the Chief Executive of the Public Procurement Authority, (9th June 2006), available at http://www.ppbghana.org/story_detail.asp?story_id=18 (accessed 3 March 2016).

⁶ World Bank, Ghana: Country Procurement Assessment Report (CPAR), (2003), vol.1, p.4, vol.2, p.19.

The Procurement Act provides a framework for regulating procurement of goods works and services including consultant services.⁷ The framework provides fundamentally detailed rights and obligations of parties. Some of these details are found in subsidiary rules such as administrative guidelines and working manuals⁸, which parties to the procurement are required to follow.

A relevant subsidiary instrument perhaps, is the Procurement Regulation, which is expected to supplement the Procurement Act. However, Ghana's Procurement Regulation has not yet been formally adopted but it is publicly available on PPA website in its draft format. Though the Procurement Regulation has provisions directed at the conduct of public procurement in Ghana, the instrument in its current state is not legally binding on parties to procurement and it cannot be relied upon nor legally enforced for the conduct of procurement in Ghana.

3.2 Objectives of Regulating Procurement in Ghana

The objectives of regulating procurement in Ghana are not independently stated in the procurement law but rather reflected in the objectives for establishing PPA as the procurement oversight body. Section 2 of the Public Procurement Act provides the purpose of the Act 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 close examination of this provision highlights a number of objectives for regulating procurement in Ghana.

Firstly, the aim “to secure a judicious, economic... use of state resources” implies the achievement of “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.⁹ Goods and services acquired on the best possible terms require effective use of state resources where the best available price is paid in relation to the value to be derived. Fit for purpose goods implies that goods must meet requirements of the government and suppliers must also have the capability to meet such requirements.¹⁰ It has been observed that value for money is the major objective in Ghana due to its high ranking on the list of objectives.¹¹

Secondly, the requirement “to secure... efficient use of state resources” highlights efficiency as an objective in Ghana. Efficiency requires that procurement is conducted in a timely and cost-effective manner. This implies 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

⁷ Ghana, Procurement Act, s. 14.

⁸ For further information, see http://www.ppaghana.org/documents/FINALMANUAL_PPB.pdf?story_id=27 (accessed 3 March 2016).

⁹ P. Badcoe, ‘Best Value - A New Approach in the UK’ in S. Arrowsmith and M. Trybus (eds), *Public Procurement: The Continuing Revolution* (Kluwer Law International, 2003), p.197.

¹⁰ Ibid.

¹¹ D.N. Dagbanja, ‘The Regulatory Framework for Public Procurement in Ghana’ in G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013), p.80.

take account of the objective of efficiency...¹² This indicates that in a sense, efficiency can be an objective in its own right but also efficiency could be inherently part of some other objectives. For example, the objective of value for money entails elements of efficiency which require cost-effectiveness. The explicit statement of the requirement for efficiency in the Procurement Act indicates the importance of efficiency as an objective for regulating procurement in Ghana. The need for efficiency does not only justify, to some extent, the different methods of procurement¹³ but also justifies the different procurement implementation options such as the decentralised procurement system adopted in Ghana as discussed in chapter 2.

Thirdly, the “fair... and non-discriminatory” manner in which procurement must be conducted suggests an objective of fairness and non-discrimination. Fairness requires honest and just in conduct without taking advantage of any of the parties in the procurement process. Non-discrimination requires impartiality in the procurement process except where otherwise justified by law. Discrimination occurs if the procurement procedure is such that it treats differently any potential bids that are identical in every commercially relevant respect.¹⁴ Non-discrimination rules are directed mainly towards procurement officials who exercise some discretion. Non-discriminatory requirements are similar to fairness in that they both relate to the treatment given to parties involved in procurement.

Fourthly, transparency is also required in Ghana and denotes openness where expectations and requirements are clear and accessible to interested parties. This means that all information relating to procurement including opportunities must be made public for interested parties.¹⁵ This ensures that no other criteria apart from those already known to participants are used in the selection process. Transparency also entails making decisions based on laid down rules and procedures which could provide limited scope for discretion. As a result, possibilities of making biased decisions or making judgemental errors through the use of discretion could be reduced. Transparency also ensures the possibility for verification to ensure laid down procedures have been followed properly. 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.¹⁶

In addition to the above objectives, specific provisions in the Procurement Act suggest the pursuit of other objectives not explicitly included in the statement of objectives of

¹² S. Arrowsmith, ‘National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict’ in S. Arrowsmith and A. Davies (eds), *Public Procurement: Global Revolution* (Kluwer Law International 1998), p.10.

¹³ S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International, 2000), p.32.

¹⁴ S. J. Evenett and B. M. Hoekman, ‘Transparency in Government Procurement: What can We Expect from International Trade Agreements?’ in S. Arrowsmith and M. Trybus (eds), *Public Procurement: The Continuing Revolution* (Kluwer Law International 2003), p.272.

¹⁵ S. Schooner, ‘Desiderata: Objectives for a System of Government Contract Law’ (2002), 11 *Public Procurement Law Review*, p.106.

¹⁶ S. Arrowsmith, ‘Transparency in government procurement: The objectives of regulation and the boundaries of the World Trade Organization’ (2003), 37 *Journal of World Trade*, p.287-303.

PPA. Particularly, section 3(t) of the Procurement Act requires PPA 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 government contracts in Ghana, 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 contracts as discussed below.

Many other African countries have adopted procurement policy objectives for domestic purposes of regulation. Ethiopia, Kenya and Nigeria for example, adopted a number of procurement objectives. The principles of value for money, transparency and non-discrimination are among these objectives but value for money appears to be the major objective of these other systems.¹⁷ The importance of value for money as an objective in Ghana but also in many African regimes could be explained firstly, by the need for efficient use of scarce resources particularly in developing countries as Ghana. Secondly, the UNCITRAL Model Law, on which the procurement law of Ghana and many other African regimes are closely modelled,¹⁸ clearly states the maximisation of economy as the first of its objectives in its preamble.

There is the need for clear distinctions between the ultimate independent objectives of procurement on one hand, and what could be seen as the means to achieving the objectives on the other hand. In Ghana, the aim of securing a judicious, economic or value for money and efficient procurement system, suggests that these are the ultimate objectives of procurement. However, the phrase “carried out in a... manner” in section 2 of the Procurement Act suggests a procedural conduct which relates to the procurement process itself rather than the outcome of the process. In this regard, fairness, transparency and non-discrimination which are expressed within the process-related phrase, could be considered as the means to achieving the objectives such as value for money in Ghana.¹⁹

The distinction between ultimate objectives of procurement and the means to achieving these objectives is essential in considering procurement policy options. In some cases, the means to achieving the objectives, for example, non-discrimination and prevention of corruption may become ultimate independent objectives of the system. An example is the case of South Africa where non-discrimination is an independent objective of the procurement system in recognition of historical discriminatory policies.²⁰

Ghana and many other Countries usually adopt several objectives for regulation.²¹ However, the relationship between some of the policy objectives requires a trade-off or

¹⁷ G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), Part 1, Country Studies, particularly chapters 3,5 and 7.

¹⁸Ibid.

¹⁹ Arrowsmith et al, (note 13 above), p.31.

²⁰ P. Bolton, 'Public Procurement System in South Africa: Main Characteristics' (2008) 37 *Public Contract Law Journal* 781.

²¹ Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict' (note 12 above), p.4.

perhaps an appropriate balance between achievement of competing objectives.²² It is necessary for the procurement entity to decide at the outset of the procurement process which policy objectives to pursue. Such decisions should inform the procurement method and procedures adopted.

3.3 Scope of Regulated Procurement in Ghana

The institutions involved in procurement with regards to their relevance for development partner regimes in Ghana have been discussed in chapter 2. Discussions in this chapter will focus on the types of contracts covered in Ghana's domestic context.

3.3.1 Types of Contracts Covered

The Procurement Act, provides the scope of regulated contracts in section 14(1) as;

- (1) The procurement of goods, works and services, financed in whole or in part from public funds.²³ This implies that any procurement involving government funds will be covered. For the purpose of applying different rules, government contracts have been classified into goods, works and non-consultant services on one hand and contracts for consultant services on the other. The procurement of goods, works and non-consultant services follow the same set of rules, making it possible for the general procurement rules to be uniformly applied. The procurement of consultant services however, follows a separate set of procedure as will be explained below.
- (2) Functions relating to procurement of goods, works and services including description of requirements and invitation of sources; preparation, selection and award of contracts; and the phases of contract administration.²⁴ It implies transactions that are incidental to procurement of goods, works and services including consultant services, and all the processes including contract administration are covered by the Procurement Act.

There are however, exceptions for application of the procurement rules to certain transactions. Firstly, the Procurement Act does not apply where the Minister responsible for Finance decides that "it is in the national interest to use a different method".²⁵ For example, the procurement of sensitive military equipment may require different procurement procedures for state security reasons. In this case, the Minister is required to define the method of procurement to be published in the Gazette (an official public record of important statutory and non-statutory notices).²⁶

Secondly, the Procurement Act does not apply where a procurement entity decides to "undertake procurement in accordance with established private sector or commercial practices"²⁷ under conditions that (a) the procurement entity is legally and financially

²² Arrowsmith et al, (note 13 above), p.28.

²³ Ghana, Procurement Act, s. 14(1)(a).

²⁴ Ibid, s. 14(1)(b).

²⁵ Ibid, s. 14(1)(a).

²⁶ Ibid, s. 14(3).

²⁷ Ibid, s. 16(2).

autonomous and operates under commercial law;²⁸ (b) it is beyond contention that public sector procurement procedures are not suitable, considering the strategic nature of the procurement;²⁹ (c) the proposed procurement method will ensure value for money, provide competition and transparency to the extent possible.³⁰ All these conditions must be fulfilled with the approval from PPA for the Procurement Act not to apply. It is not quite clear when this exemption might apply since it could be difficult for a regulated entity to satisfy all the conditions listed above. For example, a state-owned-enterprise that is determined to be financially and legally independent from government control, might be excluded from complying with the Procurement Act. However, it may be difficult to argue that any proposed alternative method could ensure principles such as competition and transparency beyond those provided in the Procurement Act so as to warrant derogation from the rule. Also, what might constitute “established private sector or commercial practices” and the procedures to be adopted by the entity in the use of the different method is not defined in the Procurement Act.

The absence of specific provisions that exclude defence and security contracts implies that such contracts are generally covered by the Procurement Act. In practice for example, the defence ministry conducts procurement, particularly for common user items such as uniforms in accordance with the Procurement rules.³¹ However, procurement of certain sensitive military items such as security equipment may be exempted.³²

The 1994 UNCITRAL Model Law suggests an outright exclusion of defence procurement, in addition to any other contracts that a state may consider excluding from regulation.³³ However, provisions under 2011 edition of the Model Law are applicable to defence procurement but offers the flexibility for enacting states to modify the procedures to accommodate classified information.³⁴ Many other African systems adopt a partial exclusion for defence procurement. Liberia, Nigeria, Tanzania and Zambia are among such countries.³⁵ In Liberia for example, procurement in the defence sector for common user items such as stationery is in accordance with the national rules whiles procurement of security equipment require modification of the rules by the oversight authority in consultation with the head of national security agency and approved by the President.³⁶

²⁸ Ibid, s. 16(2)(a).

²⁹ Ibid, s. 16(2)(b).

³⁰ Ibid, s. 16(2)(c).

³¹ For further details, see <http://www.ghanabusinessnews.com/2012/03/01/ghana-armed-forces-adhere-to-transparent-procurement-procedure/> (Accessed 3 March 2016).

³² D.K.D Letsa, “Ghana” in J. Davey and J. Falle (eds), *The Government Procurement Review* (Law Business Research, 2013), p.91.

³³ UNCITRAL, *The UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment* (1994), art. 1(2).

³⁴ UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (2011), General remarks Part 1, B, note 1b, para. 3.

³⁵ Liberia, Procurement Act, s. 1(5); Nigeria, Procurement Act, s. 15(2); Tanzania, Procurement Act, s. 2(2); Zambia, Procurement Act, s. 3(2).

³⁶ Liberia, Procurement Act, s. 1(5).

3.4 Tender Documentation and Record Keeping

3.4.1 Tender Documentation

Entities often use standardised procurement documentation to solicit tenders which are required every time entities conduct procurement.³⁷ For the purposes of domestic regulation, “Standard Tender Documents” is the terminology used in Ghana for standardised procurement documentation. This corresponds with reference to a supplier as “Tenderer” in Ghana.³⁸ The terminology differs from the use of “Solicitation Documents” under the UNCITRAL Model Law or “Standard Bidding Documents” as used in the World Bank procurement rules when referring to the same procurement documentation.

In Ghana, an invitation to tender is issued to interested suppliers for a fee which is limited to the cost of printing and delivery.³⁹ Based on the type and value of contract, different tender documents are required. For example, tender documents required for goods are different from those required for consultant services as under schedule 4 of the Procurement Act. These template documents are publicly available on the website of PPA.

In Ghana, the description of goods, works or services “shall be based on objective, technical and quality characteristics...”⁴⁰ Where there is no precise and intelligible way of describing the characteristics of a product without reference to a particular trade mark or other origin, the use of the word “equivalent” is required.⁴¹ Objective and clear manner of describing requirements in Ghana could reduce obstacles to participation in the procurement process.

3.4.2 Record Keeping

Procurement records are vital in promoting transparency and accountability. They provide the means for verifying conducts and has the potential to enhance procurement reform by providing quality and performance data for identifying areas for improvement. For example, investigations on alleged misconducts or verification and approval of procurement decisions often rely on procurement records. The Procurement Act requires entities to maintain records of procurement in line with the Evidence Act of Ghana, 1975 (Act 323).⁴²

In Ghana, procurement records are usually fragmented or unavailable and this could be attributed perhaps to the lack of effective guidelines to assist procurement entities in keeping proper records.⁴³

³⁷ Ghana, Procurement Act, s. 49(1).

³⁸ Ibid, s. 98.

³⁹ Ibid, s. 49(3).

⁴⁰ Ibid, s. 33(2).

⁴¹ Ibid.

⁴² Ghana, Procurement Act, s. 27

⁴³ Ghana Public Procurement Authority, *Electronic Bulletin* (Sep - Oct 2011), Vol. 2(5).

Moreover, the Procurement Act explicitly exempts entities from liability for damages for failure to maintain records of procurement proceedings.⁴⁴ The rules are silent on whether liability other than damages may be enforced against entities for failure to maintain procurement records. The exemption may be intended at preventing unnecessary complaints which could cause delays and increase the cost of procurement. However, with regards to the context of Ghana where a culture of absence or inadequacy in maintaining public records prevails, some form of liability, probably in the form of disciplinary sanctions, could be placed on procurement entities and individuals involved. This could prevent, to some extent, for example, deliberate destruction of records under the pretence of non-availability of records for investigative proceedings so as to conceal misconducts. The author is unaware of specific incidents of this nature in Ghana. However, a recent inability of some major institutions engaged in procurement to produce records for verification, raises concerns as to what extent failure of a legal responsibility to maintain public records should be ignored.⁴⁵ This issue is being partially addressed through the collaboration of PPA with the Public Records and Archives Administration Department in Ghana (PRAAD), to develop a Procurement Records Keeping Manual as a standard guideline to assist entities.⁴⁶

3.5 Procurement Methods

The Procurement Act allows a number of procurement methods based on the 1994 UNCITRAL Model Law and in general, other influences on methods in Ghana, which reflects the degree of exposure to competition and cost-effectiveness as outlined below.

3.5.1 Competitive Tendering

Competitive tendering or open tendering is a terminology used under the 1994 and 2011 UNCITRAL Model Law as followed in Ghana and some other African systems. In Ghana, competitive tendering is the default method of procurement for goods, works and non-consultant services.⁴⁷ It requires openness with the widest participation by all interested suppliers and any derogation shall be justified.⁴⁸ This method ensures competition and value for money through the wide participation. The Procurement Act distinguishes two types of competitive tendering as detailed below.

3.5.1.1 National Competitive Tendering

National competitive tendering is a form of open tendering method that opens up participation to only national suppliers.⁴⁹ The method engages formal open procedures including public notice and public opening of tenders. The focus of this method is on domestic suppliers at the expense of foreign suppliers. A domestic supplier is regarded as a citizen of Ghana who is a supplier or corporate bodies with majority shares owned

⁴⁴ Ghana, Procurement Act, s. 28(5).

⁴⁵ For further information, see <http://graphic.com.gh/General-News/two-bodies-fail-to-furnish-judgement-debt-commission-with-document.html> (access 3 March 2016).

⁴⁶ Ghana Public Procurement Authority, *Electronic Bulletin* (note 43 above).

⁴⁷ Ghana, Procurement Act, s. 25.

⁴⁸ *Ibid*, s. 35(3).

⁴⁹ *Ibid*, s. 44(1).

by a supplier who is a citizen of Ghana.⁵⁰ The use of national competitive tendering in Ghana is based mainly on allocated threshold values according to schedule 3 of the Procurement Act.

3.5.1.2 International Competitive Tendering

International competitive tendering is the default competitive tendering method in Ghana.⁵¹ The method engages formal open procedures including public notice and public opening of tenders. Competition is ensured by allowing equal participation of all eligible suppliers. This method is often used unless the value of the contract falls within those required for national competitive tendering. International competitive method is also the preferred method for development partners and used in loan funded procurement as will be discussed.

3.5.2 Two-Stage Tendering

Two-stage tendering⁵² is largely similar to competitive tendering and exhibits some degree of openness and competition. It is considered a method for the procurement of complex projects and involves two stages; firstly, suppliers will submit tenders based on any relevant aspect of the contract except the tender price⁵³ and then followed by negotiations on any aspect of the tenders.⁵⁴ The negotiation process enables the procurement entity to identify and set a common specification in a manner that will meet its needs. Secondly, tenders including tender prices will be submitted based on common specifications prescribed by the entity.⁵⁵ The essence of this method is to allow entities to hold consultations with suppliers to assist in formulating detailed product specifications. The use of this method is not subject to approval by the PPA presumably due to the competitive and open call for tenders.

Two grounds for the use of this method are available; (a) where there is the need to engage in discussions to formulate specifications which may be due to the fact that prior detailed formulation of specifications may not be feasible⁵⁶ or (b) in contracts for research and development.⁵⁷ Satisfying any of these conditions may allow the use of the method. Under the 2011 Model Law however, contracts for research and development are dealt with under request for proposals with dialogue.⁵⁸ Conditions applicable to the use of two-stage tendering under the Model Law are the need to hold discussions with suppliers or where an open tender method failed to result in a procurement contract.⁵⁹

⁵⁰ Ibid, s. 98.

⁵¹ Ibid, s. 45(1).

⁵² Ibid, s. 36.

⁵³ Ibid, s. 37(2)(a).

⁵⁴ Ibid, s. 37(3).

⁵⁵ Ibid, s. 37(4)(a).

⁵⁶ Ibid, s. 36(1)(a).

⁵⁷ Ibid, s. 36(1)(b).

⁵⁸ UNCITRAL Model Law on Public Procurement (2011), art. 30(2).

⁵⁹ Ibid, art. 30(1).

3.5.3 Single Source Procurement

Single source procurement is considered the least competitive method of procurement. It entails soliciting goods and services directly from a single supplier which is subject to little procedural requirements.⁶⁰ Prior approval from PPA is required for the use of this method.⁶¹ Conditions for the use of this method as provided in article 40(1) of the Procurement Act include the existence of only a single supplier, emergency situations and cases of catastrophic events. These conditions are similar to those provided under the 1994 UNCITRAL Model Law. The 2011 Model Law provides additional conditions including the protection of essential security of the state or the promotion of specific economic policy where no alternative is available.⁶²

In practice, several reports, including auditor's reports suggest an abuse of the single source procurement method.⁶³ The auditor's report for example identifies the arbitrary use of single source procurement without obtaining the requisite approval. The report also identified that in most cases, single source procurement is used when competitive methods of procurement could be used even when approval is obtained. Moreover, procurement audits in Ghana which reveal these findings are usually conducted several years after the completion of the procurement process as confirmed by an average of two to three years' delay in audit reports recorded in 2004.⁶⁴ These delays make it difficult to detect procurement misconducts at stages appropriate to take corrective measures.

The misuse of single source method could also be explained by the inadequate support and guidance for entities. There appears to be little consultation and communication between entities and PPA, particularly prior to submitting documentation for approval. Effective communication between the institutions involved could minimise risks of non-compliance. Though the head of entity is answerable for any non-compliance, the rules seem to provide inadequate sanctions or perhaps there is a failure to enforce sanctions imposed by the rules.

3.5.4 Request for Proposals

This method is generally used in Ghana for the procurement of consultant services. The Procurement Act provides a distinct set of rules for the procurement of consultant services with the use of request for proposals.⁶⁵ The separate set of rules in Ghana, which is also found in many African regimes, closely models the position of the 1994 edition of UNCITRAL Model Law and that of the World Bank rules for implementing loan funded procurement.⁶⁶ The position of the UNCITRAL Model Law and the World Bank guidelines can be justified by historical reasons in the development of the Model Law

⁶⁰ Ghana, Procurement Act, s. 41.

⁶¹ Ibid, s. 40(1).

⁶² UNCITRAL Model Law on Public Procurement (2011), art. 30(5).

⁶³ Ghana, *Report of the Auditor General on Public Accounts* (2011), p.6-8.

⁶⁴ World Bank, *Ghana Public Expenditure Management: Country Assessment and Action Plan* (2004), p.32.

⁶⁵ Ghana, Procurement Act, s. 66-77.

⁶⁶ S. Arrowsmith and E. Carborn, 'Procurement Methods in the Public Procurement Systems of Africa' in G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), p.292.

and the importance of consultants in the work of the World Bank.⁶⁷ However, the domestic rules provide no clear reason for adopting this approach in Ghana except probably because of its close interaction with UNCITRAL and the World Bank regimes. The 2011 edition of the UNCITRAL Model Law however, no longer requires a separate method for the procurement of consultant services but rather recognises the complexity of the procurement as the main determinant of the method to be used.⁶⁸

In Ghana, request for proposals entails publicly advertising the call for expression of interest from interested consultants.⁶⁹ Subject to approval of PPA, direct invitation to individual consultants for the expression of interest may also be issued for economic and efficiency reasons under specified conditions.⁷⁰ Entities are required to prepare a shortlist of potential consultants who expressed interest in the procurement.⁷¹ The limitation on candidates to be shortlisted could ensure efficiency in the conduct of procurement by removing any disproportionate burden on entities. The method of request for proposals is sometimes used for contracts involving public-private partnership in Ghana.⁷²

3.6 Other Purchasing Arrangements

An important purchasing arrangement introduced in Ghana is framework agreement, also referred to as blanket purchase agreement. There are currently no explicit provisions in the rules allowing the use of framework agreements. However, PPA issued draft Guidelines for the use of framework agreements.⁷³ These frameworks are simple single supplier service level agreements which essentially, are procurement contracts covered by the procurement rules. This implies that irrespective of whether or not the guideline on frameworks has a legally binding status, these agreements can be operated under the procurement law with no legal problems. However, the use of single supplier frameworks is explicitly written into the proposed amendment to the Procurement Act.

In Ghana, framework agreements are currently in a pilot phase particularly in the education sector.⁷⁴ Procurement entities in the education sector forms clusters with a lead entity, and procurement functions of the lead entity may be outsourced to a third party. An initial open tendering process with the applicable procedural rules is conducted to establish the terms and conditions including the price and minimum quantity of the framework.⁷⁵ A single supplier is then selected where subsequent or future call-offs could be made by individual procurement entities themselves without reference to the lead entity.⁷⁶ In essence, no contract exists until the entity issues a call-

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ghana, Procurement Act, s. 66(1).

⁷⁰ Ibid, s. 66(3).

⁷¹ Ibid, s. 67(1).

⁷² Letsa, (note 32 above), p.94.

⁷³ For further information, see <http://www.ppaghana.org/documents/policies.asp> (accessed 3 March 2016).

⁷⁴ Letsa, (note 32 above), p.94; also see <http://allafrica.com/stories/201205220534.html> (accessed 3 March 2016).

⁷⁵ This information is obtained from an official of the Public Procurement Authority in Ghana who wishes to remain anonymous. The information is on file with the author (21 November 2013).

⁷⁶ Ibid.

off. The framework agreement is used for the purchase of common user items with the aim of eliminating variations in prices.⁷⁷ With this arrangement, it is expected that the use of the framework agreement will increase value for money through time saving and uniform price over the period of the agreement.⁷⁸

3.7 Publicity for Contracts

Procurement entities in Ghana are required by law to advertise contract opportunities in most cases when soliciting tenders. The medium of publication however depends on the degree of openness of the procurement which is reflected in the threshold value of the contract.⁷⁹ In Ghana, contract opportunities are also published on the website of the PPA which is often the case for specific contract opportunities.

3.8 Qualification of Tenderers

Section 22 of the Procurement Act specifies the criteria which procurement entities shall use in every case for the selection of qualified suppliers. Qualification criteria which relates to the procurement contract, including financial and technical qualification are clearly among these criteria.⁸⁰ The use of other qualification criteria not related to the performance of the contract, including the payment of tax and social security contributions are also required.⁸¹ Procurement entities have the discretion to set other criteria it considers appropriate to determine the qualification of suppliers.⁸² Qualification criteria shall be set out in tender documents.⁸³ These provisions in Ghana are closely modelled on the position of the UNCITRAL Model Law where it suggests the setting out of qualification requirements and the evaluation of qualifications in the tender documents or other documents for solicitation of proposals.⁸⁴

A shortlisting process may be required where too many suppliers meet the minimum qualification criteria.⁸⁵ “Shortlisting” refers to the process of reducing the number of permitted tenderers participating in the procurement process where too many tenderers meet the minimum requirement. This terminology is used in Ghana and some donor regimes including the World Bank. The terminology is also used in some other African regimes particularly in systems influenced by the World Bank.⁸⁶

3.9 Evaluation and Award of Tenders

Tenders to be evaluated must generally conform to requirements spelt out in the invitation documents and non-conforming tenders shall be rejected.⁸⁷ In order to

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ghana, Procurement Act, s. 44-45.

⁸⁰ Ibid, s. 22(1)(a).

⁸¹ Ibid, s. 22(1)(d).

⁸² Ibid, s. 22(1)(f).

⁸³ Ibid, s. 22(3).

⁸⁴ UNCITRAL Model Law on Public Procurement (2011), art. 9(4); art. 9(5).

⁸⁵ Ghana, Procurement Act, s. 67(1).

⁸⁶ A. La Chimia, ‘Donor’s influence on developing countries procurement systems, rules and markets: a critical analysis’ in G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013).

⁸⁷ Ghana, Procurement Act, s. 58(1); art. 58(4)(c).

illustrate the issue of multiplicity in the area of non-conforming tenders and correction of errors will be discussed in Chapter 7.

Acceptable tenders shall be evaluated and compared with a view to selecting a winning tender in accordance with criteria set out in invitation documents.⁸⁸ A tender with the lowest evaluated tender price⁸⁹ and the lowest evaluated tender shall be considered the successful tender.⁹⁰ The above consideration shall be given relative weighting or expressed in monetary terms where practicable.⁹¹ The successful tender is determined on the basis of price in combination with other criteria. The criteria include mandatory criteria on price;⁹² operation and maintenance cost;⁹³ national security and the effect of the tender on factors including economic development⁹⁴ which entities shall consider in every case.

The determination of the lowest evaluated tender as award criteria in Ghana denotes the use of other criteria apart from price in the selection process. Mandatory criteria such as the effect on economic development could allow a broad interpretation of the criteria which could provide opportunities for abuse. The complex nature of the evaluation process which allows opportunities for abuse may require the provision of clear and well defined guidelines on the use of evaluation criteria in order to reduce the discretion of procurement officers. The 2011 Model Law provides a different standard where apart from price, the use of other criteria is not mandatory though a combination of price and the other form the basis for determining successful tenders.⁹⁵

The domestic rules have no provision on standstill period as will be discussed below. Moreover, unsuccessful suppliers shall be given notice of contract award *after* its entry into force,⁹⁶ which could present significant limitation on suppliers' ability to obtain effective remedy as will be seen.

3.10 Procedure for Selection of Consultants

The term "selection" as used here refers to the process of identifying or choosing the successful tender other than the shortlisting process as defined in section 3.8 above. The terminology is adopted in Ghana and some African systems as used under the World Bank regime. Some other regimes including UNCITRAL, broadly define the selection process to include shortlisting which offers enacting states the flexibility in adapting terms considered appropriate for domestic usage. As will be seen, procedures particularly for selecting consultants in Ghana are largely influenced by World Bank procedures for engaging consultants. This could be explained perhaps, by the close interaction between the two regimes through the involvement of domestic officers in

⁸⁸ Ibid, s. 59(1).

⁸⁹ Ibid, s. 59(3)(a).

⁹⁰ Ibid, s. 59(3)(b).

⁹¹ Ibid, s. 59(3)(b)(ii).

⁹² Ibid, s. 59(4)(a).

⁹³ Ibid, s. 59(4)(b).

⁹⁴ Ibid, s. 59(4)(c).

⁹⁵ UNCITRAL Model Law on Public Procurement (2011), art. 11; art. 43(3)(b).

⁹⁶ Ghana, Procurement Act, s. 65(9)(b).

Bank funded projects. Over time, the domestic system may have found World Bank procedures useful for adoption into domestic rules for purposes of procurement.

The principal selection procedure for consultants in Ghana is the selection procedure with consecutive negotiations. The entity is required to establish a threshold on the quality and technical aspects of the proposals in accordance with pre-determined evaluation criteria.⁹⁷ Each proposal is rated by the procurement entity according to set criteria including the relative weight and manner of application of any other criteria.⁹⁸ Those rated above the set threshold are considered and given ranks.⁹⁹ Negotiations with the successful supplier are permitted, one at a time starting with the supplier that received the highest ranking. However, negotiations are not permitted under procurement of goods and works as indicated in section 3.5 above.

In Ghana, the Procurement Act provides six types of selection procedure under the selection with consecutive negotiation procedure by which a procurement entity may choose which supplier it wants to engage in negotiations with. The choice of selection procedure and the nature of negotiations with the highest ranked supplier depend on whether or not entities consider price as significant in the procurement. Where price is considered significant, selection procedures available are; (a) Quality Cost Based Selection (QCBS),¹⁰⁰ (b) selection based on the least cost, thus based solely on price¹⁰¹ and (c) selection based on a fixed budget of the procurement entity.¹⁰² Where price is not considered significant, the available selection procedures are (d) Quality Based Selection (QBS),¹⁰³ (e) selection based on the qualification of the supplier¹⁰⁴ and (f) single source selection procedure.¹⁰⁵ Procurement entities shall give prior notice to potential suppliers of the choice of selection procedure including the criteria that will be used in the procurement process.¹⁰⁶

3.11 Enforcement Mechanisms

3.11.1 Introduction

In the remaining of this section, discussions will focus on the enforcement mechanisms for domestic regulation of procurement in Ghana. We will consider the review mechanism for enforcing the rules as provided under the Public Procurement Act. The section begins with an outline of the review forums that are available under Ghana's domestic system for aggrieved parties. Discussions thereafter will focus on the administrative review procedures including review by the procurement entity as applicable in Ghana. The section moves on to examine the judicial review system for

⁹⁷ Ibid, s. 75(1).

⁹⁸ Ibid, s. 69(3).

⁹⁹ Ibid.

¹⁰⁰ Ibid, s. 75(6)(a).

¹⁰¹ Ibid, s. 72(3); s. 75(6)(b).

¹⁰² Ibid, s. 72(2); s. 75(6)(c).

¹⁰³ Ibid, s. 72(1); s. 76(1).

¹⁰⁴ Ibid, s. 72(4).

¹⁰⁵ Ibid, s. 72(5).

¹⁰⁶ Ibid, s. 71(1).

handling procurement disputes. We will then consider other alternative review mechanisms applied in Ghana for enforcing compliance with the procurement rules.

3.11.2 Forum for Review

According to the Procurement Act, complaints may be received firstly by the procurement entity itself.¹⁰⁷ The complaints are reviewable by two independent administrative bodies; the Tender Review Board¹⁰⁸ and the Public Procurement Authority.¹⁰⁹ A final judicial review is also obtainable as will be seen below. However, the substantive procurement law is silent on the availability of a judicial forum for review. Under the current proposal for amendment of the procurement rules in Ghana, the availability of a judicial review is expressly written into the law. These review bodies and their adjudicating powers will be discussed below.

The forum for review in Ghana is a three tiered system. This implies review by the procurement entity at the first stage shall be exhausted and serves as a pre-condition for allowing review at the higher stages. The tiered review system in Ghana is modelled on provisions under the 1994 and 2011 editions of the UNCITRAL Model Law. However, the 2011 Model Law no longer requires review by the procurement entity as a compulsory stage.¹¹⁰ This change recognises the practically less effective compulsory entity review requirement where some entities deliberately delay the resolution of complaints or simply ignore the complaints.¹¹¹ Many other African countries have adopted a tiered review system, particularly in those countries where the Model Law has been influential. Gambia, Kenya, Malawi and Tanzania are examples of countries with tiered review systems.¹¹² These other African countries, with the exception of Kenya, also maintain a first instance review by the procurement entity as a compulsory requirement.¹¹³ The proposals for amendment of the domestic procurement rules in Ghana do not introduce any changes in this respect but maintains review by the procurement entity as a compulsory stage.

3.11.3 Review by Procurement Entity

Complaints from aggrieved suppliers shall in the first instance be submitted to the Head of the procurement entity.¹¹⁴ Derogation from this requirement is only permitted where the procurement contract has already entered into force.¹¹⁵ In this case, aggrieved suppliers have the option to initiate complaints before the procurement entity or directly before the independent administrative review bodies. However, the Procurement Act does not provide adequate procedural rules on how review decisions should be arrived

¹⁰⁷ Ibid, s. 79.

¹⁰⁸ Ibid, s. 20(2)(e).

¹⁰⁹ Ibid, s. 80.

¹¹⁰ Guide to Enactment of the UNCITRAL Model Law on Public Procurement (2011), Summary of Commentary on Chapter VIII, A, para.11.

¹¹¹ Ibid.

¹¹² Gambia, Procurement Act, s. 55(1); Kenya, Procurement Act, s. 100(1); Malawi, *Public Procurement Act*, (2003), s. 38(1), (hereinafter Malawi Procurement Act); Tanzania, Procurement Act., s. 113(1).

¹¹³ K. T. Udeh, 'A Critical Appraisal of Kenya's Supplier Review System in the Light of International Standards' (2013), 5 *Public Procurement Law Review*, p.187.

¹¹⁴ Ghana, Procurement Act, s. 79(1).

¹¹⁵ Ibid, s. 79(7).

at.¹¹⁶ For example, there are no rules on how the head of the procurement entity may act or what possible actions it could take in respect of its decisions.

Requirements to exhaust review by the procurement entity as a compulsory first instance, and the lack of procedural rules for the review function, could constrain effectiveness of the procurement system. Firstly, the decision of the procurement entity may be partial given its particular interest in the procurement process.¹¹⁷ Secondly, the lack of procedural guidelines may result in irregularities and compromise. The procurement entity may want to maintain its reputation as a faultless entity and so decide to amicably resolve the complaint by offering a “deal” such as sub-contracts or future contracts to aggrieved suppliers.

Nevertheless, review by the procurement entity may have the benefit of a non-adversarial resolution of disputes. The procurement entity maintains the information relating to the procurement process which could be accessed and corrected at an early stage to ensure efficiency and effective remedy.¹¹⁸

3.11.4 Review by Independent Body

A second stage of review is available from the Tender Review Board on one hand or from PPA on the other hand.¹¹⁹ There is no explicit requirement to seek review before the Tender Review Board before going to the PPA. It is unclear whether appeals from the Tender Review Board shall be reviewed by the PPA or whether appeals may lie directly to the higher judicial review body. However, it is envisaged that appeals from the Tender Review Board may require review by PPA since the Procurement Act provides that decisions and reports of the Tender Review Board shall be presented to the PPA for inspection.¹²⁰

The proposed amendment bill seeks to reinforce the autonomy of decentralised authorities including the Tender Review Boards by re-allocating review functions to decentralised authorities. Under the new proposals, the Executive Committee of Metropolitan and District Assemblies which is the highest administrative authority under the decentralised system may review appeals from entities at the decentralised level. Appeals from entities at the decentralised level may lie directly to the courts of Ghana without any obligation to exhaust review by the Executive Committee of Metropolitan or District Assembly. However, appeals from the Metropolitan and District Assembly shall first lie to the PPA for review before the option for judicial review. The current review function of Tender Review Boards (renamed as Tender Review Committees under the proposed amendment), shall be carried out at the entity level. This implies that Tender Review Boards become first instance review bodies who act on behalf of entities and

¹¹⁶ Ibid, s. 79(4).

¹¹⁷ D. I. Gordon, 'Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make' (2006) 35(3) *Public Contract Law Journal*, p.433; X. Zhang, 'Forum for Review by Suppliers in Public Procurement: An Analysis and Assessment of the Models in International Instruments' (2009) 5 *Public Procurement Law Review*, p.211.

¹¹⁸ Ibid, p.433.

¹¹⁹ See discussions in section 2.2.1.1.1 and section 2.2.1.3 above.

¹²⁰ Ghana, Procurement Act, s. 20(2)(c).

appeals from their decisions may lie to the Executive Committee of the Metropolitan and District Assembly or directly to the courts of Ghana.

In practice, the review function of the Tender Review Board is not being pursued and the Tender Review Board does not receive complaints.¹²¹ This could be explained firstly by the nature of its review function as shared with the PPA. Since review by the Tender Review Board is not a pre-condition for appeal to higher review bodies as indicated above, the PPA with its expertise in procurement matters may be preferred by aggrieved persons for having the credibility in making informed review decisions. Secondly, the Tender Review Board could be seen as directly engaged in the procurement process through approving procurement decisions at every stage of the procurement process as its core function.¹²² This implies that the Review Board may be reviewing decisions approved by itself and may have an interest in the outcome of those decisions. Thirdly, the procurement law has no provisions regarding procedures or guidelines to be followed by the Tender Review Board in performing its review function. For example, there are no provisions on available remedies or time limits within which complaints should be reviewed.

3.11.4.1 Review by Public Procurement Authority

Unlike review functions of the procurement entity and the Tender Review Board, PPA has detailed procedural rules with explicit powers to guide its review process. Review is usually conducted on the initial complaint brought by aggrieved persons rather than on the review decision of procurement entities.¹²³ For the purpose of effective performance of its review function, the PPA has established a special unit within its ambit with the exclusive responsibility for handling complaints. The complaints unit referred to as the Appeals and Complaints Panel is a nine-member review panel, whose membership includes members of the PPA.¹²⁴ Review decisions of the panel are subject to approval by the Executive Board of PPA.¹²⁵

The structure of PPA's review forum is fundamentally based on the 1994 Model Law which perhaps, weakly proposed that states could have the option of establishing a review system that did not involve any independent review. This approach could be attributed to the willingness of the Model Law to accommodate the sensitivities of states on review of their administration in general and to take account of their own constitutional and legal traditions.¹²⁶ However, the 2011 Model Law is significantly different in this respect and imposes a higher minimum standard by placing emphasis on independence from the procurement entity rather than independence from the

¹²¹ This information was obtained by the author during interviews in Ghana with procurement practitioners (August 2013).

¹²² See section 2.2.1.3 for the functions of the Tender Review Board.

¹²³ Ghana, Procurement Act, s. 79(7).

¹²⁴ Dagbanja, (note 5 above), p.238.

¹²⁵ Ibid.

¹²⁶ S. Arrowsmith and C. Nicholas, "The UNCITRAL Model Law on Procurement: Past, Present and Future", in S. Arrowsmith (eds), *Reform of the UNCITRAL Model Law on Procurement: Public Procurement Regulation in the 21st Century*, (WEST, 2009), p.70-73.

government as a whole.¹²⁷ Many African systems have instituted administrative review forums which reflect provisions under the 1994 Model Law where the review bodies are external to the procurement entity with some degree of independence. Liberia, Nigeria and Sierra Leone are examples of such systems.¹²⁸ In Liberia and Nigeria for example, the administrative review function is performed by the body that also has the duty of overall supervision of procurement functions.

The nature of PPA's review structure could provide some benefits for the domestic system. The combined role of PPA as a review body and supervisor of procurement activities may bring unique expertise to resolving procurement conflicts.¹²⁹ This is because insights gained in the supervision function may be useful in resolving disputes and that could also reveal aspects of the law that may be considered for reform. However, the review function must perhaps be carried out with caution and address specific issues on conflict of interest that may arise through the multiple roles of PPA.

3.11.5 Right to Initiate Review

The Procurement Act provides that "any supplier, contractor or consultant that claims to have suffered, or that may suffer loss or injury due to a breach of a duty imposed on the procurement entity by this Act, may seek review".¹³⁰ The rules identifies a supplier as "any potential party or the party to a procurement contract with the procuring entity".¹³¹ These provisions imply that either a supplier who already has a contract with the procurement entity or a supplier who has the potential of being a party to the contract can initiate complaints.

In Ghana, complaints from subcontractors and professional association representatives may not be admitted for review. Complaints from the general public or civil society organisations may also not be admissible for administrative review. These exclusions may be justified to the extent that it avoids unnecessary disruption to the procurement process in order to balance other interests including the public interest.¹³²

3.11.6 Interim Relief: Suspension

Submitting a complaint in Ghana does not grant an automatic right to suspension of the procurement process. It rather at the discretion of the review body on a case by case basis. According to the rules, a 7 days' suspension, with optional extension not exceeding 30 days¹³³ is on condition that the complaint (a) is not frivolous,¹³⁴ (b) demonstrates that the supplier will suffer irreparable damage if the suspension is not granted¹³⁵ and (c) is likely to succeed.¹³⁶ All these conditions must be met for a

¹²⁷ Guide to Enactment of the UNCITRAL Model Law on Public Procurement (2011), para.24-26.

¹²⁸ Liberia, Procurement Act, s. 126; Nigeria, Procurement Act, s. 154(3); Sierra-Leone, *Public Procurement Act* (2004), s. 65, (hereinafter Sierra-Leone Procurement Act).

¹²⁹ Gordon, (note 117 above), p.434.

¹³⁰ Ghana, Procurement Act, s. 78(1).

¹³¹ *Ibid.*, s. 98.

¹³² Arrowsmith et al, (note 13 above), p.758; Gordon, (note 117 above), p.430-431.

¹³³ Ghana, Procurement Act, s. 82(1).

¹³⁴ *Ibid.* s. 82(1)(a).

¹³⁵ *Ibid.* s. 82(1)(b).

¹³⁶ *Ibid.* s. 82(1)(c).

suspension to be granted. Moreover, the review body shall ensure the suspension does not cause a disproportionate harm to the procurement entity nor to other suppliers.¹³⁷ This implies the discretion of the review body is not absolute but limited to the conditions spelt out above. The review body is required to ensure that conditions spelt out above are sufficiently met in every review application to allow suspension. However, suspension shall not be granted “if the procurement entity certifies that urgent public interest considerations require the procurement to proceed”.¹³⁸

The approach to suspension in most African procurement regimes is that of an automatic suspension.¹³⁹ This means that granting suspension is not at the discretion of the review body. Ethiopia, Gambia and Sierra Leone are examples of such regimes.¹⁴⁰ These African regimes model the 1994 edition of the UNCITRAL Model Law. However, the 2011 Model Law departs from the automatic suspension approach by suggesting the granting of suspension based on the discretion of the review body as applicable in Ghana.¹⁴¹

3.11.7 Final Relief:

The main forms of final relief available in Ghana are invalidation of decisions to a limited extent and the award of damages in the form of compensation. Firstly, PPA may set aside, substitute, terminate or “annul in whole or in part an illegal act or decision of the procurement entity, other than any act or decision bringing the procurement contract into force”.¹⁴² This implies that decisions may be invalidated to the extent that the contract has not yet entered into force. In such cases, entities will be required to correct the violation or to proceed in a manner that complies with the rules. This approach, to some extent, ensures effective relief for aggrieved suppliers since the proper conduct of the process is a primary interest of aggrieved suppliers.

PPA does not have the authority to invalidate decisions on concluded contracts and decisions that bring procurement contracts into force in Ghana cannot be set aside by administrative review bodies. This position is reinforced by the decision of PPA and its Complaints Panel which, in giving judgement to the aggrieved supplier, is unable to set aside or invalidate the decision of the procurement entity due to the fact that the contract has already come into force.¹⁴³ However, the judicial review body has the authority to set aside or overturn decisions on concluded contracts as will be seen below.

¹³⁷ Ibid. s. 82(1).

¹³⁸ Ibid. s. 82(4).

¹³⁹ G. Quinot, 'A Comparative Perspective on Supplier Remedies in African Public Procurement Systems', in G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), p.320.

¹⁴⁰ Ethiopia, *The Ethiopian Federal Government Procurement and Property Administration*, (2009), Proclamation No. 649/2009, s. 74(3); s. 75(1), (hereinafter Ethiopia Procurement Act); Gambia, Procurement Act, s. 55(7); Sierra Leone, Procurement Act, s. 64(3) and s. 65(6).

¹⁴¹ UNCITRAL Model Law on Public Procurement (2011), art. 66; art. 67.

¹⁴² Ghana, Procurement Act, s. 80(3).

¹⁴³ *Mawulorm Kwame v. Adentan Municipal Assembly(AdMA), AdMA Entity Tender Committee (ETC) & All Officers Concerned* (2009), available at <http://www.ppaghana.org/appealscases.asp?offset=20> (accessed on 3 March 2016).

In some African systems including Gambia and Malawi, the review body may also invalidate decisions of the procurement entity other than decisions bringing the contract into force.¹⁴⁴ Some other regimes including Kenya provide an outright exclusion of concluded contracts from reviewable matters, indicating that no decision of review bodies shall overturn decisions on concluded contracts. The approach to protecting concluded contracts in Ghana is the position adopted under the 1994 Model Law which features in many African regimes including the regimes discussed above. However, the 2011 Model Law introduces a significant shift from this position by allowing invalidation of concluded contracts.¹⁴⁵ Indeed, the issue of protecting concluded contracts in review decisions has been a major subject of debate across procurement systems.¹⁴⁶

The lack of invalidating contracts may have adverse effects especially in Ghana where there are no standstill periods. The protection of concluded contracts perhaps makes it far too easy for entities to maintain wrongful award decisions. Moreover, the compensation scheme available in Ghana is generally restrictive as will be discussed below and this poses additional difficulty in obtaining effective remedy.

Secondly, PPA may “require the payment of compensation for reasonable costs incurred”¹⁴⁷ by the supplier or the procurement entity for wrongful acts. What can be considered a “reasonable” cost is left at the discretion of the review body to determine but may include the cost of litigation or cost of purchasing tender documentation.

PPA does not have the authority to award compensation for loss suffered such as loss of profits or the cost of preparing tenders due to breach of the rules. This suggests that no generous compensation scheme could be expected from the review body. This position could be explained perhaps, by the fact that Ghana is a developing country with scarce resources where donor support is usually required to implement development projects. Moreover, donors do not allow the use of their funds for the settlement of procurement disputes as will be discussed. The narrow compensation scheme available under the domestic system suggests that the review system seeks to ensure mainly the integrity of the domestic system by providing compensation that could only incentivise suppliers in submitting complaints. The approach to award of compensation is not uniformly applied in African systems, but it can be seen as generally restrictive. While regimes such as Liberia and Uganda have no explicit provisions on the award of compensation, some other regimes including Kenya and Tanzania adopt narrow compensation schemes where for example, only payment of costs incurred is allowed.¹⁴⁸ In Botswana for example, such payment of cost is capped at a maximum

¹⁴⁴ Gambia, Procurement Act, s. 55(6)(b); Malawi, Procurement Act, s. 38(8)(c).

¹⁴⁵ UNCITRAL Model Law on Public Procurement (2011), art. 67(9)(f).

¹⁴⁶ Quinot, (note 139 above), p.324-327; S. Treumer, 'Towards an Obligation to Terminate Contracts Concluded in Breach of the E.C. Public Procurement Rules - the End of the Status of Concluded Public Contracts as Sacred Cows', (2007) 6 *Public Procurement Law Review*, p.371-386.

¹⁴⁷ Ghana, Procurement Act, s. 80(3)(f).

¹⁴⁸ Kenya, Procurement Act, s. 98(d); Tanzania, Procurement Act, s. 97(5)(f).

which shall not exceed the commercial outlay for the preparation of a bidding package.¹⁴⁹

3.11.8 Judicial Review

The Public Procurement Act of Ghana is silent on the availability of judicial review for aggrieved suppliers and this means it has no provision on procedures including time limits for submitting complaints for judicial review. The position in Ghana seems not far different from that of the Model Law where reference to judicial review is sparingly made.¹⁵⁰ The Model Law perhaps envisaged a rigorous administrative review system where many of the complaints could be resolved. This can be inferred from the Guide to Enactment which suggests that enacting states should have clear rules to the extent possible and consider among other things, the cost of litigation, the disruption to the procurement process and the length of time for dispute resolution in traditional courts for designing a review forum.¹⁵¹

However, available case law indicates that aggrieved suppliers may seek judicial review in the High Courts of Ghana though resort to judicial review in practice is minimal.¹⁵² The current proposal for amendment to the procurement rules in Ghana has express provisions allowing judicial review. The judicial review system is the final of the three-tiered review system in Ghana. It is not clear, whether aggrieved suppliers are required to exhaust the administrative review procedures before applying for judicial review. The general administrative justice provisions enshrined in the Constitution provides the basis for judicial review¹⁵³ whiles the review procedures of the High Court are determined by its Civil Procedure Rules.¹⁵⁴

The right to initiate judicial review in Ghana appears to be open to a wide range of stakeholders including individuals, contrary to the limited review right applicable under the administrative review system. In a decided case before the Supreme Court, the plaintiff is a former Attorney-General who is declared as an individual seeking the interest of the public through a suit in relation to the award of a contract in violation of the procurement procedure.¹⁵⁵ This case gives an indication that individuals and their associations may initiate judicial review proceedings. Furthermore, there is no explicit limitation on matters that are subject to review before the judicial body. Arguably, all procurement matters are subject to review before the judicial body. This is demonstrated in a decision of the High Court which reviewed a complaint on the choice of single source method of procurement and the granting of approval for its use by the PPA as a violation of the rules.¹⁵⁶ The principles in the decision of the High Court are rather

¹⁴⁹ Botswana, Procurement Act, s. 108.

¹⁵⁰ Zhang, (note 117 above), p.220.

¹⁵¹ Guide to Enactment of the UNCITRAL Model Law on Public Procurement (2011), para.11-12.

¹⁵² *Alfred Agbesi Woyome v Attorney-General & Anor* (2010), Unreported Suit No. RPC/152/10; Letsa, (note 32 above), p.103; Dagbanja, (note 11 above), p.85.

¹⁵³ Constitution of the Republic of Ghana, (1992), art. 23.

¹⁵⁴ High Court (Civil Procedure) Rules (2004) C. 1. 47.

¹⁵⁵ *Amidu v. Attorney-General & 2 Others* (The Waterville Case), (2012), Unreported Suit No. J1/15/2012.

¹⁵⁶ *The Republic v. Ministry of Education and Sports and Others*, Unreported (Suit No. AP6/2006).

different from the explicit exclusion of the choice of procurement methods as a subject matter for review under the administrative review forum.

The powers of the High Court to award remedies are determined by the Civil Procedure Rules and other inherent general powers of the High Court. These include the authority to grant orders for the prohibition, injunction and mandamus. It also has the authority to overturn procurement decisions. Indeed, the court has powers to invalidate or set aside concluded contracts and decisions of the procurement entity and require it to act in a lawful manner. In the unreported Waterville case,¹⁵⁷ the Supreme Court overturned the decision of the Ministry of Education and Sports as a procurement entity in the award of a duly approved and concluded contract to the defendant foreign supplier. The court ruled that the contract award was in violation of the procurement procedures by failing to secure an additional parliamentary approval required specifically for contracts classified as international business transactions as discussed in Chapter 2.2.1. The jurisdiction of the courts to invalidate decisions on concluded contracts also applies to other violations of the procurement law. For example, the courts have powers to overturn decisions that violate rules on publicity.

The courts also have powers to award compensation including restitution where a contract awarded in violation of the procurement law has been overturned by the courts. In the CCWL case,¹⁵⁸ the court set aside the decision of the procurement entity for the award of a contract in violation of the procurement procedures and ordered restitution of the benefits conferred on the defendant. The authority of the courts to award compensation applies to other violations of the procurement law including failure to advertise contract opportunities.

3.11.9 Other Forms of Enforcement

Sanctions for criminal offences including acts of corruption committed under the procurement law are punishable in accordance with the Criminal Code 1960 (Act 29).¹⁵⁹

The Procurement Act also imposes disciplinary sanctions for procurement misconducts such as the submission of false information and inducing public officials. The sanctions include rejection of tenders, disqualification or debarment of the suppliers.¹⁶⁰ For other general procurement misconducts, the Procurement Act imposes administrative sanctions in the form of fines. For example, persons engaged in procurement misconduct shall be “liable on summary conviction to a fine not exceeding 1000 penalty units or a term of imprisonment not exceeding five years or both”.¹⁶¹

In practice, debarment of suppliers is not actively implemented in Ghana. There are no procedural guidelines on the debarment function and PPA does not have an active list of debarred suppliers. PPA has currently no intention to debar suppliers since it

¹⁵⁷ *Amidu v. Attorney-General & 2 Others* (The Waterville Case), (note 155 above).

¹⁵⁸ *CCW Limited v. Accra Metropolitan Assembly*, Unreported (Civil Appeal No. J4/5/2007).

¹⁵⁹ Ghana, Procurement Act, s. 93(2).

¹⁶⁰ *Ibid.*, s. 3(q), s. 22(5), s. 32.

¹⁶¹ *Ibid.*, s. 92(1).

considers the supplier market in Ghana to be small and the domestic system has not yet achieved the level of competition required.¹⁶² As a result, any debarment sanction issued could reduce competition which could compromise value for money.¹⁶³ However, PPA makes reference to the World Bank list of ineligible suppliers on its own website.¹⁶⁴ This could imply that the World Bank list of ineligible suppliers serves as the list of debarred suppliers for the purposes of domestic procurement in Ghana. In the absence of further clarification from PPA, it could be envisaged that reference to the World Bank list of ineligible suppliers may serve merely as a guide for entities. This implies that review decisions of donors including decisions on debarment may serve as a guide and could influence domestic review decisions as will be discussed in Chapter 8.

The Procurement Act is silent on the availability of disciplinary sanctions directed at public officials who violate the procurement rules. However, public institutions in Ghana usually have an internal disciplinary system which could be applied to procurement officials who engage in procurement misconducts. The internal disciplinary sanctions such as suspension or dismissal of procurement officials may be found in codes of conduct for public officials. Moreover, constitutional principles on conflict of interest on the conduct of public officials are also applicable as will be discussed in Chapter 8.

¹⁶² This information is obtained from an official of the Public Procurement Authority in Ghana who wishes to remain anonymous. The information is on file with the author (21 November 2013).

¹⁶³ Ibid.

¹⁶⁴ For further information, see <http://www.ppaghana.org/suppliers/supbarred.asp> (accessed 3 March 2016).

Chapter 4: Procurement under the World Bank

4.1 Introduction

The World Bank, is a major development partner in Ghana. This chapter provides an outline of the framework for procurement under the World Bank in Ghana. The role of this chapter is to examine the World Bank regime as one of the multiple procurement regimes operating in Ghana. The significance lies in the large scale of funded operations which involves frequent application of the Bank's Guidelines in Ghana.¹ This facilitated familiarity with the Bank's rules in Ghana and as will be seen below, some aspects of domestic procurement rules are modelled on provisions and practices under the World Bank rules. Moreover, the global reputation as a development partner, provides the Bank with some form of influence over domestic development policies.

The chapter begins with an outline of the legal framework and objectives of the Bank where the ongoing policy reform will be highlighted. The institutional and operational structure of the Bank will then be examined. Subsequently, procurement methods for goods, non-consultant services and more important in the Bank's operation, consultancy services will be considered.

As the case with other development partners, procurement policies of the Bank can be separated into two major forms as will be discussed in this chapter. On one hand, there are policies directed specifically at loan funded procurement as found in the content of the Bank's rules and reporting procedures. On the other hand, there are other general policies aimed at steering procurement reform which include local capacity building.

4.2 Legal Framework

The legal basis for the Bank's rules is the Loan Agreement which is the contract between the World Bank and the Government of Ghana. The Loan Agreement has the status of a treaty agreement which is governed by international law and as such, the Government of Ghana cannot rely on national legislation as a reason not to fulfil its obligations under the Loan Agreement.² It implies that the Loan agreement in principle has precedence over national legislation. The procurement legislation of Ghana and that of many African countries indeed acknowledges the precedence of the Loan Agreement over domestic rules as discussed in chapter 2. The Loan Agreement defines the relationship between the parties. For example, the Government of Ghana has the responsibility for the conduct of procurement including the award of contracts.³ The role of the Bank is to supervise the procurement process and ensure that its procedures are complied with. If the borrower does not follow the laid down procedures properly, the

¹ The World Bank in 2011 for example, disbursed over US\$350M of its commitments to operations in Ghana. For more information, see http://www.aidflows.org/GH_Beneficiary_View.pdf (accessed 3 March 2016).

² A. Broches, *Selected Essays: World Bank, ICSID, and other subjects of public and private international law* (Martinus Nijhoff Publishers, 1995), p.33, also cited in M. Meireles, "The World Bank Procurement Regulations: A Critical Analysis of the Enforcement Mechanism and of the Application of Secondary Policies in Financed Projects" (2006), Unpublished PhD thesis, available at <http://www.nottingham.ac.uk/law/pprg> p.41.

³ Procurement Guidelines s. 1.2; Consultant Guidelines s. 1.4.

Bank may declare misprocurement and cancel the funds for parts or whole of the project.⁴

The Bank has a duty to ensure that proceeds of any loan are used only for the purposes intended.⁵ It carries out this duty through the provision of Guidelines detailing how procurement should be carried out. There are two basic guidelines; Guidelines on Procurement under IBRD Loans and IDA Credits (January, 2011) covering procurement of goods, works and non-consulting services (herein the Procurement Guidelines) and Guidelines on the Selection and Employment of Consultants by World Bank Borrowers (January, 2011) covering procurement of consultant services (herein the Consultant Guidelines). These Guidelines are incorporated by reference into the Loan Agreement which forms part of the obligations of the Government of Ghana under procurement funded by the Bank.

The Guidelines are complemented by standard documents referred to as Standard Bidding Documents (SBDs) which are designed for different types of contracts.⁶ These SBDs are template forms which borrowers are required to use in every case for Bank-funded procurement. Essentially, the rights and obligations of borrowers and suppliers are defined by the bidding document and the procurement contract but not by the Loan Agreement or the Guidelines.⁷

The operations of the Bank are also guided by some internal rules that are binding on Bank staff in performing their supervisory role. The World Bank Operations Manual (Particularly, OP/BP 11.00; January 2011 (revised April 2013)) is a document containing the responsibilities of Bank staff, together with the Bank's policies and procedures which include procurement provisions relevant for Bank-funded projects.

The Bank's rules and procedures are not laws in themselves but they serve the same purpose and effectively constitute the legal framework for the Bank's operations.⁸ In this respect, the provisions are not guidelines but rather mandatory provisions to be applied in every Bank-funded project and failure to comply with the provisions may lead to the cancellation of funds. Through these provisions, the Bank is able to define its legal relationship with the borrower but also the legal relationship between the borrower and suppliers. However, any relationship between the Bank and suppliers remain unclear and the Bank often accepts little responsibility for suppliers.⁹

⁴ Ibid, s. 1.14 and s. 1.19.

⁵ World Bank, Articles of Agreement, Article III, s. 5(b).

⁶ The World Bank's SBDs are publicly available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20062006~menuPK:84284~pagePK:84269~piPK:60001558~theSitePK:84266,00.html> (access 3 March 2016).

⁷ Procurement Guidelines s. 1.1; Consultant Guidelines s. 1.2.

⁸ S. Arrowsmith, J. Linarelli, and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International, 2000), p.110-114.

⁹ For more information on the responsibility of the Development Banks towards third parties in general, see B. Malmendier, 'The Liability of International Development Banks in Procurement Proceedings: The Example of the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development and the Inter-American Development Bank' (2010) 4 *Public Procurement Law Review* 135.

4.3 Objectives of World Bank Procurement Rules

Procurement under the World Bank is undergoing major policy reforms following approval by its Executive Directors for a proposed new framework on procurement.¹⁰ The reform is motivated by the Bank's believe that changes in its clients including their institutional capacity but also changes in current public procurement practices, makes it necessary for the Bank to better support clients in strengthening their public procurement systems. The new framework sets out the Bank's new vision as supporting clients to "achieve value for money with integrity in delivering sustainable development".¹¹ The guiding principles for implementing the vision are economy, efficiency, effectiveness, fairness, integrity, openness and transparency with good management, all of which are already identified under the Bank's current operations. A significant change in the Bank's operations at the project level, however, is a fit-for-purpose procurement approach rather than the one-size-fits-all approach under its current operations as well as making progressive use of client country procurement systems.¹² The reform process is in its final part of phase II where the new procurement framework will be launched by July 2016.¹³

The current procurement guidelines administered by the World Bank provides the policy objectives that govern its current projects. The policy objectives guiding World Bank procurement can be summarised as follows;

Firstly, the Bank aims at ensuring the use of funds only for purposes for which the loan was granted with due consideration for economy and efficiency.¹⁴ The notion of economy and efficiency, requires acquisition of suitable goods and services in a most effective manner and on the best possible terms. It extends to achieving economy and efficiency in the broader procurement environment which also supports the achievement of other objectives, such as the development of local enterprises. In this respect, some have criticised the activities of the Bank as being far from efficient and economical.¹⁵

Secondly, the Bank is concerned with providing equal opportunities for all eligible bidders to compete in Bank-financed projects.¹⁶ This objective effectively requires equal treatment of all potential suppliers through the provision of the same information and the application of a uniform standard of requirements for all bidders. Discrimination may constitute a major barrier to free trade and it is the policy of the Bank to promote equal treatment in opening up procurement markets that promote free trade.¹⁷ The Bank's

¹⁰ Procurement in World Bank Investment Project Finance, Phase II: The New Procurement Framework (June 2015), available for download at <http://consultations.worldbank.org/consultation/procurement-policy-review-consultations> (access 3 March 2016).

¹¹ Ibid, p.11.

¹² Ibid.

¹³ Ibid.

¹⁴ Procurement Guidelines s. 1.2(a); Consultant Guidelines s. 1.4(b).

¹⁵ T. Tucker, "A Critical Analysis of the Procurement Procedures of the World Bank," in S. Arrowsmith and A. Davies (eds), *Public Procurement: Global Revolution* (Kluwer law International, 1998), p.142.

¹⁶ Procurement Guidelines s. 1.2(b); Consulting Guidelines s. 1.4(c).

¹⁷ F. Ssenoga, 'Examining Discriminatory Procurement Practices in Developing Countries', (2006) 6(3) *Journal of Public Procurement*, p.222.

policy on non-discrimination may include conditions for participation of bidders to be limited to those that are essential to ensure the firm's capability to fulfil the contract.¹⁸

Thirdly, concerns for transparency in the procurement process has remained a core objective under World Bank procurement.¹⁹ Transparency requires that both the procurement entity and potential suppliers have adequate information on their rights and obligations with avenues to address any concerns. This ensures that no other criterion is introduced into the procurement process without prior knowledge of participants.²⁰ Transparency in Bank-funded projects is implemented through the requirement of publicity for all procurement opportunities. The detailed rule-based provisions of the Bank, serve to promote transparency by effectively limiting the discretion of procurement officers to making justifiable decisions. The Bank also has strict requirements on keeping procurement records that could provide a means for future verification of procurement decisions.

The Bank is also concerned with encouraging the development of local industries.²¹ The Bank encourages participation of local suppliers in Bank-financed projects by providing some margin of preference for their bids.²² The margin of preference ensures that bids from domestic suppliers or goods manufactured domestically may be preferred over others in some Bank-financed projects below specified threshold values. Developing the local industry does not only increase competition in both domestic and Bank-funded procurement but also promotes the ability of local firms to participate in foreign contracts. However, developing local industries with preferential treatment may conflict with the pursuit of other objectives of the Bank including the objective of providing all qualified bidders with equal opportunities and promoting non-discrimination. Any preference given to local industries may involve discrimination in favour of the local industry. It will be seen that the development of local industries as an objective of the Bank, appears to be applied in a limited extent and necessarily balanced by the need to open up the procurement market to all eligible bidders and promoting non-discrimination.

Also, the Bank is demonstrating an increasing concern for eliminating all forms of corruption in procurement as an objective.²³ Anti-corruption policies have become a major focus of the Bank in enforcing the rules in financed projects, the details of which will be discussed below.

4.4 Institutional Arrangements under World Bank Procurement

The World Bank, properly referred to as the International Bank for Reconstruction and Development, has 184 member states of which Ghana is one. The Bank's headquarters is in USA where policy making decisions are usually taken although some

¹⁸ Procurement Guidelines s.1.8.

¹⁹ Procurement Guidelines s.1.2(d); Consultant Guidelines s.1.4(e).

²⁰ S. Schooner, "Desiderata: Objectives for a System of Government Contract Law," (2002) 11 *Public Procurement Law Review*, p.106.

²¹ Procurement Guidelines s.1.2(c); Consultant Guidelines s.1.4(d).

²² Procurement Guidelines s. 2.55.

²³ Procurement Guidelines s.1.16; Consultant Guidelines s.1.23.

implementation decisions are taken at the regional or country level through obtaining appropriate clearance as will be seen below. The Bank has a country office in Ghana and similar to its other country offices in many other African countries, this is used to coordinate regional projects funded by the Bank.

The office of the World Bank in Ghana is led by a Country Director and a Programme Manager who are also responsible for some other neighbouring African country offices of the Bank (Liberia, Sierra Leone and Guinea in particular). The Country Director and the Programme Manager are responsible for liaising with the Government of Ghana on all Bank projects and overseeing the Bank's lending portfolio in Ghana.²⁴ In particular, the Country Director is also responsible for issuing misprocurement for procurement conducted in violation of the rules.²⁵ Other major institutions or units involved in carrying out procurement funded by the Bank are discussed below;

4.4.1 World Bank Institutions Involved in Procurement

Procurement Specialists: These are the Bank's staff with expertise in procurement usually working with the country offices and serves as the main intermediary in communicating the position of the Bank to the borrower.²⁶ The PS supports the Team Leader in ensuring procurement is carried out according to the Bank's rules by granting no-objection approval on procurement decisions.²⁷ PS play a key role in providing operational support and making recommendations on reports submitted by the Borrower to obtain no-objection approvals.

4.4.2 National Institutions Involved in Procurement

The Implementing Agency: This agency refers to a national institution which implements Bank funded projects. Implementing Agency is a terminology used by the World Bank and some other development partners when referring to the Borrower's institution responsible for carrying out procurement funded by the donor. The implementing agency is usually responsible for preparing the project plan in consultation with the Bank and receives the funds on behalf of the Government of Ghana for implementing the project. The decision on which government institution to be appointed as the Implementing Agency for projects funded by the Bank is determined by several factors including the type of project involved and the capability of the institution to support the facilities needed for carrying out the project. For example, the Ministry of Agriculture with its capacity in agricultural matters, will usually be the designated implementing agency for farm irrigation projects funded by the Bank.²⁸

Project Implementation Units (PIU): This is a separate, usually stand-alone department created by the Bank and many other donors for implementing funded projects on behalf of the implementing agency. Technically, the PIU is a department

²⁴ The World Bank Operations Manual, BP 11.00, Annex A.

²⁵ Ibid.

²⁶ Ibid.

²⁷ The World Bank Operations Manual, BP 11.00, para 3.

²⁸ Information obtained by the author in an interview with procurement officials at the Ministry of Finance in Ghana who wishes to remain anonymous.

under the Implementing Agency but it is often a separate Bank-funded department on its own. The PIU, may be housed either within or outside the implementing agency, having a separate budget allocated for their operations including the payment of staff.²⁹

In practice, PIUs may either be separate stand-alone units or integrated into the implementing agency, consisting of permanent domestic civil servants. PIUs in Ghana are often permanent departments of Implementing Agencies. For example, the Ministry of Finance and Economic Planning as an Implementing Agency, has a World Bank Desk, with similar desks for some other donors, which are permanent departments under the Ministry for handling current and future projects financed by the Bank.

Functions of PIUs are comparable with Procurement Units existing within the national Procurement Entity (the latter being referred to as Implementing Agency under Bank funded projects). However, the creation of PIUs has been largely justified by the need to mitigate risks in weak capacity environments such as Ghana and the need for speed in project implementation and disbursement of funds.³⁰

Staff of PIUs are made up of procurement experts selected by the Implementing Agency in consultation with the Bank. Experts are usually selected from the private sector as consultants but also from the public sector, made up of domestic public servants with knowledge of procurement. These public servants are usually permanent staff either within the specific Implementing Agency or transferred from a different government institution that is not concerned with the current Bank project.

Significantly, the same procurement officers are often responsible for carrying out both domestic and donor funded procurement rather than states having officers specialised in conducting only domestic or only donor funded procurement. Where the PIU is a permanent unit of the implementing agency, it implies that permanent officers applying national rules may also remain permanent staff of the PIU. This implies that procurement officers who normally apply national procurement rules, are also required to apply World Bank rules for the Bank's funded procurement.³¹

A more practical and complex scenario exist where different donors finance projects at the same time and implemented by the same institution. This requires creating several PIUs for each project (either stand-alone or integrated units) under the same implementing agency. The role of such permanent government officers on the PIUs becomes multiple-fold; ensuring the successful project implementation according to the Bank's Guidelines and according to the rules of other donors, in addition to their traditional role of implementing domestic procurement rules for projects funded from national resources.

²⁹ Information obtained from an interview with a Procurement Specialist in Ghana on 21 November 2013, (information on file with author).

³⁰ Asian Development Bank, *Questioning the Role of Project Implementation Units, Special Evaluation Study on Project Evaluation Units* (Operations Evaluation Department, 2005).

³¹ Information obtained by the author during a working visit and interviews in Ghana.

4.5 Structural Procedures under World Bank Procurement

Bank-financed projects follow a well-documented Project Cycle. For the duration of the Project Cycle which could last over several years, the Bank and the borrower works closely together. The Procurement Cycle comprises of six stages; Identification, Preparation, Appraisal, Negotiation and loan approval, Implementation and supervision, and Evaluation.³² Particularly, the Preparation and the Implementation and supervision stages are important phases in terms of procurement since many, though not exclusively, procurement specific decisions are taken at these stages.

The Project Preparation involves procurement planning where proposals are made for example, on the types of contracts and the bidding documents required.³³ In principle, the responsibility of project preparation rests on the Implementing Agency but the Bank's staff provide operational support including setting out thresholds for prior and post reviews. The level of Bank supervision is determined by the identified nature of risks and capacity of the Implementing Agency.

After negotiations have taken place and the loan approved, the project enters the Implementation and Supervision stage which involves carrying out the actual procurement including identification of suitable suppliers. Disbursement of the loan is conditional on fulfilment of the procurement plan.³⁴

4.5.1 Harmonisation and Use of Country Systems

The World Bank cooperates with other multilateral Development Banks (MDBs) to standardise bidding documents, referred to as Harmonised Master Procurement Documents among other initiatives.³⁵ These initiatives involve only specific participating donors with minimal engagement particularly with borrowers. Though this approach to harmonisation could create standardisation and bring greater similarity between the multiple procedures in Ghana, it does not eliminate parallel implementation of procedures. The approach rather widens the distinction between the process of harmonisation and the use of country systems which implies that achieving the use of country systems is likely to render harmonisation initiatives redundant in some cases.

The Bank proposed a three-stage piloting programme for the use of country systems.³⁶ It describes use of country systems as the use of the procurement procedures contemplated in the domestic system and found to be acceptable to the Bank.³⁷ Stage

³² For more information on the World Bank's Project Cycle, see <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20109658~pagePK:84269~piPK:60001558~theSitePK:84266~isCURL:Y,00.html> (accessed 3 March 2016).

³³ The World Bank Operations Manual, BP 11.00 para 12.

³⁴ The World Bank Operations Manual OP 12.00 para 1.

³⁵ E. Nwogwugwu, 'Towards the Harmonisation of International Procurement Policies and Practices', (2005) 3 *Public Procurement Law Review*, p.139; For more information on harmonised procurement documents, see <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:22989220~menuPK:8118597~pagePK:8271521~piPK:8271523~theSitePK:84266,00.html> (accessed 3 March 2016).

³⁶ World Bank, *Use of Country Procurement Systems in Bank-Supported Operations: Proposed Piloting Program* (Operations Policy and Country Services, May 2008), available for download at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Use.of.Country.Systems.March.20.Version.for.Di.sclosure.pdf> (accessed 3 March 2016).

³⁷ Procurement Guidelines s.3.20; Consultant Guidelines s.3.12.

one involves assessing the overall quality such as CPAR of selected countries procurement system.³⁸ Stage two involves a series of assessments to determine whether the domestic framework is “consistent” and “equivalent” to the Bank’s principles and policies such as competition.³⁹ The Bank provides three instances where it may deviate from a strict interpretation of provisions in its Guidelines; a) use of domestic Standard Bidding Documents (SBDs) found to be consistent with the Bank’s SBDs, b) advertisement in national language and c) use of local currency. In all other cases, assessment at this stage will ensure that procurement under the domestic policies achieve substantially the same results as the Bank’s funded procurement. Stage three involves assessment on compliance, performance, capacity and fiduciary risks at the implementing agency level.⁴⁰

Ghana, at the request of its Government, is among four other African states involved in the UCS pilot programme. However, the report on Ghana’s stage I assessment show the need for further domestic reforms in order to qualify for stage II assessment.⁴¹ Particular weaknesses in the report concern the need to enhance institutional development capacity, transparency and strengthening of procurement operations among others.⁴² Indeed, the domestic legal framework including the rules and methods achieved the required standards while the main weaknesses remain in the institutional framework. This finding could mean that perhaps, the Bank may use domestic rules on procurement methods but within the Bank’s monitoring and supervision framework to address the domestic institutional weaknesses. Out of a total of 20 candidate countries initially participating in the project, only 2 countries (Rwanda and Senegal) have received a conditional approval to proceed to stage III.⁴³ It is quite clear that the UCS programme failed to achieve its objectives as there was no identifiable project that could rely entirely on country systems for its implementation.⁴⁴ The Bank acknowledges the failure of the programme and has since discontinued its implementation.⁴⁵

Indeed, as the general assessment results show, the Bank does not actually let countries use their own systems as the Bank seems to insist all countries have systems that comply with its extremely detailed and specific requirements. The Bank however, asserts the policy is rather a progressive reliance on strengthened country systems.⁴⁶ This implies the use of country systems is based on conditions that existing national systems undergo significant reform, many of which are being financed and eventually

³⁸ World Bank, *Use of Country Procurement Systems in Bank-Supported Operations: Proposed Piloting Program*, (note 36 above), p.8.

³⁹ *Ibid*, p.12.

⁴⁰ *Ibid*, p.15.

⁴¹ World Bank, *Ghana – Assessment of Stage 1 Use of Country Procurement Systems in Bank-Supported Operations: Proposed Piloting program* (Draft Report, August 2010).

⁴² World Bank, *Piloting Program in the Use of Country Procurement Systems, Second Progress Report* (Operations Policy and Country Services, December 2010), p.8. Available for download at [http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1311363656902/UCS_Second_Progress_Report_\(Final_version\)_\(22_Dec_2010\).pdf](http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1311363656902/UCS_Second_Progress_Report_(Final_version)_(22_Dec_2010).pdf) (accessed 3 March 2016).

⁴³ *Ibid*, p.2.

⁴⁴ *Ibid*; The originally planned two-year programme was extended with an additional year with the aim of identifying projects that could be implemented using country systems.

⁴⁵ *Ibid*, p.5.

⁴⁶ *Ibid*, p.4.

influenced by the Bank. Perhaps, the Bank's ongoing reform programme could present a flexible approach to the use of country systems, moving away from its one-size-fits-all approach to perhaps, using domestic systems on specific procurement stages such as the domestic rules and procedures on procurement methods or domestic standard bidding documents.

4.6 World Bank Guidelines: Scope of Application

The Bank's guidelines, are applicable to all contracts financed in whole or in part from Bank loans.⁴⁷ The scope of application of the Bank's rules with relevance for issues of multiplicity are as follows.

4.6.1 Co-Financing

A practical and complex situation of multiplicity is under co-financing where two or more donors combine resources to finance a project. In such cases, the Bank becomes one of several sources of finance for the specific project. The extent to which the Bank's rules are applicable to its funded procurement in such co-financing situations is in two folds:

- 1) **Procurement under joint financing arrangement;** this is a type of co-financing where financing of the same contracts is shared between the Bank and other co-financiers in agreed proportions. In this case, the Bank's rules are applicable to only portions financed by the Bank whilst the borrower is allowed to adopt other rules that may apply to the remaining portion of the contract.⁴⁸ In practice however, the Bank do not allow the borrower to determine the rules applicable to the remaining portion of the contract. The Bank's rules are made applicable to all contracts including those not financed by the Bank under joint financing arrangement.⁴⁹ The procedures and responsibilities of the Bank in this case, generally remain the same as in situations where it wholly finances a project.
- 2) **Procurement under parallel financing arrangement;** this is a type of co-financing agreement where the Bank and other co-financiers finance different contracts under the same project. This is the most common type of co-financing arrangement used in Ghana but also more generally.⁵⁰ This could be explained perhaps by the relative flexibility and less complexity in applying a single set of rules to a particular contract. Under this arrangement, the project can be divided into different contracts and each co-financier can finance different contracts under the same project. Each contract may be awarded in accordance with the procurement rules imposed by the donor for that specific contract. The Bank's rules in this respect are applicable to only portions of the project financed by the Bank. The responsibilities of the Bank are also limited to only portions of the project it finances. Since most donors have specific requirements for the use of

⁴⁷ Procurement Guidelines section 1.5; Consultant Guidelines section 1.8.

⁴⁸ Procurement Guidelines section 1.5; Consultant Guidelines section 1.8.

⁴⁹ The World Bank Operations Manual OP 11.00 para 9.

⁵⁰ Information obtained by the author in an interview with Procurement Specialists at the World Bank Ghana country office who wishes to remain anonymous (28 November 2013)

their funds which differ through for example applicability or eligibility rules, parallel financing arrangements are often used under co-financed projects. In practice, many co-financed projects in Ghana are a combination of joint and parallel financing arrangements.⁵¹ The Bank usually co-finances projects with a number of donors including the EU, African Development Bank, individual EU donor member states including Netherlands, UK and Switzerland. The number of co-financiers for a particular project usually differs and may depend on the level of negotiation on several issues including the extent of divergence or similarity in donor requirements. The Bank usually contributes the largest proportion which could be up to 80% of the amount particularly in cases where there are only few co-financiers.⁵²

The scenarios described above under both joint and parallel co-financing arrangement, increases the level of complexity in the system with regards to the application of multiple rules. The complex co-financing implementation arrangement is likely to place undue practical burden on domestic officials carrying out the procurement but also the burden could be felt by potential bidders. For example, procurement officials in Ghana in some cases, may specify the same procurement requirements on different template documents and formats as issued by the different co-financiers.⁵³ Suppliers may also be required to duplicate the preparation of their proposals and present their offers in different formats as required by the different co-financiers.

Procurement officials in both scenarios above will be required to apply different rules for contracts under the same project. These procurement officials are regular civil servants who also conduct procurement according to the domestic rules and are called upon only occasionally to conduct donor funded procurement so that familiarity with donor rules is less than perhaps expected. These officials are expected to acquire the necessary capacity after a short and intensive training workshops in order to fully comply with all aspects of the different donor requirements. The time spent in capacity building workshops on donor procedures may be lost in undertaking their regular duties under the national system. Some of these problems faced by procurement officials have been described as “capacity erosion” where many of the officials often become confused on what rules needed to be followed.⁵⁴

On the part of potential bidders, they will be required to comply with different requirements for each offer they make under the same project. Meanwhile, these potential bidders are more often than not, excluded from training programmes on donor procedures. They are usually left with instructions (which may not always be clearly set out) to follow in order to submit their bids. Moreover, procurement opportunities under

⁵¹ World Bank, *Ghana: Project Performance Assessment Report* (2008); World Bank, *Ghana Implementation Completion and Results Report* (2011).

⁵² Ibid.

⁵³ Information obtained by the author in an interview with Procurement Officials at the Ministry of Finance in Ghana who wishes to remain anonymous (21 November 2013).

⁵⁴ P. Trepte, 'Building Sustainable Capacity in Public Procurement', in S. Arrowsmith and R. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011), p.381.

the same project may become fragmented and published at different locations required by each donor. Identification of procurement opportunities may become time consuming and pose extra difficulty for the participation of potential bidders.

4.7 Procurement Methods

The Bank's applicable procurement methods usually depend on the nature of projects and indeed, not all available procurement methods under the World Bank regime are applied in Ghana. Discussions under this section will be limited to methods of procurement under World Bank regime that are applied in Ghana which may have the potential for causing duplications.

4.7.1 International Competitive Bidding

International Competitive Bidding (ICB) is the terminology used under the World Bank regime when referring to an open competitive method of procurement for goods, works and non-consultant services. It requires open and adequate notification to potential suppliers through formal open procedures including public notice and public opening of bids.⁵⁵ It is the default method of procurement for goods, works and non-consultant services which allows participation of all eligible suppliers.⁵⁶ This method is comparable to the "open tendering" procedure which is the default method used under the UNCITRAL Model Law as adopted in Ghana and many other African systems.⁵⁷ Domestic preferences are allowed only under ICB procedures.⁵⁸ With the agreement of the Bank, the borrower may grant a margin of preference for national goods and works.⁵⁹ The World Bank provisions on domestic preferences are comparable with the preference scheme available under the UNCITRAL Model Law which is also available under the domestic law of Ghana and many African systems.⁶⁰

4.7.2 National Competitive Bidding

National Competitive Bidding (NCB) is described as the competitive method of procurement normally available under the national system. NCB may be used where foreign bidders are not expected to express interest in the opportunities and contracts are unlikely to attract foreign competition due to their nature and scope.⁶¹ Advertising is limited to national media and bidding documents may be prepared only in national language while price quotations also in the national currency. The Bank may allow the use of other domestic procedures related to the NCB method such as the use of national bidding documents on conditions of their acceptability to the Bank. However, it appears that in practice, the Bank rarely uses national procedures without significant modifications.⁶² For example, the Bank's funded NCB procedures do not allow preference schemes unlike the case under the domestic system. One could argue that

⁵⁵ Procurement Guidelines s. 2.1.

⁵⁶ Procurement Guidelines s. 1.3.

⁵⁷ S. Arrowsmith and E. Carborn, 'Procurement Methods in the Public Procurement Systems of Africa' in G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013).

⁵⁸ Procurement Guidelines s. 3.2.

⁵⁹ Procurement Guidelines Appendix 2, para 7.

⁶⁰ UNCITRAL Model Law on Public Procurement (2011), art. 11 3(b); Also see discussions in section 3.10.

⁶¹ Procurement Guidelines s. 3.3.

⁶² Ibid.

provisions relating to domestic preference under World Bank regime are perhaps inconsistent for allowing preferences under ICB method but not under its NCB procedure despite the identical principal features of both ICB and NCB including the participation of foreign bidders.

In effect, the Bank's funded NCB procedures are not applied in the same manner as those under the domestic system. Domestic NCB procedures are seen as a form of template and a basis for introducing modifications that demonstrate the principles of transparency, publicity and equal treatment.⁶³ The Bank allows minimal deviation from its default ICB requirements. In Ghana, such deviations likely to be acceptable under the NCB method are the limitations on advertisement to national media and the use of national currency.

4.7.3 Two-stage Bidding

A two-stage bidding procedure is used for complex contracts such as complex information technology or turnkey projects, where it may be undesirable or impractical to prepare a complete technical specification in advance.⁶⁴ The Bank may require the use of a two-stage bidding procedure under which firstly, unpriced technical proposals on the basis of a conceptual design or performance specifications are invited at the first stage, subject to technical as well as commercial clarifications and adjustments. Subsequently, the bidding documents are amended and final technical and priced bids are submitted at the second stage. This procedure is similar to the two-stage tendering procedure under the UNCITRAL Model Law⁶⁵ which has been applied in Ghana⁶⁶ and many African countries.

4.7.4 Framework Agreements

The Bank adopts both single and multi-supplier framework where prices are either pre-agreed, or determined at the call-off stage through competition or a process that allows their revision without further competition.⁶⁷ In Ghana, the Bank uses a modified version of the single supplier framework usually applicable under domestic system,⁶⁸ but with due regard for NCB principles including fair and open competition.⁶⁹

The procurement methods described above could be seen as similar in many respects to those applicable in many other regimes including the domestic and UNCITRAL regimes. For example, conditions for the use of methods other than the preferred open competition method are largely similar in the regimes under consideration whilst any differences are noticeable mainly in the use of terminologies.

⁶³ Procurement Guidelines s. 3.4.

⁶⁴ Procurement Guidelines s. 2.6.

⁶⁵ UNCITRAL Model Law on Public Procurement (2011), art. 30(1).

⁶⁶ See discussions in section 3.5.2.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

4.8 Publicity for Contracts

Two types of notices shall be submitted to the Bank for publication; firstly, the General Procurement Notice (GPN)⁷⁰ which is an advance notice of upcoming procurement. Secondly, the Specific Procurement Notice (SPN)⁷¹ which is an invitation to bid on readily available opportunities. Only the latter notice on readily available opportunities is required in Ghana as indicated above.⁷²

The location of both publications to be arranged by the Bank is in UN Development Business online (UNDB online) and on the Bank's external website.⁷³ Additional requirement for SPN publication is at least one newspaper of national circulation, official gazette or a widely used website.⁷⁴ In Ghana, Bank-funded contract opportunities are usually published on the website of the PPA.⁷⁵

4.9 Qualification of Bidders

Except where pre-qualification procedure is used, qualification generally in Bank-funded projects is essentially post-qualification. According to the guidelines, "...the Borrower shall determine whether the bidder whose bid has been determined to offer the lowest evaluated cost has the capability and resources to effectively carry out the contract. If the bidder does not meet the requirements, the bid shall be rejected and the Borrower shall make a similar determination for the next-lowest evaluated bidder".⁷⁶ This implies that only a bidder to whom the borrower wishes to award the contract shall undergo qualification process to determine its capability to carry out the contract.

This position is rather different in terms of procedure under the domestic rules as modelled under the UNCITRAL Model Law. As provided under the Model Law, qualification generally is determined at any stage as part of the procurement process.⁷⁷ The post-qualification procedure under Bank-funded procurement perhaps prevent the need for bidders to go through the difficulty of demonstrating qualification if they might not win the contract. This may reduce the administrative burden on the borrower who will not need to qualify all bids but only bids of preferred bidders until one is determined to be qualified.

4.10 Standards and Specifications

According to the guidelines, "standards and specifications quoted in bidding documents shall promote the broadest possible competition while assuring the critical performance or other requirements..."⁷⁸ Bidding documents must state in all cases that tenders that meet other standards, and offer at least "substantial equivalence", will also be

⁷⁰ Procurement Guidelines s. 2.7.

⁷¹ Procurement Guidelines s. 2.8.

⁷² See discussions in section 3.7.

⁷³ Procurement Guideline s. 2.7.

⁷⁴ Procurement Guideline s. 2.8.

⁷⁵ See discussions in section 3.7.

⁷⁶ Procurement Guidelines s. 2.58.

⁷⁷ See discussions in section 3.8.

⁷⁸ Procurement Guideline s. 2.19.

accepted.⁷⁹ Reference to specifications shall be based on relevant characteristics or performance requirements.⁸⁰ This implies brand names, catalogue numbers or similar classifications may not be used unless necessary. In such cases, the use of the words “or equivalent”⁸¹ is required to clearly state the willingness to accept equivalent products.

These provisions are similar to those required under the domestic regime and under the UNCITRAL Model Law.⁸² The domestic regime in particular, emphasise the importance of clarity in drawing up specifications and the need to promote competition through the use of internationally accepted standards of specification.⁸³

4.11 Evaluation and Contract Award

After a mandatory public bid opening,⁸⁴ bids are examined to ensure they are substantially responsive to the bidding documents.⁸⁵ The concept of substantial responsiveness implies that bids must generally conform to requirements spelt out in bidding documents and deviations will be allowed only to the extent that they are minor and does not materially depart from the terms spelt out in the bidding documents. In order to closely analyse the problems of multiple regimes, the issue of responsiveness and correction of errors in tenders will be discussed in chapter 7.

Evaluation involves comparison of the bids to determine the lowest evaluated bid, taking into account the price and other relevant factors. The Bank requires factors other than price which will be considered in evaluation, be expressed in monetary terms where practicable and also allows relative weights to be given to the criteria in some cases.⁸⁶ The position is similar to those applicable under the domestic rules of Ghana and the UNCITRAL Model and ensures that decisions are not bias.⁸⁷

The award criterion applied by the Bank is the lowest evaluated substantially responsive price, which implies that the contract is not necessarily awarded to the lowest price bidder.⁸⁸ Once the evaluation decision has been made, post-qualification will be conducted to determine whether the lowest evaluated price bidder is capable of effectively carrying out the terms of the contract. The contract will then be awarded to the bidder whose bid is substantially responsive and offers the lowest evaluated price. The Bank’s provisions on the award criteria are also similar in many respects to those applicable under the domestic regime of Ghana as adopted under the Model Law.⁸⁹

⁷⁹ Ibid.

⁸⁰ Procurement Guidelines s. 2.20.

⁸¹ Ibid.

⁸² See discussion in section 3.4.1.

⁸³ Ibid.

⁸⁴ Procurement Guidelines s. 2.45.

⁸⁵ Procurement Guidelines s. 2.48.

⁸⁶ Procurement Guidelines s. 2.52.

⁸⁷ See discussions in section 3.9.

⁸⁸ Procurement Guidelines s. 2.59.

⁸⁹ See discussions in section 3.10.

4.12 Procurement of Consultant Services

The Bank regards consultant services - which is generally of an intellectual nature - differently from the procurement of goods, works and non-consultant services. The Bank implements a different set of rules (Consultant Guidelines) for procurement of consultant services. This incorporates the Bank's core principles including competition but does not use the Bank's classic ICB method.

As indicated earlier,⁹⁰ Ghana adopts a separate set of rules for the procurement of consultant services mainly due to the influence of the World Bank and the 1994 version of the Model Law. The 1994 version of the Model Law had the separate method system until that was changed in the 2011 version which now allows the use of the same range of methods for all forms of procurement.⁹¹ The Bank places greater emphasis on quality service rather than price and believes that quality will not necessarily be achieved by its default ICB method. However, the separate methods for consultancy services could be seen as variations or flexibilities in the standard methods of procurement under other forms of procurement.⁹² This perhaps provides a justification for the approach adopted by the 2011 version of the Model Law in applying the same range of methods for all forms of procurement.

The Bank's selection procedures follow competition among shortlisted firms, based on the quality of proposals and, where appropriate, on the cost of the services to be provided.⁹³ The detailed Bank's rules focus mainly on Quality and Cost Based Selection (QCBS) as the most recommended and expected selection method. Indeed, the most common selection method used under Bank-financed projects in Ghana is the Quality and Cost Based Selection.⁹⁴ However, other alternative methods such as Quality Based Selection (QBS) and Least Cost Selection considered to be more appropriate are also provided with the circumstances and conditions under which they may be used.

The terms "selection" and "shortlisting" are terminologies used under different regimes referring to different but also sometimes similar procedures. In general, the terms are often used, though not in a strict sense, under procurement for consultant services. Under the World Bank, the term "selection" refers to the procedures for identifying qualified bidders generally, which includes choosing the most suitable bidder for contract award. Shortlisting on the other hand, could be seen as a stage in the selection procedure which involves reducing the number of permitted and qualified bidders in the process. This definition is similar to the use of the same terms under the domestic law of Ghana, probably due to the influence of the Bank's procedures, particularly the procedures for selecting consultants.⁹⁵ The UNCITRAL regime presents an interesting

⁹⁰ See discussions in section 3.11.

⁹¹ Ibid.

⁹² Arrowsmith and Carborn, (note 57 above), p.293.

⁹³ Consultant Guidelines s. 1.5.

⁹⁴ Information obtained by the author in an interview with Procurement Specialists at the World Bank Ghana country office who wishes to remain anonymous (28 November 2013)

⁹⁵ Arrowsmith and Caborn, (note 57 above), p.267.

comparison with no reference to shortlisting⁹⁶ but prefer using “pre-selection” in referring to shortlisting as defined in this paper.⁹⁷

4.13 Enforcement Mechanism under World Bank Regime

This section examines the enforcement mechanisms under World Bank funded projects as an important means of ensuring compliance with its rules. The section first considers the review procedure led by the Bank as the primary means of enforcement. The role of bidders in enforcing the rules of the Bank will then be discussed. Also, the possibility of obtaining review in accordance with domestic law will be considered, followed by discussions on the Bank’s provisions on exclusions.

The Bank’s approach to enforcement is to adopt a generally administrative oversight role with the use of its internal mechanisms to review and enforce compliance with the rules.⁹⁸ A reason for the Bank’s approach could be the nature of its relationship defined as a non-party to the procurement contract but rather a supervisory role as part of its fiduciary duty to ensure proper use of funds. The Bank perhaps acts as an external enforcement agent with an impartial perspective in ensuring compliance with the rules. Moreover, the use of supplier-led review could imply delegating some of the Bank’s fiduciary duty to suppliers, which the Bank may be unwilling to allow so as to reduce some of the associated risks such as the risk of supplier and borrower arrangements to conceal misuse of funds. In this respect, the Bank adopts an approach to review not based on the dissatisfaction and grievances of bidders but rather based on reassuring the lender of the borrower’s compliance. The enforcement mechanisms available under Bank financed projects are outlined below.

4.13.1 Bank-led Review Procedures

Review led by the Bank itself appears to be the primary mechanism for enforcing compliance with the Bank’s rules. The Bank’s staff often review procurement documentation submitted by the implementing agency to ensure that all aspects of the process is in compliance with the agreed Bank’s procedures. Review conducted by the Bank usually takes three main forms; firstly, a prior review at specified stages of the procurement process where a no-objection letter from the Bank is an important piece of information which the implementing agency requires in order to proceed to the next stage of the procurement process. Secondly, a post review involving the verification of random sample of awarded contracts and procurement related documentation. Thirdly, an audit of some procurement processes.⁹⁹ The description and form of review procedure to be conducted is determined by the Loan Agreement whilst the Procurement Plan and the Procurement Supervision Plan specifies the extent to which the review procedures shall apply.¹⁰⁰

⁹⁶ Arrowsmith et al, (note 8 above), p.645.

⁹⁷ UNCITRAL Model Law on Public Procurement (2011), art. 2(h).

⁹⁸ J. F. Weiss and D. Kalogeras, 'The Principle of Non-Discrimination in Procurement for Development Assistance', (2005) 14(1) *Public Procurement Law Review*, p.10.

⁹⁹ Procurement Guidelines s. 1.13; Consultant Guidelines s. 1.16.

¹⁰⁰ Ibid; The World Bank Operations Manual BP 11.00 para 20.

In situations where the Bank finances several contracts at the same time as part of the same larger project - which is usually the case in Ghana - the procurement officer is likely to be confused with the burden of identifying which of the many contracts require prior or post review with different applicable threshold values and under what circumstances. Some procurement officers in Ghana have come to acknowledge that many donors including the World Bank require some form of approval at some stage in the procurement process irrespective of what terminology is used to describe the approval note.¹⁰¹ This situation has the potential to limit procurement officers from taking initiatives and adopting innovative approaches to procurement. For example, supposing the Bank issues approval note accompanied by its recommendations on a decision submitted by the procurement officer, any deviation from the Bank's advice may result in cancellation of the contract. In such cases, the procurement officer may become reluctant to initiate decisions or adopt innovative approaches to decision making since such decisions may be weakened by the Bank's approval recommendations. As a result, the development of local skills and expertise will be limited.

There are some instances in Ghana where procurement documentation submitted by the implementing agency is determined not to comply with agreed procedures, for example, where contract award recommendations were made based on undisclosed criteria.¹⁰² The Bank in cases of prior review, may advise the implementing agency to make corrections and re-submit the documentation for further verification and approval. Many of the cases of non-compliance in Ghana generally, appear to be considered as minor deviations which could be corrected.¹⁰³ However, such minor deviations have the potential of causing significant delays in project implementation. Though the decision to cancel the loan is not a common practice, the thread of action remains a powerful weapon to guard against the occurrence of breaches.¹⁰⁴

The Bank's review process in Ghana involves close consultation and collaboration with the implementing agency throughout the procurement process. The implementing agency may continually seek the Bank's advice through several informal lines of communication (which are not legally required) even before submitting procurement documentation for approval.¹⁰⁵ These consultations allows the implementing agency to implement the rules correctly and minimise errors. An adverse effect however, could be overreliance and perhaps the transfer of significant decision making to Bank staff as discussed above. For the Bank, it could imply that review of such documentation need not be thorough since the Bank may already be aware of the information on the documentation through previous frequent communication.

The review procedure of the Bank is comparable, to some extent with the enforcement role of the PPA under the domestic system, particularly the prior approval of specified

¹⁰¹ Interview conducted by the author with procurement officials in Ghana, (26 November 2013).

¹⁰² Ibid.

¹⁰³ Interview conducted by the author with procurement officials in Ghana indicate that they were requested by the Bank to correct most of the cases of non-compliance detected, (26 November 2013).

¹⁰⁴ Arrowsmith et al, (note 8 above), p.138.

¹⁰⁵ Ibid.

procedures including single source procedures and the use of procurement audits under the domestic system. A major difference is that, while prior approval by the Bank is usually required at several stages in the procurement process, prior approval by PPA is a one-off approval which occurs at a specific stage, usually before the procurement begins.¹⁰⁶ Apart from the Bank's power to cancel the loan as its weapon for enforcement, other differences in the regimes are seen in the level of support and guidance for the institutions undertaking the procurement.¹⁰⁷

4.13.2 The Role of Bidders in Law Enforcement

Bidders have the responsibility to raise any issues concerning the bidding documents or any other issues on the procedure to the implementing agency.¹⁰⁸ Bidders are also free to notify the Bank on correspondence with the implementing agency where such communications relate to a complaint or inaction.¹⁰⁹ In such cases, the Bank has internal measures for dealing with the complaints as will be seen below.

It is quite unclear what kind of comments or advice is given by the Bank and what kind of actions the implementing agency is required to take in respect of complaints. It is envisaged that the possible actions may be in the form of clarifying and correcting the mistakes identified. In Ghana, bidders sometimes call on the implementing agency (who intend seek advice from the Bank) to clarify some information relating to the bidding documents or the procurement procedure in general.¹¹⁰ However, supposing such clarifications in fact, point out violations caused by the implementing agency who may be acting on the advice from the Bank and the available form of corrective measure is unlikely to ensure application of the Bank's core principles of fairness and equal opportunity for aggrieved bidders. How does the Bank address such situations? Moreover, supposing the practical situation of bidders wanting to make complaints to the Bank or have some kind of redress on issues other than those relating to the bidding documents as expressly allowed by the Bank, how are those other issues addressed?

The Bank's rules appear to have no specific provision addressing such situations. The informal role of bidders adopted by the Bank implies that aggrieved bidders have no specific challenge rights and remedies. This could be a result of the carefully drafted relationship of the parties involved as indicated above. The final contract award usually includes challenge rights, often through arbitration with possible remedies for only bidders who actually signed the procurement contract but not for bidders aggrieved from the time leading to the procurement contract.¹¹¹ For bidders aggrieved from the time leading to contract awards, remedies are generally not available. The Bank is also able to avoid further communication with bidders apart from acknowledging receipt of complaints.¹¹² In this respect, one could argue that there is no real benefit of fairness for

¹⁰⁶ See discussions in section 3.5.3.

¹⁰⁷ Ibid.

¹⁰⁸ Procurement Guidelines Appendix 3 para 6-9; Consultant Guidelines Appendix 3 para 7-9.

¹⁰⁹ Ibid, para 11.

¹¹⁰ Interview conducted by the author with procurement officials in Ghana, (26 November 2013).

¹¹¹ B. Malmendier, (note 9 above), p.138.

¹¹² Procurement Guidelines Appendix 3 para 14; Consultant Guidelines Appendix 3 para 14.

bidders and participation in Bank-funded procurement may become a risk for bidders which they could incorporate into bid prices. This may create a disincentive for bidders to participate in Bank-funded projects.

Where the Bank allows complaints to be submitted, it is at the discretion of bidders whether or not to send their complaints to the Bank. Submitting complaints to the Bank has some benefits since the Bank established internal arrangements for handling such complaints.¹¹³ Moreover, the threat of the bank declaring misprocurement where such complaints are determined to be violations may force the implementing agency to resolve the complaint as indicated above. In cases of prior review, the Bank will not issue its no-objection letter until complaints have been satisfactorily resolved.¹¹⁴ This procedure could ensure that complaints from bidders are given the necessary attention if not effectively resolved. Despite the limitations with this procedure such as the lack of time frame for complaint resolution, the procedure still provides a better option for bidders to get their complaints resolved.

It appears that the role of bidders in enforcing compliance with the rules under Bank-funded procurement is significantly limited. In Ghana, very few complaints have been received from bidders,¹¹⁵ perhaps due to the strict review procedure conducted by the Bank or rather due to the absence of enforceable complaint rights and remedies. Where these complaints are raised, they are usually resolved at an early stage, sometimes through the frequent communication between the institutions as discussed above without necessarily using the Bank's formal internal procedure.¹¹⁶ An aggrieved bidder is likely to go only as far as getting a meeting arranged with the Bank which is only intended for the bidder to ascertain the grounds on which his bid was not selected.¹¹⁷ Any issues raised by bidders in this respect is likely to draw the attention of the Bank to probably tighten its oversight duty and further reinforce the Bank's review procedure.

4.13.3 Possible review under Domestic Law

Introduction

It was noted that the Loan Agreement has the status of a treaty agreement which is governed by international law and as such, the Government of Ghana cannot rely on national legislation as a reason not to fulfil its obligations under the Loan Agreement.¹¹⁸ However, there appears to be some gaps and overlaps in the rules which create the possibility for enforcing the Bank's rules based on domestic law. This possibility may not be uncommon given the fact that some domestic rules have precedence over the Bank's Guidelines as will be seen below and domestic rules could also become relevant

¹¹³ The World Bank Operations Manual BP 11.00 Annex E.

¹¹⁴ Ibid, para 8.

¹¹⁵ A World Bank procurement staff in Ghana who wishes to remain anonymous, indicated during an interview with the author that he witnessed just one complaint from a bidder over the past two years. It should be noted however that the Procurement Specialist is not involved with every World Bank project in Ghana over the period stated, (28 November 2013).

¹¹⁶ Ibid.

¹¹⁷ Procurement Guidelines Appendix 3 para 15; Consultant Guidelines Appendix 3 para 15.

¹¹⁸ See discussions in section 4.2.

where applicable foreign rules are unclear or have no specific provisions on a subject matter.¹¹⁹

The Constitution of Ghana as the sovereign domestic law provides the authority on which other laws, including national regulations and international agreements may be derived.¹²⁰ The Constitution has precedence over the Procurement Act of Ghana and the Loan Agreement as the basis for implementing the Bank's rules. This implies that Constitutional provisions relevant to procurement cannot be displaced by requirements in the Loan Agreement and the Procurement Act since the former provides the authority for the application of the latter. This is confirmed in a Supreme Court ruling in Ghana which held that laws including international law, regional and municipal laws which are found to be inconsistent with the Constitution cannot be binding on the State whatever their nature.¹²¹

Review Based on Domestic Constitutional Principles

The general principles of administrative justice enshrined in the Constitution of Ghana provide that "administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal."¹²² This provision subjects acts of administrative authorities in Ghana to challenge by aggrieved persons. This implies implementing agencies under Bank-funded projects could be challenged by aggrieved bidders under the Constitution of Ghana. The significance of this provision lies in the fact that suppliers have a general right to challenge breach of the Bank's rules in the High Courts through a judicial review process.¹²³

A more specific situation where bidders could also rely on the Constitution of Ghana to seek redress is provided in Article 181(5) where "this article (requiring parliamentary approval for government loans) shall... apply to an international business or economic transaction to which the Government is a party as it applies to a loan." A bidder relying on this provision may be required to demonstrate 1) the existence of a contract for a transaction, funded with a loan to which the Government is a party and 2) such contract having the nature of an "international business". In respect of the first requirement, perhaps only the successful bidder who actually signed the procurement contract could rely on the provision. The reverse situation where the Government of Ghana as a party to an existing contract, relied on this provision to seek cancellation of the contract was seen in a case law discussed under Chapter 3.¹²⁴

¹¹⁹ J. H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', (1992) 86 *American Journal of International Law*, p.310-340.

¹²⁰ Constitution of the Republic of Ghana (1992), art. 2.

¹²¹ *NPP v Attorney-General* (1996-97) SCGLR 729.

¹²² Constitution of the Republic of Ghana (note 120 above), art. 23.

¹²³ *Ibid.*

¹²⁴ See discussions in section 3.11.8.

4.13.4 Provisions on General Exclusion

The Bank's rules have detailed provisions which exclude the participation of persons from its funded procurement on grounds for lack of integrity including professional misconduct and corruption. The Bank may also exclude participation of persons on grounds other than corruption such as non-fulfilment of tax obligations as will be seen below. The jurisdiction of the Bank's enforcement regime may be limited to its fiduciary interest and determines the extent of application to projects funded by the Bank. This limitation, to some extent, creates situations where enforcement of specific domestic rules become less effective as will be seen below.

4.13.4.1 Exclusions on Grounds for Corruption

The World Bank Anti-Corruption Policy

Anti-corruption is core to the Bank's agenda and as it builds on experience, the Bank continually reforms its strategy to better deal with corruption as will be seen below. The Bank's anti-corruption policy is based on four key strategies; i) providing assistance to states that ask for help in preventing corruption, ii) contributing to the international effort against corruption iii) incorporating its concerns for corruption directly into country analysis and lending decisions and iv) preventing corruption in Bank-financed projects.¹²⁵ As part of its policy implementation, the Bank established a formal sanctions procedure¹²⁶ and also provides assistance to Ghana, in the form of funds and technical assistance for implementing anti-corruption strategies. The Bank supports Ghana in the fight against corruption not necessarily concerned with Bank-funded operations. For example, the Bank supports capacity building of national institutions and civil society groups including the Ghana Anti-Corruption Coalition (GACC), which is a coalition of both public and private sector anti-corruption institutions.¹²⁷ Also, the Bank facilitated the initiation of Ghana's National Anti-Corruption Action Plan (NACAP) and was instrumental in preparing the first NACAP in Ghana.¹²⁸

At the international level, the Bank is part of an International Task Force on anti-corruption working towards a consistent and harmonised approach to fighting corruption in the activities of participating MDBs.¹²⁹ Following the development of a Uniform Framework for Preventing Corruption, a Mutual Enforcement Agreement which allows cross debarment was adopted and includes; i) a common set of definitions for sanctionable conducts and ii) common principles and guidelines for investigating allegations of corruption.¹³⁰ Cross debarment is an agreement among the MDBs to

¹²⁵ World Bank, *Helping Countries Combat Corruption: Progress at the World Bank Since 1997* (2000).

¹²⁶ Procurement Guidelines s. 1.16; Consultant Guidelines s. 1.23.

¹²⁷ The Bank has consistently provided financial support for the activities of GACC since 2000. For more information, see the website of GACC. <http://www.gaccgh.org/> (accessed 3 March 2016).

¹²⁸ Ghana, *2012-2021 National Anti-Corruption Action Plan* (December 2011).

¹²⁹ A publicly accessible web portal is created with information on the joint activities of participating MDBs. The participating MDBs include the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group. For more information, see <http://lnadbg4.adb.org/oi001p.nsf/Home.xsp> (accessed 3 March 2016).

¹³⁰ Ibid; N. Seiler and J. Madir, 'Fight against Corruption: Sanctions Regimes of Multilateral Development Banks', (2012) 15(1) *Journal of International Economic Law*, p.37; F. A. Fariello and C. Daly, 'Suspension and Debarment:

mutually enforce each other's debarment sanctions.¹³¹ In this respect, the Bank may exclude from participation in its funded projects in Ghana, firms debarred by other MDBs as part of its cross-debarment commitments.

Exclusion for Corruption

As indicated above, the Bank's rules have detailed provisions for excluding the participation of persons in its funded procurement on grounds for corruption, fraud and other misconducts.¹³² In this respect, the Bank has its own list of firms excluded on grounds for corruption from participation in its funded projects.¹³³ The Bank may also exclude persons debarred for corruption by other MDBs under its cross debarment commitments as indicated above. The debarment sanction promotes its policies against corruption as indicated above.

However, the Bank may not exclude bidders debarred under Ghana's domestic law from participation in projects funded by the Bank.¹³⁴ This position is contrary to provisions on debarment under the domestic law of Ghana which exclude bidders debarred under all regimes from participation in procurement funded by national resources.¹³⁵ Though the Bank's position provides a wide supplier eligibility for the its projects with the likely benefit of competition, the wider effect on domestic anti-corruption policies and for that matter, the Bank's policy on helping States such as Ghana in the combat of corruption may be minimal.

The World Bank usually allows domestic authorities to require suppliers participating in donor-funded procurement to comply with domestic rules on anti-corruption through the use of integrity pacts.¹³⁶ Integrity pacts are agreements that secure the commitment of suppliers not to engage in corrupt activities. These are part of the Bank's anti-corruption measures which ensures that suppliers comply with domestic anti-corruption rules. However, this policy does not prevent suppliers already debarred under domestic law from participating in Bank funded project.

In exceptional cases and at the discretion of the bank, it may exclude participation of persons debarred for corruption under domestic law on conditions that debarment is issued by appropriate judicial authority to the satisfaction of the Bank.¹³⁷ However, this exceptional case may have limited practical effect in Ghana due to the nature of the regulatory framework of procurement in Ghana. Firstly, according to the Procurement Act of Ghana as noted in Chapter 3, the duty to issue debarment sanctions is allocated

Coordinating the Fight against Corruption among MDBs: The Past, Present and Future of Sanctions', (2013) 45 *George Washington International Law Review*, p.253.

¹³¹ Ibid.

¹³² Procurement Guidelines s. 1.16; Consultant Guidelines s. 1.23.

¹³³ For World Bank listing of ineligible firms and individuals, see <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984> (accessed 3 March 2016).

¹³⁴ Procurement Guidelines s. 3.3; also see C. Yukins, 'Suspension and Debarment: Cross-Debarment: A Stakeholder Analysis', (2013) 45 *George Washington International Law Review*, p.219.

¹³⁵ See discussions in section 3.11.9.

¹³⁶ Procurement Guidelines, s. 1.17.

¹³⁷ Ibid.

to the PPA as an administrative authority.¹³⁸ As indicated earlier,¹³⁹ PPA does not maintain its own list of debarred bidders but rather provides reference to the World Bank's list of debarred bidders with little clarification as to whether the reference imposes a duty on procurement entities to take the list into account in decision making or to serve merely as guidance, though the latter is envisaged. Secondly, even where PPA issues debarment sanctions and creates its own list of debarred persons, its authority as administrative rather than judicial as required by the Bank, may render debarment issued by PPA unacceptable to the bank. In this respect, enforcement of policies issued by domestic authorities may become ineffective.

The overall effect of the Bank's anti-corruption policy on the domestic system could be two folds; on one hand, a potential negative effect from the content of its rules where enforcement and compliance with domestic policies become weak; and on the other hand, a potential positive effect from its other policies, particularly its policies aimed at assisting Ghana on developing a potentially harmonised and sustainable national anti-corruption strategy as indicated above. A large proportion of procurement in Ghana is conducted under the rules of the Bank and any negative impact from its requirements could have significant effect on domestic policies relating to corruption and criminality. The potential for the Bank's requirements to undermine domestic policies is applicable to other donors as will be seen.

4.13.4.2 Other General Grounds for Exclusion

As noted above, regimes including the World Bank and the domestic regime of Ghana usually exclude persons on grounds for corruption from participating in procurement. Other grounds for exclusion, apart from corruption, may be failure to fulfil tax and social security obligations. As indicated earlier,¹⁴⁰ the domestic rules of Ghana indeed exclude the participation of persons on grounds for failure to fulfil tax and social security obligations in procurement funded from domestic resources. This provision secures the generation of revenue for the domestic regime through taxation to enable it finance development projects.

However, the Bank's rules have no explicit provision excluding persons on grounds for failure to fulfil tax and social security obligations. This implies the Bank may not exclude persons who fail to fulfil their tax and social security obligations from participating in its funded projects. Though the Bank's consultant guidelines require negotiations with the winning bidder to include clarifications on the bidder's tax liabilities,¹⁴¹ there is no indication of what the nature of such clarification might be, particularly whether or not it may include previous tax liabilities. This implies bidders who fail to fulfil their tax and social security obligations under the domestic system which do not involve the use of the Bank's funds, may be allowed to participate and enforce their rights in World Bank funded projects.

¹³⁸ See discussions in section 3.11.9.

¹³⁹ Ibid.

¹⁴⁰ See discussions in section 3.8.

¹⁴¹ Consultant Guideline s. 2.29

This situation on one hand could benefit bidders with enhanced participation rights and likely competition in the procurement process as envisaged by the Bank's rules discussed above. On the other hand, however, the policy may work against domestic development objectives which may outweigh the intended benefits. The ability to enforce domestic rules, particularly on tax obligations may be limited because a large proportion of procurement is implemented under World Bank rules. This could result in loss of revenue for the State and the inability to finance its own development projects.

Chapter 5: Procurement under EU External Aid

5.1 Introduction

The European Union (EU) is an active donor in Ghana and several other developing countries. Over the past 10 years for example, African states were the most significant recipients of EU development assistances which amounts to 4.9 Billion US Dollars in 2011.¹ Development assistance for African states is perhaps enhanced by EU's political commitment to reduce poverty and provide better aid as set out in its policy statement referred to as the European Consensus on Development.² For example, in Ghana, EU alone contributed 10% of total foreign aid received from Ghana's multiple donors.³ EU funding activities in Ghana are concentrated within 11 sectors, with significant focus on governance, environmental and infrastructure development.⁴

EU external aid as used in this chapter refers to aid provided by the EU institutions, sometimes referred to as community aid. EU external aid is usually made up of contributions from its individual member states. For the purposes of this research, reference to EU external aid does not include aid granted directly by individual member states. Aid from member states is often granted through bilateral relations and subjected to different sets of rules and procedures set out by the member state concerned. This aid is usually administered and implemented through separate and perhaps less coordinated channels as will be seen below. This arrangement clearly leads to multiplicity of regimes in Ghana and raises further complications in the system, the details of which will not be discussed in this research.

Moreover, not all member states may have an interest in establishing bilateral relations with Ghana through foreign aid. However, the EU remains one of Ghana's major trade partners and many EU member states including the UK, Germany, Netherlands and Denmark have established bilateral relations with Ghana for several reasons. These relations could arise based on trade or perhaps other ties including historical, solidarity or geographical proximity. For example, UK has an established trade and historical ties with Ghana through colonial rule.

EU external aid is developed on both thematic and geographical basis, which is financed from the EU General Budget and the European Development Fund (EDF) respectively. Aid to Ghana is financed mainly on geographical basis from the EDF - which is an instrument for cooperation between the EU, represented by the European Commission (the Commission) and a group of African, Caribbean and Pacific (ACP)

¹ EU Donor Atlas 2012, <http://development.donoratlas.eu/> (accessed 3 March 2016).

² The European Consensus on Development, 2005 (2006/C 46/01). This is a Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on EU Development Policy, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ar12544> (accessed 3 March 2016).

³ OECD Statistics, www.oecd.org/dac/stats (accessed 3 March 2016).

⁴ Ibid

states⁵ through a series of successive agreements, with the latest revision concluded in Ouagadougou (Partnership Agreement).⁶ Apart from the EDF, Ghana also benefits from some thematic programmes funded through the EU General Budget. For example, programmes aimed at promoting participation of women in domestic governance issues are funded through the EU General Budget.⁷

As the case with other donors, aid beneficiaries including Ghana are required to apply procurement rules provided by the EU for implementing funded projects. These rules are significantly different in many respects, from the procurement rules applicable within the EU internal market.⁸ This chapter outlines the regulatory framework of procurement funded by the EU in Ghana with a focus on the EDF as the main funding instrument. Procurement funded through the EU General Budget has been extensively discussed in other literature⁹ and will also be relevant in Ghana as a result of harmonisation of the rules of both funding instruments as will be seen below. The role of this chapter is to examine the rules and procedures for EU external aid in Ghana as one of the multiple regimes applicable in Ghana. The significance of EU external aid regime is seen in its large volume of funding in Ghana as indicated above which results in the frequent application of its rules in Ghana.

The chapter first outlines the legal framework for EU external funding, followed by an outline of its objectives and institutional arrangements. The structural procedures of the regime will then be considered with a discussion of its harmonisation policies and the practice of tied aid. The procurement methods under the regime including the applicable selection and awards procedures will then be discussed. The chapter will conclude with a discussion on the enforcement mechanism under the regime.

5.2 Legal Framework

The legal basis for the implementation of EU external aid procurement rules under EDF programmes is derived from the ACP-EU Partnership Agreement including its Annexes signed in Cotonou and revised in Ouagadougou.¹⁰ Particularly relevant is Chapter 4 (Articles 19A-31) of Annex IV of the Agreement, where Article 19C (1) provides that “contracts shall be implemented according to the Community rules and, the standard procedures and documentation set and published by the Commission for the purposes of implementing cooperation actions with third countries and in force at the time the procedure in question is launched.” With this provision, the applicable rules under EU

⁵ The ACP Group comprises 78 countries. South Africa does not benefit from the EDF due to its peculiar situation although it belongs to the ACP Group.

⁶ The ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000 is in force for a period of 20 years, running from 2000 to 2020. It was revised for the first time by the Agreement signed in Luxembourg on 25 June 2005 with the second and latest revision signed in Ouagadougou on 22 June 2010 (OJ 2010 L287/3). Consultations are ongoing towards the development of a new partnership between the EU and ACP countries after 2020. For more information, see <https://ec.europa.eu/europeaid/> (accessed 3 March 2016).

⁷ For the list of projects implemented by the EU delegation in Ghana, see http://eeas.europa.eu/delegations/ghana/projects/list_of_projects/projects_en.htm (accessed 3 March 2016).

⁸ For analysis of the key differences between the procurement rules applicable within the EU internal market and those applicable to EU external aid, see P. Trepte, *Public Procurement in the EU: A Practitioner's Guide*, (Oxford University Press, 2007), Chapter 10.

⁹ Ibid.

¹⁰ The ACP-EU Partnership Agreement (note 6 above).

General Budget are stated to apply and for that matter, aligned with the rules under EDF programmes.

The Partnership Agreement also defines the nature of relationship between the parties; the ACP state awards the contract and it is supervised by the EU or the EU may act on behalf of the ACP state in the award of contracts as will be seen below. The Partnership Agreement has the status of an international agreement, which in principle, is not subject to the domestic law.¹¹ In this respect, the express exclusion on the application of domestic procurement law to externally funded procurement in Ghana as discussed in chapter 2, also guarantees the application of EU external aid rules in Ghana.

The Partnership Agreement is a series of successive agreements with the latest being the 10th EDF cycle and the 11th EDF cycle is currently under negotiations.¹² As envisaged in Article 19C (1) of Annex IV, different rules may apply under the different EDF programme cycles as determined by the time of launching the procurement procedure.

For the purposes of implementing the Partnership Agreement, Financial Regulations have been adopted for the EDF programme cycle, currently the 10th EDF¹³ and applicable together with the rules and procedures adopted by decision of the ACP-EU Council of Ministers. Particularly, the Annex of that decision provides the rules and procedures for implementing the partnership Agreement.¹⁴ These regulations provide specific rules on the procedure for awarding contracts including the allocation of responsibilities as will be seen below. Several other rules which are not directed specifically at procurement may also be relevant and applicable to procurement funded under EU external aid in Ghana.¹⁵

At the project implementation level, specific working tools have been developed to consolidate and simplify the legal terms and contracting procedures. The consolidated rules, known as the Practical Guide to Contract Procedures for EU External Actions (PRAG), and includes its Annexes and standard form documents, referred to as Tender Dossiers. These rules are also applicable to aid financed from the EU General Budget with some variations and are publicly available on the Europe Aid website.¹⁶ The Practical Guide, revised for its relevance to the current 10th and forthcoming 11th EDF cycles, is essentially a guiding tool that compiles and explains the fragmented legal instruments applicable to procurement funded from both the EU General Budget and the EDF. These rules are applicable to the procurement of goods referred to as supplies,

¹¹ See ACP-EU Partnership Agreement, (note 6 above), art. 91.

¹² The 10th EDF runs from 2008-2013 and the 11th EDF runs from 2014-2020.

¹³ Council Regulation 370/2011 amending Regulation 215/2008 on the Financial Regulation applicable to the 10th EDF as regards the European External Action Service.

¹⁴ Decision 2/2002 of the ACP-EC Council of Ministers regarding the implementation of Article 28, 29 and 30 of Annex IV to the Cotonou Agreement (OJ 2002 L320/1).

¹⁵ For a list of other regulations applicable to EU external aid, see Chapter 7 of PRAG.

¹⁶ Practical Guide to Contract Procedures for EU External Actions (PRAG), publicly available at <http://ec.europa.eu/europeaid/prag/document.do> (accessed 3 March 2016).

works and services including consultant services in Ghana, either financed in whole or in part from the EDF.¹⁷

5.3 Objectives

The underlying purpose for implementing EU external aid rules is to secure effective use of funds. In pursuance of this, Article 19C (2) of Annex IV under the Partnership Agreement provides that “where a joint assessment shows that the procedures for awarding contracts and grants... are in accordance with the principles of transparency, proportionality, equal treatment and non-discrimination and preclude any kind of conflict of interest, the Commission shall use these procedures.” In this respect, some fundamental principles governing the application of EU external aid rules in Ghana could be identified as discussed below.

Firstly, the EU external aid rules are concerned with the principles of transparency as well as equal treatment and non-discrimination of eligible suppliers as outlined above. These principles are similar to those under the domestic system of Ghana and also found in other donor regimes including the World Bank as discussed earlier.¹⁸

An objective of EU external aid is to encourage the development of local industries in Ghana and other ACP states as expressed in the provisions on preferential treatments.¹⁹ As it is under the World Bank regime, preference may be given to domestic suppliers or locally manufactured goods below specified threshold values under EU funded projects as a means of encouraging participation of local suppliers.²⁰

A significant difference in the objectives of the regimes however, is the requirement of the principle of proportionality under EDF programmes which is not explicitly required under the World Bank nor the domestic system of Ghana. The principle of proportionality as applied under the EU internal market²¹ requires that contract requirements are both necessary and relevant to the contract under procurement.²² This means requirements in a procurement process shall be proportional to the size and technicality of the required goods and services. For example, qualification and accreditation requirements may not be well above the level necessary in order to perform the contract.

5.4 Institutional Arrangements under EU External Aid

The institutional structure under EU external aid is complex which largely reflects perhaps, the complex policies and institutional arrangements within the EU internal market. The EU, with its 28 member states is represented by the European Commission when implementing EU funded programmes in Ghana. The Commission with its

¹⁷ Practical Guide to Contract Procedures for EU External Actions (PRAG), section 1.

¹⁸ See discussion in section 3.2; section 4.3.

¹⁹ ACP-EU Partnership Agreement, (note 6 above), art. 26 of Annex IV.

²⁰ Ibid.

²¹ Treaty on European Union (TEU), art. 5(3).

²² On the general principles of proportionality under EU law see N. Emiliou, *The Principle of Proportionality in European Law* (Kluwer Law International, 1996), p.115.

headquarters in Brussels has the financial responsibility for operations carried out under EDF funds in Ghana.²³

The Commission carries out its mandate under different management systems; firstly, it may implement projects by itself or through an appointed agency who acts on behalf of the Government of Ghana under centralised management system.²⁴ Secondly, it may delegate implementation to the Government of Ghana under decentralised management approach.²⁵ The latter approach is considered the default option.²⁶ In practice however, the management approach varies from one sector to another or even among ACP states depending on a number of factors including the available domestic procedures and capacity of the domestic system. As a result, EU's concept of decentralised management in Ghana is rather a partial decentralised management. This means only specific agreed upon tasks within the procurement process are carried out by the decentralised authorities, while the Commission maintains management control.

The specific institutions engaged in EU external aid procurement in Ghana are in two categories; EU institution or its delegated agencies on one hand and some national institutions that have been assigned duties under EU funded projects as discussed below.

5.4.1 EU Institutions Involved in its Funded Procurement

At the country level, the Commission is represented by the EU Delegation to Ghana, led by the Head of Delegation as will be seen below. With a country office in Ghana and similar establishments in many other ACP states, EU Delegations represent the EU in the ACP states, not only on development cooperation but also on other EU foreign policies including political and security issues. Within the EU Delegation in Ghana, staff members are drawn from two main institutions; the European External Action Service (EEAS) with a more political mandate on one hand and the Commission's directorate, the Directorate General for Development and Cooperation Europe Aid (DEVCO), which has a focus on development cooperation. The internal structure of EU Delegations with their functional challenges is simplified for the purposes of this research.²⁷ The main actors involved in procurement are the Head of Delegation and the Contract and Finance unit and their functions discussed below.

Head of Delegation: The Head of Delegation represents the European Commission in Ghana and communicates the position of the EU to the Government of Ghana.²⁸ Procurement related duties of the Head of delegation include approval of procurement documentation submitted by the contracting authority as will be seen below.²⁹ The Head

²³ ACP-EU Partnership Agreement, (note 6 above), art. 34 (1) of Annex IV.

²⁴ Ibid; PRAG section 2.2.

²⁵ Ibid, art. 34 (1) (b) of Annex IV; PRAG section 2.2.

²⁶ Ibid, art. 34 (2) of Annex IV.

²⁷ For more information on the complex structure and challenges of the EU Delegation in Ghana, see C. V. Rasmussen, *Striving for Complementarity and European Development Cooperation: Evidence from Burkina Faso and Ghana*, (Danish Institute for International Studies, 2013:17)

²⁸ ACP-EU Partnership Agreement, (note 6 above), art. 36 (1), (4) of Annex IV.

²⁹ Ibid, art. 34 (d) of Annex IV.

of delegation works closely with domestic authorities on many issues including launching of tender invitations and sitting as an observer in tender openings.³⁰ In practice however, many of the duties of the Head of Delegation are usually sub-delegated to other internal units as will be seen.

Finance and Contracts Section: This is a department within the office of the EU Delegation to Ghana which plays a key role in facilitating implementation EU funded projects in Ghana. The department usually acts as sub-delegated authority and supports the Head of Delegation to perform its procurement related duties.³¹ For example, the department makes recommendations to the Head of Delegation for the approval of procurement documentation and represents the Head of Delegation at tender openings. The department collaborates with the contracting authority and manages communications between the Head of Delegations and the contracting authority.

5.4.2 National Institutions Involved in EU Funded Procurement

National Authorising officer (NAO): This refers to the domestic institution created specifically to support EU funded procurement as required by the EU under the Partnership Agreement. The NAO represents the Government of Ghana on development cooperation with the EU.³² The duty of the NAO is to coordinate programmes financed by the EU and its member states including preparing tenders.³³ In practice however, the NAO is less involved in coordinating projects financed by individual member states, perhaps due to the challenges of the vast divergence in implementation modalities of member states.³⁴

In Ghana, the Ministry of Finance and Economic Planning, led by the Minister, serves as the designated NAO. The role is sub-delegated to the fourth deputy NAO who has the daily operational responsibilities and heads the ACP-EU unit, which is a department created specifically to handle projects financed by the EU institution. The unit has internal divisions that mirror the structure within the EU Delegation in Ghana.³⁵ There are several other similar donor departments created within the same ministry aimed specifically at managing projects funded directly by individual EU member states and other donors. However, the ACP-EU unit operates quite independently from these other similar donor departments.³⁶ The ACP-EU unit is made up of permanent national civil servants who are perhaps, burdened with other duties when performing functions under the domestic system.

³⁰ Ibid, art. 34 (b), (e) of Annex IV.

³¹ Interview conducted by the author with staff from the EU Delegation to Ghana who wishes to remain anonymous, (21 November 2013).

³² ACP-EU Partnership Agreement, (note 6 above), art. 35 of Annex IV.

³³ Ibid.

³⁴ Information obtained during an interview with a procurement official at the NAO office in Accra (25 November 2013) who wishes to remain anonymous.

³⁵ Ibid.

³⁶ Ibid.

The NAO acts as the contracting authority and has responsibilities including tender publication and evaluation. In practice, the implementation duty of the NAO is often sub-delegated to more appropriate departments who often rely on project implementation units (PIUs) to conduct the procurement. For example, projects for improving rural farming methods are usually sub-delegated to the department responsible for agriculture. Essentially, the NAO is often not the contracting authority and even where the Ministry of Finance is the sub-delegated contracting authority, the unit responsible for implementing the project may often be a separate department with its own personnel and operations.

The approach whereby implementation duties of the NAO is sub-delegated to more appropriate departments could be explained perhaps by an attempt to integrate the role of the NAO into the decentralised system of procurement that exist under the domestic system. In this regard, projects are implemented by the relevant departments and internal approval is often required in accordance with the domestic institutional requirement which is based mainly on threshold values prior to obtaining approval from the NAO.³⁷

Project Implementation Units (PIUs): PIUs under EU aid programmes have traditionally been stand-alone units, usually with separate budgets and often accountable directly to the Head of Delegation.³⁸ However, there appears to be a gradual integration of PIUs into the national system as part of a reform process, motivated perhaps by aid effectiveness commitments as will be seen below. The responsibilities and composition of the PIU is similar in many respects to those identified under the World Bank system discussed above.³⁹

The role of the NAO is comparable to the functions of PPA as the institution responsible for coordinating procurement activities under the domestic system as discussed in Chapter 2. However, there is little indication on the involvement of the PPA in the activities of the NAO and procurement funded by the EU in general.⁴⁰ This could result in duplicated institutions and procedures. This may place functional constraints on domestic institutions and limit the impact of capacity development. The current location of the NAO within the ministry responsible for finance may have benefits including facilitating disbursement of funds and serving as a single point of contact on EU development programmes. However, its institutional disconnection with comparable domestic institutions, may pose challenges for the effectiveness of development projects. For example, supposing the functions of the NAO are assigned to the PPA, the EU aid regime will usually provide funds for strengthening the institutional capacity of PPA to support EU funded projects. Such capacity provided could also benefit

³⁷ Information obtained during an interview with a procurement official at the NAO office in Accra (25 November 2013) who wishes to remain anonymous.

³⁸ See note 44 below.

³⁹ See discussions in section 4.4.1.

⁴⁰ Information obtained during an interview with a procurement official at the NAO office in Accra (25 November 2013) who wishes to remain anonymous.

procurement funded from domestic resources with a wider impact of donors' capacity building programmes.

5.5 Structural Procedures under EU External Aid

EU assistance to Ghana usually begins with a series of documented research and consultations, referred to as programming. An important document in this respect is the Country Strategy Paper (CSP),⁴¹ which usually covers the period of the EDF cycle, currently a period of five years under the 10th EDF. The 11th EDF cycle which is currently under negotiation will cover a period from 2014-2020.⁴² An implementation plan, referred to as the National Indicative Programme (NIP), provides details of precise programmes to be funded including the timescale for implementation and how the objectives will be fulfilled.⁴³ The latter document is subject to mid-term and annual review where changes could be made during the operational period.

5.5.1 Harmonisation and Use of Country Systems

EU member states are encouraged to coordinate individual funding activities to complement each other.⁴⁴ Through its code of conduct, member states are encouraged to reduce fragmentation of aid and concentration within specific sectors.⁴⁵ For example, with concentration ratio of 55% within 11 sectors in Ghana by 2011,⁴⁶ EU donors commit to focus engagement on not more than three sectors and to limit the number of active donors to a maximum of three to five sectors.

Coordinating donor activities generally, could reduce the number of donor procedures for example by allowing donors to agree on common procedures to be used. However, those agreed upon procedures are unlikely to be those normally applied under the domestic system and the burden of applying rules of donors in addition to domestic rules may not be eliminated.

One could question the role of EU institution as an additional donor to its member states rather than solely coordinating the funding activities of member states. Though this approach may benefit the domestic system as an additional source of funding and perhaps represent other EU member states with no individual relations with Ghana, the adverse effect on multiplicity may outweigh any benefits. EU institution as a donor regime in addition to its member states clearly duplicates procurement procedures. This

⁴¹ ACP-EU Partnership Agreement, Article 2 of Annex IV; the CSP and NIP for the 10th EDF is publicly downloadable at <http://ec.europa.eu/europeaid/search/library/> (accessed 3 March 2016).

⁴² For more information on programming for 2014-2020, see A. Herrero, G. Galeazzi and F. Krätke, "Early Experiences in Programming EU aid 2014-2020: Charting the Agenda for Change", (ECDPM Briefing note, September 2013); S. Görtz and N. Keijzer, "Reprogramming EU Development Cooperation for 2014-2020: Key Moments for Partner Countries, EU Delegations, Member States and headquarters", (ECDPM Discussion paper, April 2012).

⁴³ ACP-EU Partnership Agreement, Article 4 of Annex IV.

⁴⁴ EC, Reforming Technical Cooperation and Project Implementation Units for External Aid Provided by The European Commission: A Backbone Strategy (July, 2008). Available at https://ec.europa.eu/europeaid/work-plan-reforming-technical-cooperation-and-project-implementation-units-external-aid-provided_en (accessed 3 March 2016).

⁴⁵ EU Code of Conduct on Complementarity and Division of Labour (May, 2007). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0072:FIN:EN:PDF> (accessed 3 March 2016).

⁴⁶ OECD Statistics, www.oecd.org/dac/stats (accessed 3 March 2016).

situation perhaps, reflects the reality on the nature of EU and its member states as different actors and the practical challenges it may face in addressing the issue of multiplicity.

5.5.2 Tied Aid and Visibility

Tied aid is a feature of EU external aid and requires that eligible tenderers and their goods originate from EU and ACP member states.⁴⁷ Tied aid and other exclusions do not only create negative economic effects,⁴⁸ but also has effects on multiplicity of regimes in the domestic system. For example, where citizens or products from other countries are excluded from procurement funded by the EU, other donor regime may be encouraged to practice tied aid in order to provide business opportunity for its citizens or products excluded under other regimes. This creates significant administrative burden on the usually unskilled domestic officers responsible for applying the multiple rules. As a result, the pursuit of domestic policies including efficiency through simplification of procedures may be undermined.

Duplication of procedures may not only be a result of the different eligibility requirements. The desire to promote individual image or diplomatic ties and to demonstrate this before the international community could also result in duplicating procedures. This is a feature particularly of the EU external aid regime where for example, the rules explicitly require visibility of funded projects.⁴⁹ For example, EU may fund only projects it considers unique and to which it could assign names that reflect its identity. This practice may encourage donors to maintain their rules as a way of distinguishing themselves in terms of their uniqueness from other donors. As a result, it may become difficult for donors to co-finance and implement projects collectively.

5.6 Substantive Procedural Requirements

5.6.1 Procurement Procedures

Procurement procedures available under EU funded projects in Ghana are the open procedure,⁵⁰ restricted procedure,⁵¹ negotiated procedure,⁵² framework contracts,⁵³ dynamic purchasing system,⁵⁴ competitive dialogue,⁵⁵ and single tender procedure.⁵⁶ The basic principle in awarding contracts is competitive tendering which ensures respect for the awarding requirements and to obtain quality at best possible price.⁵⁷ Not all available procedures under EU external aid regime will be of practical relevance in

⁴⁷ ACP-EU Partnership Agreement, Article 20 of Annex IV; For a comprehensive analysis of tied aid under EU external aid regime, see A. La Chimia, *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law*, (Hart Publishing, 2013), Chapter 6.

⁴⁸ Ibid.

⁴⁹ ACP-EU Partnership Agreement, Article 12 (3) of Annex IV; PRAG section 2.3.5.

⁵⁰ PRAG section 2.4.2.

⁵¹ Ibid, section 2.4.3.

⁵² Ibid, section 2.4.4.

⁵³ Ibid, section 2.4.5.

⁵⁴ Ibid, section 2.4.6.

⁵⁵ Ibid, section 2.4.7.

⁵⁶ Ibid, section 2.4.8.

⁵⁷ Ibid, section 2.4.

Ghana due to the nature of the domestic procurement environment. For example, as envisaged by the PRAG, the dynamic purchasing system⁵⁸ as a completely electronic process of purchasing common user items may only have future relevance since Ghana is still at the early stages of developing e-procurement facilities as indicated above.

The rules applicable to open procedure⁵⁹ under the EU aid regime, provides a narrow distinction between international and local open procedures, based mainly on the threshold value and the degree of publicity required. Local open procedures are used under specified lower threshold values where publication in the ACP countries and on the Europe Aid website is required.⁶⁰ International procedures on the other hand, are used for contracts with higher threshold values with additional publication in the Official Journal of the EU.⁶¹ This procedure is similar in content and substance to those under the domestic regime and the World Bank regime discussed earlier.⁶² The policy consideration for the use of the method also appears to be similar in all the regimes and regarded as the default method where specified conditions apply to the use of other methods.

There are however, differences in terminologies which are used interchangeably in some cases, when referring to the same things. For example, the terms competitive tendering, open procedure and competitive bidding are used under the different regimes when referring to the same open type of procurement method. In all the regimes under review, a similar distinction is usually made between international and national competitive type of procurement which is often determined by the threshold value of the contract and the degree of publicity required. In effect, the content and substance of the rules are similar in the regimes and the rules will practically be applied in the same manner in all the regimes under review.

Notable is the use of multiple supplier framework agreement as a type of contract under EU external aid in Ghana.⁶³ This form of contract is not available under the domestic system even though a simple single-supplier framework agreement is currently operated under a pilot scheme. Procurement entities under EU funded projects are allowed to use multiple supplier frameworks with the approval of the Commission.⁶⁴ The requirement to apply multiple supplier frameworks in Ghana may raise concerns on the capacity and skills of domestic procurement officers to support implementation of framework agreements above the level of those required under the domestic system. The author has no evidence of the use of these frameworks in practice. However, the rules provide no exemption in this respect and domestic officers will be required to apply the framework where it offers the best means of achieving the objectives of the procurement. The use of such frameworks on one hand, may result in inefficiencies

⁵⁸ Ibid, section 2.4.6.

⁵⁹ Ibid, section 2.4.2.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² See discussions in sections 3.5.1; section 4.7.1.

⁶³ PRAG section 3.4.1.

⁶⁴ PRAG section 3.4.1.1.

through delays in procurement where domestic procurement officers are required to take some time off their normal duties to attend training sessions tailored at implementing the multiple-supplier frameworks in order to satisfy requirements under the EU external aid regime. On the other hand, it could provide procurement officers with useful skills where the knowledge gain could be applied to procurement funded by national resources.

The rules under EU aid regime also allow the use of restricted method of procurement⁶⁵ which in many respects, is similar in content and in terminology with the restricted procedure under World Bank rules and the rules applicable under the domestic system.⁶⁶ However, the restricted method of procurement is used for different types of contracts under the different regimes even though the terminology and content of the rules are the same. For example, the restricted procedure under the domestic regime is used for the procurement of goods, works and non-consultant services. Under EU external aid regime however, the procedure often appears to be used for contracting consultant services which is also referred to as technical assistance.⁶⁷ As indicated earlier,⁶⁸ procurement of consultant services under the domestic law follows a distinct set of rules - selection procedure with consecutive negotiations - which is largely similar to the World Bank method of engaging consultants.

5.6.2 Standards and Qualification

Tender documents, referred to as tender dossiers under EU regime provides all the information including the description of requirements necessary for suppliers to offer compliant bids. The description of requirements, referred to as technical specification (for works and supply contracts) or terms of reference (for service contracts), provide instructions to tenderers on the minimum standards required. The general principle requires technical specifications to be clear with no unjustified obstacles to competition.⁶⁹ Where brand names and other origins are used in specifications, entities shall include the word "or equivalent".⁷⁰ These standards are similar in many respects to those required under the domestic regime and also in other donor regimes including the World Bank as discussed.⁷¹

The process of identifying qualified tenderers generally is referred to as selection process under EU aid regime, and has a similar connotation under the domestic and World Bank regime.⁷² The suitability of suppliers for contract award is determined through the use of selection criteria - referred to as qualification criteria under the domestic regime. Selection criteria shall be pre-disclosed in the tender document and

⁶⁵ Ibid, section 2.4.3.

⁶⁶ See discussions in section 3.5.2; section 4.7.3.

⁶⁷ This information is obtained from an anonymous procurement official in Ghana (25 November 2013); a basic search for published contract awards funded by the EU in Ghana also confirms this trend.

⁶⁸ See discussions in section 3.11.

⁶⁹ PRAG section 2.6.

⁷⁰ Ibid, section 4.3.2; section 5.3.2.

⁷¹ See discussions in section 3.4.1; section 4.10.

⁷² See discussions in section 3.11; section 4.13.

shall include financial, technical and professional capabilities.⁷³ The rules allow qualifications to be ascertained at different stages of the procurement process where for supply contracts for example, only successful tenderers' qualification may be verified.⁷⁴

Entities are required to prepare shortlist of tenders, where too many tenders obtain the minimum selection criteria.⁷⁵ The term "shortlisting" is used under EU aid regime with similar connotation under the World Bank and the domestic regimes as discussed earlier.⁷⁶

5.6.3 Evaluation and Award of Contracts

After a mandatory public opening,⁷⁷ tenders satisfying the pre-disclosed requirements are accepted and non-conforming tenders shall be rejected.⁷⁸ However, tenders containing minor errors may be accepted and included in the evaluation.⁷⁹ The issue on correction of error and how it is treated under the different regimes will be discussed in chapter 7.

Evaluation of tenders is carried out through comparison and ranking of tenders with the view to recommending a tender for contract award. Representatives of EU Delegation in Ghana, the contracting authority and the NAO are also members of the evaluation committee either as observers or voting members.⁸⁰ According to the PRAG, two award criteria are available under EU aid regime; a) the automatic award procedure, where award is made to the tenderer quoting the lowest price⁸¹ and b) the best-value-for-money procedure, which is the most economically advantageous tender.⁸²

The terminology for these award criteria are quite different from those used under the domestic regime. However, the content of the rules and their manner of application are the same in both regimes. The term automatic award procedure corresponds with the lowest price criterion under the domestic regime while the best-value-for-money procedure or the most economically advantageous tender corresponds with the lowest evaluated tender criterion under the domestic system. These criteria are also found under the World Bank and UNCITRAL regimes which reflect substantial similarity in the regimes despite the use of different terminologies.

5.7 Enforcement Mechanism

5.7.1 Review by the Commission

The EU Commission carries out its mandate either by acting as the contracting authority or decentralising the procurement function to the domestic authority. However, the

⁷³ PRAG section 2.4.11.1.2; section 2.4.11.1.3.

⁷⁴ Ibid, section 2.4.11.1.1.

⁷⁵ Ibid.

⁷⁶ See discussions in section 3.8; section 4.12.

⁷⁷ PRAG section 3.3.10.2.

⁷⁸ Ibid, section 3.3.10.3.

⁷⁹ Ibid.

⁸⁰ Ibid, section 2.8.

⁸¹ Ibid, section 2.4.11.2.

⁸² Ibid.

domestic authority acting as the contracting authority is not economically free in its decisions but subject to supervision and scrutiny by the Commission.⁸³ The supervisory duty is carried out firstly, through a prior review procedure where procurement decisions are verified and approved at various stages of the procurement process.⁸⁴ Secondly, a post review may be carried out where verification of procurement decisions occurs after the decisions have been implemented.⁸⁵ These procedures constitute the Commission's formal means of enforcing compliance with the rules, an approach which is similar to the World Bank's review system discussed in chapter 4.

5.7.2 Role of Bidders in Enforcement

The rules under EU external aid regime provide that "where a candidate, tenderer or applicant believes he has been adversely affected by an error or irregularity allegedly committed as part of a selection or procurement procedure, he may file a complaint to... (specified authorities)."⁸⁶ This implies bidders under EU external aid regime may exercise specific enforcement rights, which contrasts significantly with the approach under the World Bank regime. The formal enforcement role of tenderers under EU external aid regime could be explained perhaps by the importance of suppliers in enforcing procurement rules in general as seen in the regime for its internal market which regulate the member states and the EU institutions themselves.

However, aggrieved bidders under EU external aid regime must come to terms with the multiple review forums and the different applicable rules. The choice of review forum is usually determined by the nature of the review itself and the legal relationship between aggrieved persons and the contracting authority.

Where the Commission acts as the contracting authority either on its own behalf or on behalf of domestic authorities, complaints may be sent to the person who took the contested decision for administrative review.⁸⁷ Alternatively, appeal may be sent to the relevant geographical director in the EU headquarters in Brussels.⁸⁸ The rules are silent on the nature of remedies available under this review process though an amicable resolution of disputes is envisaged.

Moreover, aggrieved tenderers may also launch complaints in accordance with procedures under EU law as set out in the Treaty on the Functioning of the European Union (TFEU).⁸⁹ This provision gives rise to two courses of action; firstly, complaints to the European Ombudsman against the Commission on grounds of maladministration is open to tenderers who are European citizens, persons residing or having their registered office within the EU.⁹⁰ This provides an administrative review and the

⁸³ P. Kalbe, 'The award of contracts and the Enforcement of claims in the context of EC external aid and development cooperation', (2001) 38 *Common Market Law Review*, p.1223.

⁸⁴ PRAG section 2.2, para 4.

⁸⁵ PRAG section 2.2, para 5.

⁸⁶ *Ibid*, section 2.4.15.1.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*, section 2.4.15.3.

⁹⁰ *Ibid*, section 2.4.15.2; The Treaty on the Functioning of the European Union (TFEU), article 228.

authority of the Ombudsman is limited to mediating and seeking amicable resolution of disputes.⁹¹ The Ombudsman cannot overturn or order the correction of decisions of the Commission.⁹² Moreover, mediation procedures are usually perhaps too slow for procurement matters where rapid resolution of disputes is necessary to ensure effective remedy.

Secondly, tenderers may also bring complaints to the European Court of Justice for a judicial review on annulment of the Commission's decision⁹³ or failure to act,⁹⁴ with an application for compensation of damages suffered in the case of non-contractual liability.⁹⁵ The courts have broad powers to invalidate or overturn decisions of the Commission and award damages including loss of profit. Application to these review authorities is generally not sequential, and it gives aggrieved suppliers some discretion, perhaps based on the nature of relief being sought, as to which forum to commence its application.

5.7.3 Review under Domestic Law

Where the domestic regime acts as the contracting authority, complaints may be brought directly to the contracting authority with the view to resolving the issue administratively.⁹⁶ Furthermore, aggrieved tenderers may also launch ordinary actions "in accordance with the conditions and deadlines fixed by the national legislation of the contracting authority".⁹⁷ This provision allows the application of review procedures in accordance with domestic law. The specific reference to the application of national legislation implies that the review system under EU external aid rules do not apply to situations where the Commission is not the contracting authority. In this respect, the EU external aid rules are replaced by the application of the domestic legislation. A key issue for consideration is what national legislation does the rules refer to and what national legislation is usually applied by domestic contracting authorities?

Firstly, the Constitution of Ghana is the supreme national legislation which is applicable. Indeed, the Constitution allows review of decisions based on the general administrative principles of justice which are applicable to procurement as will be discussed below.⁹⁸ Such review may commence before the High Courts of Ghana in accordance with its procedures with the available remedies as discussed in section 3.11.8 above.

Secondly, it is submitted that the Public Procurement Act is applicable and indeed, it is the national legislation usually applied by the contracting authority as discussed above.⁹⁹

⁹¹ For further information on the mandate of the European Ombudsman, see <http://www.ombudsman.europa.eu/home/en/default.htm> (accessed 3 March 2016).

⁹² Ibid.

⁹³ The Treaty on the Functioning of the European Union (TFEU), article 256 and 263.

⁹⁴ Ibid, article 265.

⁹⁵ Ibid, article 268 and 340.

⁹⁶ PRAG section 2.4.15.1.

⁹⁷ Ibid, section 2.4.15.3.

⁹⁸ See discussions in section 8.5.

⁹⁹ See discussions in section 2.2; section 3.11.

Review procedures under the Public Procurement Act allow three-tier review as discussed earlier.¹⁰⁰ This implies the possibility for the Complaints Panel as an administrative review authority, to receive complaints from aggrieved tenderers. Though this possibility is not recognised in practice, it is argued that the jurisdiction of the PPA to receive complaints in this respect is derived from its mandate under the Procurement Act as the fundamental national legislation applicable to procurement in Ghana. Review in accordance with the Procurement Act is the procedure usually applied in Ghana. The jurisdiction of the PPA in this respect however, may not be clearly inferred from the provisions under the PRAG, particularly with the use of words such as “ordinary actions”¹⁰¹ which could give rise to the general interpretation perhaps for actions that are generally of judicial nature.

In practice, there are no records of complaints to the PPA relating to EU funded projects,¹⁰² perhaps due to the general assumption of inadmissibility by aggrieved tenderers or perhaps an outright rejection of such complaints by the PPA as inadmissible.

The distinction between centralised and decentralised management for the purposes of launching complaints is not clear cut, largely due to the control and powers of the Commission to intervene in the procurement process even where it does not act as the contracting authority. Where the domestic authority acts as the contracting authority, the EU Delegation provides substantial operational assistance and indeed is required to do so by preparing and running the tender procedures as indicated above. In such cases, it could be difficult to identify who the actual decision maker at a particular stage of the process might be. For example, supposing the Commission does not share the views of an aggrieved tenderer against a decision of the domestic authority and refuses to intervene on behalf of the tenderer when asked to do so; or the Commission in assisting the domestic authority, informs a tenderer on the ineligibility of goods supplied which were later found to be eligible, can the aggrieved tenderer take any action against the Commission?

The general position adopted in such cases is based on the division of powers and duties between domestic authorities and the Commission under the Partnership Agreement; a Contracting Authority’s decision may not be replaced by a decision taken by the Commission.¹⁰³ However, some evidence of case law from the European Court of Justice suggests that complaints may be brought in limited instances against the Commission even where the domestic authority acts as the contracting authority.¹⁰⁴ However, the extent to which and under what circumstances such complaints may be successful remains largely uncertain.

¹⁰⁰ See discussions in section 3.11.

¹⁰¹ PRAG section 2.4.15.3.

¹⁰² Information obtained in an interview with an official at the PPA office in Ghana (26 November 2013).

¹⁰³ PRAG section 2.2, para 13 ; *Geotronics SA v. Commission*, [1995] ECR II-2795, case T-185/94.

¹⁰⁴ *New Europe Consulting Ltd Vs Commission* (1999) ECR II-02403, case T-231/97; For a comprehensive analysis of these issues, see Kalbe, (note 83 above), p.1217-1267.

5.7.4 Provisions on General Exclusions

As indicated above,¹⁰⁵ participation in procurement under EU external aid is not open to all qualified candidates. Apart from the specified exceptions,¹⁰⁶ general exclusion clauses are strictly enforced. It may be difficult to perceive any unique benefit of the general exclusions to the domestic system apart from the substantial gains for the donor including the potential to boost economic activities within donor countries.

Apart from exclusions based on the origin of tenderers and their goods and other general eligibility criteria, EU rules provides that tenderers will also be excluded from participation if they are convicted of fraud, corruption or unprofessional misconduct by a judgement of a competent authority of an EU member state, where such offences are construed within the meaning of provisions under EU Law.¹⁰⁷

This implies tenderers convicted under the domestic laws of Ghana may generally be allowed to participate in procurement funded by the EU. This position is similar to the case under the World Bank regime discussed earlier¹⁰⁸ and it is likely to exist under other donor regimes. This practice by multiple regime could imply the ineffectiveness of domestic policies on preventing criminality including fraud and corruption which may have significant deteriorating effect perhaps on the general level of security and accountability in the domestic system.

¹⁰⁵ See discussions on section 5.5.2.

¹⁰⁶ ACP-EU Partnership Agreement, article 22 of Annex IV.

¹⁰⁷ PRAG section 2.3.3.

¹⁰⁸ See discussions in section 4.13.4.

Chapter 6: USA Development Aid Procurement

6.1 Introduction

Apart from the United Kingdom, US is the second largest bilateral donor in Ghana with a disbursement of USD 255 million in 2012,¹ through its 51 aid agencies in Ghana.² This chapter examines the procurement procedures of US foreign aid regime as one of the distinct and large donor regimes operating in Ghana. Large donors such as the US also have the potential to influence smaller donors due to the volume and nature of their spending. Discussions on US aid regime are significant due to the volume of its operations in Ghana which may have implications for domestic development and the potential to influence smaller donor regimes.

The US foreign aid regime in Ghana operates through multiple initiatives under different aid agencies such as the US Agency for International Development (USAID) and the Millennium Challenge Corporation (MCC), each with its own specific mandate and operating procedures.³ USAID and other US aid agencies usually implement perhaps overlapping and conflicting policy programmes which is formulated by both the executive and the legislative arms of US government in Washington. Indeed, this creates multiplicity of institutions and procedures whose detailed discussion is constrained in this research. For the purposes of this analysis, only procurement procedures of USAID will be considered. USAID has been a leading US development agency with an established presence in Ghana since the latter's independence, with funding activities across several sectors including health and education.

This chapter will begin with discussions on the legal framework under US aid regime and then consider the objectives of US development assistance. We then focus on procurement under USAID with discussions on its institutional as well as structural arrangements. We then discuss the use of country systems where recent reforms at USAID will be relevant, followed by analysis of the substantive procurement procedures as well as its remedies regime.

6.2 Legal Framework

The primary legislative instrument for regulating procurement is the Federal Acquisition Regulation (FAR),⁴ which provides the uniform policies and procedures for procurement⁵ under all executive agencies including USAID. The Foreign Assistance Act (FAA)⁶ is also a permanent foreign aid instrument, particularly Part I, which covers most bilateral economic and security assistance programmes. The Agency for

¹ See www.foreignassistance.gov (accessed 3 March 2016).

² OECD, *Survey on Monitoring the Paris Declaration: Making Aid More Effective by 2010*, (2008).

³ C. Tarnoff and M. L. Lawson, *Foreign Aid: An Introduction to U.S. Programs and Policy*, (Congressional Research Service, 2012), p.21.

⁴ Information available at <http://www.acquisition.gov/far/> (accessed 3 March 2016).

⁵ The term "acquisition" as used under the US system, has the same meaning as "procurement" used throughout this thesis.

⁶ Information available at <http://www.usaid.gov/sites/default/files/documents/1868/faa.pdf> (accessed 3 March 2016).

International Development Acquisition Regulation (AIDAR), as provided in the Code of Federal Regulations,⁷ serves as USAID's supplement to the FAR. The Code of Federal Regulations, particularly title 22 CFR 228 also provides the fundamental regulations on the source, origin and nationality, including the geographic codes for commodities and services procured which is relevant for USAID funded procurement.

The AIDAR and the FAR provide the legal basis on which procurement is conducted by USAID. The AIDAR serves as the mandatory reference point for the operational policy documents of USAID, referred to as the Automated Directives System (ADS),⁸ where particularly Chapter 302 deals with procurement conducted directly by USAID. Procurement conducted by domestic officials, referred to as the host country, is governed by Chapter 305 of the ADS and supplemented by USAID's internal guidelines referred to as the Country Contracting Handbook.⁹

These provisions, in addition to the agency specific Standard Bidding Documents (SBDs), are made part of the Financing Agreement and constitute the legal framework under US aid funded procurement. The Financing Agreement has the status of a treaty agreement which is governed by international law and has implications as those discussed under World Bank and EU regimes.¹⁰

A feature of the legal framework for US foreign aid regime is fragmented rules and complex policies. The general framework is stipulated in a number of legislative instruments while specific procedural requirements which allow deviations from the general policy principles through exemptions or waivers, are elaborated in the rules of the individual aid agencies. This complexity has the potential to create difficulties arising from identifying the applicable law on a particular procurement opportunity which could deter potential suppliers. The complexity may also constrain efforts at engaging civil societies and the general public in the procurement process since standards against which accountability or transparency could be demanded may be difficult to understand.

6.3 Objectives

The objectives of US development assistance as stated in section 101 of the FAA includes the alleviation of poverty and integration of developing countries into an open and equitable international economic system. In practice however, several other objectives including good governance and national security have become key objectives.¹¹ Indeed the objectives of US development assistance continue to evolve in reflecting the changing approach to development financing, which is a feature also identified under the EU external aid regime discussed in chapter 5.

⁷ See The Code of US Federal Regulations, Title 48, Chapter 7.

⁸ Information available at <http://www.usaid.gov/who-we-are/agency-policy> (accessed 3 March 2016).

⁹ See http://www.usaid.gov/sites/default/files/documents/1868/305_0.pdf (accessed 3 March 2016).

¹⁰ See discussions under section 4.2; section 5.2.

¹¹ OECD, Development Assistance Committee Peer Review of USA, (2011), p.24-26, available at <http://www.oecd.org/development/peer-reviews/48434536.pdf> (accessed 3 March 2016); Tarnoff and Lawson, (note 3 above), p.3-6.

The fundamental principles guiding USAID procurement procedures are competition and transparency through publicity of opportunities.¹² US funded procurement rules require competition to ensure value for money.¹³ The provisions also place emphasis on publicity to ensure transparency.¹⁴ Transparency ensure that potential bidders have open and adequate information on their rights and obligations. Transparency also limit the discretion of procurement officers to ensure that decisions are justifiable. Transparency may also serve a monitoring function by ensuring that procedures are recorded to provide a means for verification.

Publicity requirements also promote fairness and equal opportunities. The objective of fairness and equal opportunity implies that potential suppliers are offered equal treatment through a uniform standard of requirements and the same level of information to all potential suppliers at a particular time and place.

USAID also appears to pursue the objective of developing local industries in Ghana through the use of preference schemes, referred to as local method of procurement.¹⁵ However, the effect of the preference scheme may be limited since some other US donor agencies such as the MCC explicitly prohibit the use of preference schemes under its funded procurement.¹⁶ This objective is similar to those applied under the World Bank and the EU regimes discussed earlier.¹⁷

6.4 Procurement under USAID

6.4.1 Institutional Arrangements under USAID

Under the policy guidance of the US Secretary of State, USAID operates in Ghana through its country mission office, which also houses the West African regional mission. USAID has similar country offices in other African countries, which is coordinated by the Bureau for Africa as the regional office. The several departments within the mission office in Ghana represents the various programmes managed by the mission. The head of the mission in Ghana has responsibility among others, for approving the procurement process and for determining the suitability for using the host country's procurement systems as will be explained below.¹⁸ The approval duties of the head of Mission are supported by several other USAID's internal officers including the Contracting Officer who is responsible for monitoring the selection and award process.¹⁹

A clear distinction is made between USAID-direct contracts on one hand, where USAID acts as implementing agency and controls the procurement process;²⁰ and the Host Country Contracts (HCC), also referred to as Government to Government contracts

¹² USAID Operational Policy (ADS) Chapter 305. 3.2; Chapter 305.3.3.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Host Country Contracting Handbook Chapter 2 section 2.5.8.

¹⁶ This information is available at <https://www.mcc.gov/pages/business/guidelines> (accessed 3 March 2016).

¹⁷ See discussions in section 4.3; section 5.3.

¹⁸ USAID Operational Policy (ADS) Chapter 305.2(g).

¹⁹ USAID Operational Policy (ADS) Chapter 305.2(e).

²⁰ USAID Operational Policy (ADS) Chapter 301.3.1.1.

(G2G) on the other hand, where the Government of Ghana acts as implementing agency.²¹ USAID in this case, acts as financier with reserved rights of approval rather than acting as contracting party.²²

In practice, the Government of Ghana rarely assumes procurement responsibility and USAID often implements its projects, either on its own behalf or on behalf of the Government of Ghana, often relying on external agencies and other third parties such as civil societies and other Non-Governmental Organisations (NGOs).²³

The benefit of this approach perhaps is the relief for the procurement officer who do not have to apply additional donor rules, or rather the donor's relief from rigorous enforcement mechanism through approval and monitoring duties, which could eliminate delays in the procurement process and ensure efficiency. However, the argument for the benefits may be weak when considering the long term potential implications for the domestic system. Significantly, the approach does not eliminate multiple rules system. Suppliers for example, will still have the burden of identifying applicable rules for each opportunity irrespective of who bears implementation responsibility. The domestic system also loses ownership and control over domestic developments which prevents the development of local expertise.

6.4.2 Structural Procedures under USAID

USAID's programmes begin with the development policy strategies, in alignment with key US government policies such as the Presidential Policy Directive (PPD) and the Quadrennial Diplomacy and Development Review (QDDR).²⁴ At the country level, it has developed a five year strategy, referred to as the Country Development Cooperation Strategy (CDCS).²⁵ The CDCS shall reflect USAID and host country priorities through engaging national stakeholders such as local civil societies and other donors.²⁶ USAID usually develops a Project Appraisal Document (PAD) which forms the basis for project implementation. Monitoring and evaluation is a key part of the project cycle to ensure accountability but also to build on knowledge in improving future projects.²⁷

6.4.2.1 Use of Country Systems and USAID Reforms

USAID usually requires the use of its own rules for many of its funded programmes. In Ghana, only 1% of USAID funds provided in 2010 relied on some domestic

²¹ Ibid.

²² Ibid.

²³ C. Dunning, *Is Local Spending Better? The Controversy over USAID Procurement Reform*, (Centre for American Progress, 2013); Also, information obtained by the author from some Procurement Officers in Ghana who wishes to remain anonymous, confirms this position.

²⁴ USAID Operational Policy (ADS) Chapter 200 .3.5.1; USAID, Program Cycle Overview, 2011, p.4, available at http://pdf.usaid.gov/pdf_docs/pdacs774.pdf (accessed 3 March 2016).

²⁵ Information on Ghana's CDCS is available at http://www.usaid.gov/sites/default/files/documents/1860/Ghana_CDCS_fy2013-17.pdf (accessed 3 March 2016).

²⁶ Ibid.

²⁷ Ibid, p.11; USAID Operational Policy (ADS) Chapter 200.3.5.5.

procedures.²⁸ However, recent USAID policy reforms as will be seen below are likely to encourage the use of country systems.

A distinction needs to be made between host country contracting on one hand and use of country systems on the other. Host country contracting requires USAID's certification that the Government of Ghana is able to carry out procurement duties in accordance with USAID's rules. Use of country systems on the other hand, involves a rigorous assessment of the domestic system in order to approve the use of domestic procurement procedures for USAID funded projects.

USAID launched a policy reform in 2010, referred to as USAID Forward. These reforms arguably, emerged from two major high level documents; the Presidential Policy Directive on Global Development and the Quadrennial Diplomacy and Development Review which defined the broad development goals to be pursued as discussed above. Implementation and Procurement Reform (IPR) with the possibility of using country systems was identified as central to the reform, believing that strengthened local institutions with their ultimate responsibility for country development could achieve sustainable results.²⁹ A key feature of the reform is a series of rigorous assessments of domestic systems under the Public Financial Management Risk Assessment Framework (PFMRAF).³⁰

Ghana is among 30 countries qualified for a risk assessment of their systems.³¹ Assessment results on Ghana show progress in some government departments with a major deficiency in the country's preparedness for the use of country systems.³² However, recommendations have been provided to address the deficiencies.

6.4.2.2 Tied Aid and Eligibility rules under USAID Procurement

Participation in procurement funded by USAID is based on eligibility and not opened to all qualified suppliers. Strict source and nationality rules under 22 CFR 288 are supplemented by USAID agency specific policies to ensure that procedures meet requirements of the FAA. The practice and implications of tied aid under USAID is similar to those under other regimes discussed earlier³³ and has also been extensively discussed in other literature and will not be repeated in this section.³⁴

6.4.3 Substantive Procedural Requirements under USAID

6.4.3.1 Procurement Procedures

As indicated above, the fundamental principle under USAID procurement, subject to specific waivers, is competitive bidding through publicity.³⁵ The available procurement

²⁸ OECD, *Aid Effectiveness: Progress in Implementing the Paris Declaration*, (2011), Chapter on Ghana, p.8.

²⁹ USAID Operational Policy (ADS) Chapter 220.1; Dunning, (note 23 above), p.4.

³⁰ USAID Operational Policy (ADS) Chapter 220.

³¹ USAID Forward Progress Report, (2013), p.22.

³² USAID, *USAID Forward, Implementation and Procurement Reform Achievements*, (February 2012), Issue 3, p.4.

³³ See discussions in section 5.5.2.

³⁴ A. La Chimia, *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law*, (Hart Publishing, 2013), Chapter 7.

³⁵ See discussions in section 6.3; USAID Operational Policy (ADS) Chapter 305.3.3.

methods include open competition, competitive negotiation, two-stage bidding and single source procurement.³⁶ Subject to approval by the head of Mission, the two-stage method may be used under certain conditions including for complex and diverse procurements where it is impossible to develop adequate specifications.³⁷ The available procurement methods under USAID rules and the conditions for their use including approval requirements are similar in many respects to those under the domestic and other donor regimes as discussed in previous chapters.³⁸

USAID allows several modifications to the procurement methods through the use of waivers which provide significant flexibility in the extent to which competition is achieved. This level of flexibility is not available under the domestic rules in Ghana, perhaps due to the lack of skills and expertise of domestic officers which could lead to misuse of flexibilities.

Moreover, competitive negotiation, referred to as informal competitive bidding under USAID regime, is used differently in Ghana. The method is similar in content and manner of application to the domestic method for engaging consultant services.³⁹ In other words, differences in the rules lie mainly in the appearance and the use of terminology.

6.4.3.2 Standards and Qualification

USAID's tender documents establish the criteria against which all bids are judged equally. As a general principle, specifications shall be precise and complete, with all information necessary for suppliers to prepare bids which can be evaluated on common basis.⁴⁰ Though USAID provides little guidance on applicable standards of criteria, there is a detailed list of what information shall be included in tender documents.⁴¹

The process of identifying qualified bidders generally is referred to as the selection process under USAID. Where it is deemed necessary to reduce the number of qualified bidders, a shortlist of bidders is prepared.⁴² The content of these procedures and the terminologies are similar to those under the domestic and EU regimes as seen above.⁴³

6.4.3.3 Evaluation and Award of contracts

Evaluation is conducted following a public opening of bids.⁴⁴ Under procurement for consultancy services, technical proposals are first evaluated followed by the financial proposals.⁴⁵ Evaluation is carried out by assigning weights to the pre-disclosed criteria

³⁶ Host Country Contracting Handbook Chapters 1, 2, 3. Available at <http://www.usaid.gov/who-we-are/agency-policy> (accessed 3 March 2016).

³⁷ Ibid, Chapter 2 section 3.6.6.1.

³⁸ See discussions in section 3.5; section 4.7; section 5.6.1.

³⁹ See discussions in section 3.10.

⁴⁰ Host Country Contracting Handbook, Chapter 2 section 4; Chapter 3 section 4.

⁴¹ Ibid.

⁴² Ibid, Chapter 1 section 3.4.3; Chapter 2 section 3.7; Chapter 3 section 3.6.4.

⁴³ See discussions in section 3.8; section 5.6.2.

⁴⁴ Ibid, Chapter 2 section 3.8.4; Chapter 3 section 3.6.6.

⁴⁵ Ibid, Chapter 1 section 3.4.4.

where the bids are ranked according to their rated weight.⁴⁶ Negotiations on price are then carried out with the highest ranked bidder with a view to award the contract.⁴⁷ For goods, works and non-consultant services, bids shall be deemed responsive and reasonable in price.⁴⁸ The bids shall be adjusted to reflect any non-price factors considered in evaluation, and given monetary value to arrive at an evaluated bid.⁴⁹ These procedures and requirements are similar in many respects to those discussed under the domestic and other regimes under review.

Changes to bids may be allowed in exceptional situations.⁵⁰ In order to closely analyse the issues of multiplicity, a case study on the specific issue of correction of bids after bids have been opened, will be examined in the next chapter.

The award criteria under USAID is the lowest responsive and responsible bidder.⁵¹ This simply refers to the lowest priced compliant bid. These provisions appear different through the use of different terminologies but are in fact the same in content and manner of application to those discussed in the regimes under review.⁵² The lowest responsive bidder refers to lowest price criterion which is also available under the domestic regime of Ghana.

6.4.4 Enforcement Mechanism under USAID

6.4.4.1 Review by USAID

As financier, USAID reserves the right to approve procurement decisions of domestic contracting authorities at any stage of the procurement process.⁵³ Prior approval is often required at specified stages where the contract amount is anticipated to exceed USD 250 000.⁵⁴ For lower value contracts, it could be a prior or post review at the discretion of USAID's head of mission.⁵⁵ USAID may also require approval of contracts not funded by it, but which have substantial impact on the activities of USAID.⁵⁶ The provision is silent on what decisions may constitute substantial impact on USAID's funding activities. However, co-financed contracts for instance, may fall under such category. It may also imply that some projects financed solely from domestic resources may require USAID approval. Mandatory clauses which generally limits the liability of USAID, are often written into every USAID funded contract.⁵⁷

Approval requirements under USAID are similar to those under many other donor regimes including the EU discussed in Chapter 5. Where non-compliance is detected, it may lead to significant delays in the process or even loss of funds.

⁴⁶ Ibid.

⁴⁷ Ibid, Chapter 1 section 3.5.1.

⁴⁸ Ibid, Chapter 2 section 3.8.4; Chapter 3 section 3.6.7

⁴⁹ Host Country Contracting Handbook, Chapter 2 section 3.8.4; Chapter 3 section 2.6.7.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² See discussions in section 3.9; section 4.11; section 5.6.3.

⁵³ Ibid.

⁵⁴ USAID Operational Policy (ADS) Chapter 305.3.1.1.

⁵⁵ USAID Operational Policy (ADS) Chapter 305.3.1.

⁵⁶ USAID Operational Policy (ADS) Chapter 305.3.1.3.

⁵⁷ USAID Operational Policy (ADS) Chapter 305.3.7.

The authority of USAID to require approval of projects for which it does not provide funds, appears to extend the limit of its powers beyond funded projects. This approach could interfere with the pursuit of domestic objectives. It could also present potential difficulties for collaborative procurement with other donors as the case under co-financing discussed in Chapter 4.

An important consideration is whether or not there are domestic legislations that could prohibit such approval requirements. The domestic rules which deals with the interaction between domestic and donor rules states that its provisions apply to “procurement with funds or loans taken or guaranteed by the State and foreign aid funds except where the applicable loan agreement, guarantee contract or foreign agreement provides the procedure for the use of the funds.”⁵⁸ The rules further states that “notwithstanding the extent of the application of this Act to procurement, procurement with international obligations arising from any grant or concessionary loan to the government shall be in accordance with the terms of the grant or loan.”⁵⁹ These provisions define the scope of application of the domestic legislation. Significantly, it does not deal with the issue of approval requirements beyond funded projects. This implies that approval of the kind required by USAID may not be prohibited under the domestic legislation.

However, even where domestic legislation explicitly prohibits any approval requirements beyond donor funded projects, it may still not prevent donors from requiring approval beyond their funded procurement. This could be explained by the authority of donors to withdraw funding for non-compliance with their funding requirements and the status of the Financing Agreement as a treaty where domestic legislation cannot be a reason for noncompliance with the treaty agreement as discussed above.⁶⁰

Though approval of the kind required by USAID may appear to concern the suitability of domestic institutional and enforcement arrangements, it could determine the direction and nature of development under the domestic system. For example, supposing USAID funded an initial programme to enhance participation of Ghana’s military in regional peacekeeping operations. A subsequent funding with domestic resources to upgrade and equip Ghana’s military could be considered as sensitive or having a substantial impact on USAID’s funding activities which requires USAID’s approval. As a result, the scope of domestic development may be prevented from addressing national security concerns. The resulting ill-equipped military may create vulnerability and limit the ability of the domestic system to defend its territory and sovereignty during international conflicts. Though such authority has not been exercised in practice, its mere existence with the authority of USAID to implement projects on its own behalf and on behalf of Ghana, could prevent the initiation of some essential projects in Ghana either in collaboration with donors or solely funded from domestic resources. This could constrain the freedom of domestic authorities to determine the kind and nature of development required and this could limit the scope and direction of domestic development.

⁵⁸ Ghana, Procurement Act, s. 14(d).

⁵⁹ *Ibid.*, s. 96.

⁶⁰ See discussions in section 6.2.

6.4.4.2 Role of Bidders in Enforcing USAID Rules

Bidders under USAID funded projects play some role in submitting complaints on procurement misconducts which is necessary to clarify the complex procedures and to address other concerns of bidders. Bid protests or bid challenge as a terminology used under the US regime, is a formal supplier review procedure which allows grievances of bidders to be addressed, usually as supplementary mechanism to review conducted by the donor itself. Bidders under USAID projects may bring complaints on a wide range of issues as compared to the limited scope provided under the World Bank regime discussed in Chapter 4.

It should be noted that procurement conducted directly by USAID, either on its own behalf or on behalf of the host country, is subject to a separate formal complaints procedure administered by the US Government Accountability Office (GAO), an independent agency in the US that investigates federal government expenditure.⁶¹ Discussions under this section will focus on situations where the host country acts as contracting authority to implement USAID funded projects in which case complaints to GAO may not be admissible.

Aggrieved bidders under USAID procedures may direct their complaints, referred to as protests, to the host country contracting authority.⁶² As the financier, USAID will not be directly involved in resolving these complaints.⁶³ However, contract award recommendations submitted for approval shall include documentation on complaints received and how they are resolved, and USAID will not approve contract award recommendations where complaints are not resolved.⁶⁴ USAID provides no procedural guidance on how complaints should be resolved but rather requires resolution of complaints in accordance with the contracting authority's own policies and procedures.⁶⁵

It is unclear how USAID may become aware of unresolved complaints prior to receiving the contract award recommendation. The provisions are silent on whether any form of complaints perhaps informal, could be sent directly to USAID. For example, supposing the contracting authority in its submission, did not include documentation on how it resolved complaints brought against it where in fact, it deliberately ignored the complaint or resolved it unsatisfactorily. In such cases, USAID may approve the award recommendation based on its lack of knowledge on unresolved complaints. Moreover, where post review is used and approval of documentation occurs after contract award and perhaps contract already performed, it is unclear what course of action is available. These situations perhaps, demonstrate the lack of effective remedy where aggrieved bidders may be denied a fair treatment but also a missed opportunity for USAID to enforce compliance with its rules.

⁶¹ For more information on GAO, see <http://www.gao.gov/about/index.html> (accessed 3 March 2016).

⁶² Host Country Contracting Handbook, Chapter 1 section 3.4.7; Chapters 2 section 3.8.5.

⁶³ Ibid.

⁶⁴ Ibid

⁶⁵ Ibid.

In practice however, some aggrieved bidders in Ghana may send informal complaints to USAID in addition to complaints sent to the contracting authority.⁶⁶ USAID is under no obligation to act on those complaints but it may informally make recommendations to the contracting authority on how to resolve the complaint.

The rules are silent on possible appeal procedures which implies the possible use of appeal procedures available under the contracting authority's policies and procedures as will be explained below. Indeed, obtaining effective remedy may depend largely on the diligence of the domestic contracting authority and the inadequacy of the general supplier review mechanism under USAID may provide little incentive for participation in its funded procurement.

6.4.4.3 Possible Review under Domestic Law

As indicated above, USAID requires complaints be resolved in accordance with the contracting authority's own domestic policies and procedures.⁶⁷ This may include the procurement manual used by the institution and other internal reporting policies for resolving complaints. These internal review procedures are largely based on and in fact, should be found consistent with the domestic procurement rules. This possibility for review in accordance with domestic law is similar, though limited to those available under other regimes including the World Bank and EU regimes.⁶⁸ The difference lies in the possibility of using domestic procedures other than the review process, such as procurement methods which are not available under USAID as will be discussed in Chapter 8.

6.4.4.4 Rules on General Exclusions

As indicated above, not all qualified suppliers are allowed to participate in USAID funded procurement. Significant exclusion clauses apply for example to geographical codes with an outright prohibition on procurement of some specified commodities.⁶⁹

A specific form of exclusion under USAID relates to fraud and corruption where suppliers convicted of criminal offences, under suspension or debarment sanctions in accordance with the laws of US, may be excluded from USAID funded procurement.⁷⁰ This implies that sanctions issued in accordance with the domestic law of Ghana may not be recognised under USAID funded procurement and suppliers convicted for fraud and corruption or debarred in accordance with domestic law may be allowed to participate in USAID funded procurement. This situation may render domestic policies aimed at controlling corruption ineffective which could have significant adverse implications on the level of corruption, particularly in aid dependent countries such as Ghana where major development projects are usually financed through aid

⁶⁶ Information obtained by the author from an official in USAID country office in Ghana who wishes to remain anonymous (3rd December 2013).

⁶⁷ See discussions in section 6.4.4.2.

⁶⁸ See discussions in section 4.13.3; section 5.7.3.

⁶⁹ Host Country Contracting Handbook, Chapter 3 section 2.5.

⁷⁰ Host Country Contracting Handbook, Chapter 1 section 2.3; Host Country Contracting Handbook, Chapter 2 section 2.6.3.

procurement. These exclusions are similar to those discussed in other donor regimes including the World Bank and EU regimes.⁷¹ The effect of these exclusions imposed by multiple donors may significantly limit the effectiveness of domestic policies.

⁷¹ See discussions in section 4.13.4; section 5.7.4.

Chapter 7: Case Study on Multiplicity in the Specific Issue of Correction of Errors in Tenders

7.1 Introduction

As indicated earlier,¹ donors usually require aid recipients such as Ghana to follow procurement rules and procedures provided by the donor which is intended to ensure the proper use of their funds. This chapter presents a case study on the issue of multiple procurement regimes in one specific area – correction of errors in tenders once accepted tenders have been opened. The purpose of the case study is to illustrate the sort of issues that may arise when applying different rules under different regimes in relation to the conduct of different stages of the procurement process. One specific area has been selected for detailed analysis since it is not possible to deal in detail with all the areas in this context. However, the issues identified in this chapter may be applicable to other areas that are the subject of regulatory rules.

The practical importance of the 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 an area where a number of different policy objectives in procurement must be considered and traded off, and it is something that is important in practice and regulated by legal rules in all the regimes under study. It is also a highly technical stage that could be exposed to significant potential for abuse. For the supplier, it is a critical stage in determining its success or failure to continue its bid for the procurement contract.

This chapter first outlines how correction of errors is regulated under the domestic regime in Ghana. Correction of errors under the World Bank, the EU external aid and the US regimes respectively, will subsequently be discussed. It will conclude with analysis of the nature of interaction and the possible policy implications.

7.2 Correction of Error under the Domestic Regime

As a general rule under the Procurement Act, tenders shall meet requirements set out in the tender documents as pre-disclosed to tenderers.² 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.”³ This position generally, prohibits correction of errors as a way of preventing ambiguities in tenders which might be interpreted in different ways so as to give undue advantage to a supplier at the discretion of the procurement officer. Prohibition of correction of errors could also provide a means to deterring suppliers from making mistakes in tenders to ensure maximum compliance with the rules. However, due to considerations on balancing these requirements with other policy objectives, the rules distinguishes

¹ See discussions in section 4.2; section 5.2; section 6.2.

² Ghana, Procurement Act, s. 58(1).

³ *Ibid*, s. 57(2).

between changes that affect the substance of tenders from those that do not as will be discussed below.

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

- **Correction of arithmetic errors:**⁴ 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”.⁵ This provision clearly allows changes to tenders to be made and limits the scope of such changes to specific types of errors; purely arithmetic errors. In this respect, the rules require the correction of 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.

The Standard Tender Documents to be sent to suppliers provide some clarification on the scope of correcting arithmetic errors by 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.”⁶ 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 be relevant, particularly in developing countries including Ghana where procurement officers with the best of intentions could still misuse such discretion due to their limited skills in procurement.

- **Errors or oversights capable of being corrected:**⁷ 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.⁸ In such cases, the deviations shall be quantified to the extent possible and taken into account during evaluation.⁹ This provision could encourage maximum

⁴ Ibid, s. 57(3).

⁵ Ibid.

⁶ Ghana, Standard Tender Document (Information to Tenderers), clause 26.2.

⁷ Ghana, Procurement Act, s. 58(2).

⁸ Ibid.

⁹ Ibid, s. 58(3).

participation of suppliers to ensure competition. An essential criterion is that such correction shall not touch on the substance of the tender.¹⁰ However, there is little guidance and, therefore, it is open to different interpretations on what it means for corrections to touch on the substance of tenders.¹¹ As 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.¹² 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 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 1994 Model Law on which the domestic procurement law in Ghana was modelled.¹³ 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.¹⁴

However, correction of errors under the 2011 Model Law does not apply to all cases. As clarified in the Guide to enactment of the Model Law, the procurement entity is not permitted to correct errors where firstly, such correction introduces substantive change to a tender, particularly where a nonresponsive tender will otherwise become

¹⁰ Ibid, s. 58(2).

¹¹ Ghana’s Standard Tender Documents in section II, 26.5, provides some clarification on when minor errors could be waved.

¹² S. Arrowsmith, *Public Procurement Regulation: An Introduction* (University of Nottingham, 2010), P.70.

¹³ 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.

¹⁴ UNCITRAL Model Law on Public Procurement, (2011), art. 16(2); 43(b).

responsive.¹⁵ Secondly, correction of errors is not permitted under some methods of procurement including request for quotation and request for proposal methods.¹⁶

In Ghana, it appears that correction of errors is generally permitted under all methods of procurement.¹⁷ Some limited clarification is provided in the Procurement Manual of PPA which states that “where a Tender is determined to be substantially responsive, the Evaluation Panel may waive, clarify or correct any non-conformity, error or omission, which does not constitute a material deviation...”¹⁸ This seems to imply differently from the Guide to Enactment of the Model Law.

7.3 Correction of Error under World Bank Regime

The rules on correction of bids¹⁹ under the World Bank are provided in the Procurement Guidelines and the Consultant Guidelines.²⁰ Generally, bids (referred to as tenders under domestic regime) are required to be substantially responsive, thus containing no material deviations and bidders shall neither be permitted nor invited to correct or withdraw material deviations once bids have been opened.²¹ 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 differences are in the emphasis placed on the extent of deviation in tenders from all requirements, rather than the effect on the substance of the tender which is an issue of wording or choice of words. However, the substantive content of the rules remains the same. It is also likely that the application of these rules could lead to similar results though this is uncertain. This uncertainty lies mainly in the use of quite vague terminologies such as “substance of a tender” or “material deviation” under the multiple regimes. There is little clarification on the exact intended meaning of these terminologies, which provides the potential for different interpretations and perhaps potential for abuse, which is rather unintended. For example, it is unclear what constitutes the substance of a tender and whether or not a correction that affects the award criteria could be considered as affecting the substance of the tender as illustrated above. Several interpretations of these terminologies could be adopted and allows different procurement officers to take perhaps slightly different interpretative approach even under the same procedure, which might lead to some differences in the outcome of the rules.

¹⁵ Guide to Enactment of the 2011 UNCITRAL Model Law, art. 16 para 6.

¹⁶ Ibid.

¹⁷ Ghana, Public Procurement Manual, section 6.11 point 1.

¹⁸ Ibid, section 4.14.2. point 6.

¹⁹ The terms ‘bids and tenders’, which corresponds with bidders and tenderers, are used interchangeably in this section to denote the different terminologies adopted by the different regimes under review.

²⁰ 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.

²¹ World Bank, Procurement Guidelines para 2.48.

However, the Guidelines require 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”.²² These provisions *require* correction of errors and limit 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 provides a wide duty for correction particular with the uncertainties in the interpretation of the term “material deviation”. 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. The required corrections may be those affecting formal requirements with little effect on the tender itself. In Ghana it would be at the discretion of the procuring entity to decide whether to allow such formal corrections, as we have seen.

Under the World Bank, correction is required whenever there is an error whiles this is not the case under the domestic system. This may suggest a narrow interpretation of the concept of touching on the substance as under UNCITRAL Model Law. The fact that the Bank’s provisions impose a duty on procurement officers to correct tenders under both situations prevent the use of discretion and leads to less abuse.

Thus we can see that the content of the rules is generally similar in many respects to those under the domestic law in Ghana though there are some individual differences. As regards the similarities, both regimes impose a duty to correct arithmetic errors. The main difference is that whilst the World Bank regime imposes a duty to correct errors in all cases, the domestic regime merely allows discretionary correction in cases where errors are minor and do not touch on the substance of the tender.

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. Notification of corrections to bidders is envisaged since according to the Guidelines, clarification may be sought to assist in bid evaluation.²³ In the case of giving consent to corrected bids, 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. This position is different from those under the domestic regime where the rules impose explicit obligation to seek consent of bidders is imposed.²⁴

7.4 Correction of Error under EU Aid Regime

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

²² World Bank, Procurement Guidelines para 2.50.

²³ Ibid, para 2.47.

²⁴ Ghana, Procurement Act, s. 57(4).

amended in Ouagadougou.²⁵ Rules on correction of tenders are provided in the Practical Guide (PRAG),²⁶ a document with detailed explanation of the 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,²⁷ 2) technical compliance²⁸ and 3) financial compliance.²⁹ 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”.³⁰ Notwithstanding the strict appearance of the above provisions, only substantial deviations shall be rejected, which is similar in content and wording to those found under World Bank regime. The rules are also similar in content but not in wording to those under the domestic law in Ghana. Particularly, the domestic provisions allow a waiver of non-material deviations³¹ which has similar 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 under the EU regime, 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”.³² Secondly, other minor formal and technical errors may be corrected or waived.³³ The former creates a requirement to correct errors and limits the duty to correct errors 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. In the example in which an entity receives 2 copies of tender instead of required 3 copies, correction would be at the discretion of the entity as the case in Ghana rather than a duty to correct the error as under the World Bank.

However, it is unclear how other minor errors falling outside the categories explicitly provided may be treated. It is envisaged that clarifications may be sought from suppliers and if the deviation is not substantial, the tender can be accepted. For example, in the case of arithmetic errors that are not obvious (not clear on the face of it as to what the right figure should be), corrections could be made by seeking clarification from suppliers. Also, any inconsistencies, for example, in the unit and total prices or

²⁵ The ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000 as revised first time by the Agreement signed in Luxembourg on 25 June 2005 and second time by the Agreement signed in Ouagadougou on 22 June 2010 (OJ 2010 L287/3).

²⁶ Practical Guide to Contract Procedures for EU External Actions (PRAG), publicly available at <http://ec.europa.eu/europeaid/prag/document.do?locale=en> (accessed 3 March 2016).

²⁷ Ibid, section 3.3.10.3 part 1.

²⁸ Ibid, section 3.3.10.3 part 2.

²⁹ Ibid, section 3.3.10.4.

³⁰ Ibid, section 3.3.10.3 part 2.

³¹ See discussions under section 7.2.

³² PRAG, section 3.3.10.4; section 4.3.9.5; section 5.3.9.5.

³³ Ibid, section 3.3.10.3 part 1 para 1; part 2 para 2.

ambiguities resulting from arithmetic errors are required to be corrected by seeking clarification from the bidder.³⁴

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.³⁵ 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 perhaps has 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 and ensure integrity.

Irrespective of the 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.

7.5 Correction of Errors under USAID

Generally, bids shall be responsive in the sense that it “complies with all terms and conditions of the tender without material modification”.³⁶ Bidders shall not be allowed to modify nonresponsive bids once bids have been opened.³⁷ These provisions distinguish material modification from those regarded as non-material and further prohibits any changes to material deviations. These provisions are similar to those under the World Bank and EU regime but quite different in wording from those under the domestic rules discussed above. However, the content of the rules is similar and its application may have similar effects as those under the domestic rules.

As an exception to the general rule, it is allowed to waive minor informality in a bid which does not constitute material modification.³⁸ USAID rules permit a waiver of minor informal errors at the discretion of the procurement entity, where tenders may be accepted despite not satisfying all requirements as the case under the domestic system. However, it is unclear how other minor errors such as arithmetic or technical errors falling outside the scope of those explicitly provided may be treated. It is envisaged that clarifications may be sought from suppliers and bids without material modification may

³⁴ *Tideland Signal Ltd Vs Commission of the European Communities* (2002) E.C.R. II-3781, (T-211/02); also see analysis of the case in P. Kalbe, ‘EC-external aid: some comments on the Tideland case’, (2003) 12(2) *Public Procurement Law Review*, NA22-NA27.

³⁵ PRAG, section 3.3.12.

³⁶ Host Country Contracting Handbook, Chapter 2 section 3.8.4(b); Chapter 3 section 3.6.7(a).

³⁷ *Ibid.*

³⁸ *Ibid.*

be accepted.³⁹ These provisions are also similar in many respects to those under the World Bank, the EU and the domestic system of Ghana as discussed above.

7.6 Nature of Interaction and Policy Considerations

Application of the multiple rules in Ghana as outlined above, presents significant issues of interaction between the rules. This may have several policy implications particular in Ghana where the same procurement officer is usually responsible for conducting both domestic and donor funded procurement as indicated above. It is required of the same procurement officer to carefully identify even the very minor differences in the applicable rules and take all factors into account whenever he conducts procurement funded by the different regimes. Significantly, some policy issues could be identified which may have potential implications as outlined below.

7.6.1 Similar Policy Rules but Different Terminologies

The policy of the rules on correction of errors in all regimes under review are generally similar but only expressed in different terminologies. The mere use of different terminologies or choice of words such as “material deviation” as under the World Bank, EU and domestic regimes or “effect on the substance of tenders” as under UNCITRAL could make the rules appear different on the face of it. However, the content or substance of the rules and the manner in which they are applied are basically the same across the different regimes. In other words, the rules are simply different ways of expressing how to do basically the same things to achieve the same results. In fact, in all the regimes the exact meaning of the words used is rather uncertain, even though the basic idea of identifying errors that can be corrected without creating scope for abuse or giving an unfair advantage to a tenderer is the same. For example, all the regimes allow only a limited scope for correcting errors, which are generally minor in nature. This allows some balance between the achievement of sometimes conflicting policy objectives such as value for money and equal treatment.

However, some isolated cases of differences in the rules of the regimes exist which may be considered generally as insignificant. These differences are usually caused by the complexity of the multiple rules system as will be explained in the next section and the different levels of detail in the rules. For example, unlike the domestic regime, the EU and US regimes, the World Bank imposes an outright obligation, with no discretion whatsoever to correct errors identified [in which cases – only certain types of errors]. This difference relates to the level of detail in the rules in expressing how much discretion should be given to procurement officers. In other words, the policy effect of these isolated differences are largely the same as will be explained further in section 8.2 below.

7.6.2 Complex Procedures

A significant feature of the multiple rules system is the level of complexity generated by the different ways of expressing how to do basically the same things. Though rules of

³⁹ Ibid.

the different regimes are largely similar, they provide different levels of detail and degrees of flexibility in addressing specific issues of concern for each regime. There is no uniform approach to expressing how the generally similar policy objectives may be achieved. For example, an issue of complexity and perhaps a source of confusion for the same officer responsible for applying the multiple rules in Ghana is the issue of details on whether an obligation or discretion in the correction of errors is available, which is approached differently in the regimes under consideration. While the World Bank imposes an outright obligation to correct all errors identified, the domestic regime, the EU and US regimes imposes an obligation to correct errors in some cases but also allows the use of discretion in some other cases. For example, supposing the procurement entity receives a total of seven bids. Three of the bids conform to all requirements and are regarded as responsive while the remaining four bids contain some form of minor deviations which is considered as not materially departing from the terms of the solicitation document.

On one hand, the procurement entity under the World Bank regime has a duty to first consider and correct the errors in the four bids containing minor deviations, though it already has three other conforming bids from which best value bid could be selected. This approach involves procedural costs and could constrain the achievement of efficiency in Ghana as an essential policy objective, particularly where bids with minor deviations do not offer best value even after they have been corrected. However, this approach places more emphasis on the possibility of achieving better value and competition through equal opportunity for bidders by ensuring 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.

On the other hand, the procurement entity under the domestic regime or the US regime, who already has three 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.⁴⁰ This issue is relevant in addressing potential litigation 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

⁴⁰ S. Arrowsmith, *Public Procurement Regulation: An Introduction* (University of Nottingham, 2010), p.81.

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.

The differences in the level of detail of the rules and the different manner in which the similar policy options are implemented, generates a complex multiple rules system which could result in some isolated cases of differences in the policy effects as will be further discussed in section 8.2 below.

7.6.3 Scope of Regulatory Policy

As indicated above, the issue of correcting errors in tenders is one of practical importance where a number of different policy options require consideration and indeed typical of the kind of issues subject to regulatory rules. However, the issue is one of the least well addressed areas in the regulatory policy of all the regimes under consideration, which could be particularly problematic in general. This approach contrasts the generally large volume of regulatory provisions addressing other equally important areas of procurement such as publicity of rules and award criteria.

Moreover, the regimes under consideration provide different levels of detail on the issue of correction of errors in the generally limited regulatory policy rules. The regimes usually focus their regulatory rules on specific areas of concern and provide sometimes vague and unclear rules on how other types of errors may be treated. For example, the EU regime requires correction of obvious arithmetic errors in addition to allowing a waiver of other minor formal and technical errors as indicated above. However, it is unclear how other minor errors falling outside the scope of those explicitly provided may be treated, though it is envisaged that clarifications may be sought from suppliers. The generally limited regulatory rules and differences in the level of details allow the possible application of domestic rules to fill in the gaps as will be further discussed in section 8.5 below.

Chapter 8: Potential Policy Implications of Multiple Regimes

8.1 Introduction

As noted from earlier discussions on individual regimes, multiplicity of procurement regimes – the application of different sets of procurement rules and systems set by donors in addition to existing domestic rules on procurement - presents significant issues arising from the different areas of those rules' interaction with each other. The nature of this interaction, particularly with the domestic rules, is determined by several factors including the volume and type of projects to be funded, the frequency in application of the rules and the general procurement environment.¹ The interaction with domestic law as a result of multiplicity may have considerable implications for the policy options that are available to the State in driving development in its domestic economy.

A distinction need to be made between the mere existence and operation of many different donor regimes in Ghana and the existence and application of different sets of procurement rules and procedures by the different regimes. This thesis and chapter focus on the latter, which is the existence and application of multiple rules by the different regimes – referred to as multiplicity of regimes or parallel implementation of rules. The mere existence of different donors does not necessarily imply the application of different sets of rules. The different donors could decide to place their funds in a single pool to which a single set of rules apply. In such cases the existence of many donors does not result in the application of different sets of rules and may not necessarily raise many of the issues of multiplicity under discussion. Simply having many different donors could provide benefits including different sources of funds which could generate competition on the donor market and allow the domestic system some leverage to obtain favourable terms of agreement. A disadvantage however, could be the challenges of coordinating the different sources of funds with the usually low capacity in beneficiary states such as Ghana. However, as we have seen, this is in any case not the position in Ghana where, in fact, the different donors apply their own sets of procedural rules.

As will be seen, all regimes under consideration share the fundamental objective of developing the domestic economy. This could be seen through requirements aimed at ensuring procurement procedural effectiveness such as competition, transparency and efficiency, or by promoting domestic development through procurement and other related outcomes. However, significant variations exist among the regimes with regards to the degree of emphasis placed on specific objects in a particular procurement, which is usually necessary to ensure some balance in the achievement of other, perhaps conflicting objectives. For example, the objective of promoting local industries through perhaps preference schemes may require a balance with the sometimes conflicting

¹ S. Arrowsmith, J. Linarelli, and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International, 2000), p.18-22; P. R. Schapper, J. V. Malta and D. L. Gilbert, 'An analytical framework for the management and reform of public procurement', (2006) 6 *Journal of public procurement*, p.4; R. Dibié, 'Public Sector Management Policies in Sub-Saharan Africa' in A. K. Kalu (eds), *Agenda Setting and Public Policy in Africa* (Ashgate publishing, 2004), p.87-113.

objective of promoting competition through non-discrimination and equal opportunities. Most of the differences in the regimes relate not to different objectives but rather difference in the details on the way of doing basically the same thing to achieve the same results. In other words, these differences are usually accidental rather than deliberately formulated. However, the mere differences in the way of doing the same things could result in perhaps unintended immediate or long term implications for the domestic system.

This chapter draws on previous discussions of the thesis to analyse the themes arising from the nature of interaction between the regimes and to highlight some of the possible policy implications resulting from multiplicity. The significance of this analysis is to provide understanding of the policy issues on multiplicity, which may inform policy making and also provide potential directions for further research on the issues of multiplicity, perhaps through empirical investigation.

The chapter first examines the complexity of the rules at section 8.2 and then considers the implications of multiple regimes for procurement officials in section 8.3. Subsequently, implications of multiple regimes for capacity building will be discussed in section 8.4. The next discussion in section 8.5 will focus on the relevance of national rules to donor-funded procurement which will be divided into four sub-sections for detailed analysis; the difficulties arising from the application of domestic constitutional principles of enforcement and conflict of interest rules will be discussed in sub-sections 8.5.1 and 8.5.2 respectively, analysis will then move to the difficulties arising from the application of domestic rules expressly allowed in the rules of donors and the implications for those other domestic rules that may be applicable to donor funded procurement in subsections 8.5.3 and 8.5.4 respectively. The next discussion in section 8.6 will focus on the implications of the approach to remedies systems under the multiple regimes. Subsequently, section 8.7 will focus on the implications of multiple regimes for the exclusionary grounds in procurement which will be divided into two sub-sections for closer analysis; sub-section 8.7.1 will discuss the implications of exclusion for corruption and other general grounds will follow in sub-sections 8.7.2.

8.2 Complex Procedures with Different Terminologies

Procurement rules in all regimes under consideration demonstrate significant complexity with bureaucratic procedures, which perhaps becomes too difficult to apply without making some form of error. The content of the rules is generally large in volume and provide different degrees of flexibility and detail in addressing specific issues of concern for the particular regime. For example, the World Bank regime has a dedicated - about fifty pages - set of rules, supplemented by its internal guidelines with detailed provisions to regulate how it engages consultants who are an important aspect of its operations.² The rules are also usually fragmented where different pieces of regulations address different areas of procurement as the case under EU and US aid regimes.³

² See discussions in section 4.2.

³ See discussions in section 5.2 and 6.2.

The complexity also poses significant burden and time constraints on identification and application of the appropriate set of rules, which may have adverse implications for procurement lead time. Within the same donor regime, multiple rules and procedures may apply, depending on the time and nature of the project or the duration of the financing agreement. For example, EU regime usually applies different sets of rules to its different funding cycles under the same Partnership Agreement as previously discussed.⁴ The situation becomes even more complicated under co-financing arrangements discussed in section 4.6.1. As it is the case in Ghana, a number of donors may agree on using a single set of rules on a portion of the project – as joint financiers - while other individual donors' rules are applicable to the remaining portion of the same project – as parallel financiers. In this case, different sets of rules are applicable to even the same types of contracts under the same project. These complex arrangements could be a source of undue administrative burden which may place excessive constraint on scarce domestic resources and could have the potential of limiting the effect of policies on efficiency and simplification of procedures in the domestic system.

Complexity in the rules is also seen in the use of procurement methods and tendering procedures which usually appears to be different from one regime to the other. The difference in appearance however, usually has little effect on the similarity in the content of the rules. The manner of application and the substantive content of the multiple rules are often the same and applied in a similar manner as illustrated by the case study on correction of tenders in Chapter 7.

Different and sometimes vague terminologies are also used by the different regimes when referring to the same things. This results in the lack of clarity and presumably confusion in the multiple rules and creates complexity in the system. For example, the World Bank procurement rules identifies a supplier who is participating in a procurement process as a “bidder” while the domestic procurement rules in Ghana refers to the same supplier as a “tenderer”.⁵ Also, the terms “bid protest” and “bid challenge” is used interchangeably under US aid regimes in the same way as “complaints” or “review system” is used under the domestic and EU regimes when referring to the same procedures or systems that allows aggrieved suppliers to file complaints.⁶ One can also see the use of the terms “implementing agency” under World Bank regime; “contracting authority” under EU aid regime and “procurement entity” under the domestic regime in Ghana when referring to the same institution responsible for conducting the procurement.⁷ These terminologies may be considered as technical terms with(out) geographical or historical association with specific regimes, which appear to be different on the face of it, but used across different regimes in a rather similar manner, perhaps interchangeably even within specific regimes. The different terminologies, the choice of legal clauses in the rules and the manner in which the rules are drafted, contribute to some uncertainties in interpretation as the case of “effect on the substance of tenders”

⁴ Ibid.

⁵ See section 3.4.1; section 4.9.

⁶ See section 3.11; section 5.7; section 6.4.4.

⁷ See sections 2.2.1.2; section 4.4; section 5.4.

and “material deviation” discussed in Chapter 7 and renders the rules perhaps overly complex.

Although the rules are similar in many respects, there are some minor differences which could be considered as insignificant. However, these insignificant differences could lead to different outcomes in some isolated cases. The difference in outcomes, despite the minor nature of the differences, could be the result of complexities created by the differences in approach to expressing how the same things should be done as discussed in section 7.6.1. In other words, it is the complexity of the system and not any intended differences in the rules themselves that creates the different outcomes. Other possible causes could be issues unrelated to the procedures and content of the rules, such as the disconnection between institutions involved in the procurement as will be discussed below. In other words, the differences in the regimes do not exist solely in the use of different terminologies as discussed above.

The complexity in the system described above, may also create difficulties for effective community participation in the procurement process. For example, civil societies and the general public may not easily understand requirements and standards in the rules to actively participate in the procurement process. The difficulty in identifying the appropriate rules and understanding the standards against which to demand accountability and transparency may work against domestic policies and those of donors that encourage accountability and good governance. This may serve as a disincentive for the general public in enforcing the rules. In some cases, community participation in procurement may be achieved only at a higher cost of public education to enable them understand the complex rules, which may not be necessary where the rules were simplified.

As noted earlier, the domestic regime has policies to simplify its procurement rules and streamline procedures through for example, the current proposals for amendment of the procurement rules.⁸ However, the complexity imposed by the multiple systems may constrain the achievement of domestic policies on simplification and streamlining procedures. It is acknowledged that some donor regimes including the US and the World Bank regimes are also undergoing major reforms to internally streamline procedures or harmonise the rules with the domestic regime.⁹ However, the impact of such streamlined procedures of individual donor regimes will be limited because of the other regimes who are not involved in the policy reforms. In this respect, the effect of individual policies on streamlining procedures without coordination with all other relevant regimes will be limited.

8.3 Application of Multiple Rules by Single Individuals

As discussed in previous chapters, the multiple systems in Ghana usually require a single procurement officer to implement projects funded from domestic resources in addition to those funded by the various donors in accordance with their respective

⁸ See section 2.2.1.

⁹ See section 4.5; section 6.4.2.

rules.¹⁰ This is rather different from the situation where states could have procurement officers specialised in implementing either solely projects funded from domestic resources or solely donor-funded projects. As a result, a single procurement officer is responsible for implementing multiple procurement rules for different projects and maintaining different timescales for preparing multiple, and perhaps duplicating project reports to meet each donor's specific requirements. These procurement officers are usually regular public servants who often implement the domestic rules and may perform other duties under the domestic system.

The above situation imposes an enormous and unnecessarily burdensome task on a single procurement officer in a developing country such as Ghana where constraints of procurement capacity and skills are inherent problems. The situation is exacerbated by the complex co-financing arrangements in the system where different sets of rules are applied to different or perhaps similar contracts within the same project as discussed in Chapter 4. These procurement officers may find it difficult to become familiar with some of the donors' rules due to the irregular nature of donor-funded projects in Ghana as could be explained perhaps by the unreliable flow of donor funds. The above situation is indeed a repetitive administrative burden on procurement officers, which may have significant adverse implications for procurement lead time and efficiency in the system.

Moreover, the multiple systems require the single procurement officer to take perhaps undue care and caution when applying the different rules. As indicated in Chapter 7 on the issue of correction of tenders, procurement rules of the different regimes are similar and any difference in the regimes is rather insignificant. However, the procurement officer who is applying these rules must be careful to identify the appropriate differences in the rules in every case and apply any minor difference in the rules accordingly.

The very insignificant nature of differences in the multiple systems and the duty to identify and apply any such differences appropriately, is a source of confusion and complexity for the procurement officer as explained further below. It is acknowledged that some rules of donors are aligned with the domestic rules, which allows procurement officers to apply donors' rules in the same manner as required under the domestic rules. However, where some other rules under the multiple system are not aligned, it becomes counterproductive and effectively neutralises any policy effect or potential benefits to be gained. In this regard, individual donor efforts on policy reforms may require active engagement with the rest of the regimes in the system.

The minor difference in the rules could also lead to laborious administrative tasks for procurement officers, which could create unnecessary confusion and render the procurement function unattractive as will be seen below. Procurement officers, who are usually domestic civil servants, may have other duties imposed under the domestic system. These officers could only occasionally conduct donor funded procurement depending on when donor funds become available. The procurement officer may not be equally familiar with all the rules of the different regimes due to the irregularity of donor-

¹⁰ See section 4.4.2; section 5.4.2.

funded projects. This may create some confusion and frustration for the procurement officer who genuinely believes he has properly applied any minor differences under the multiple regimes. Non-compliance with the rules as a result of the confusion appears to be a major focus of capacity building, which is on compliance with donor procedural rules rather than the competence of officers to achieve value adding outcomes as will be explained below. Such confusion could arise where differences identified in one regime are mistakenly applied to other regimes. This phenomenon referred to as capacity erosion,¹¹ may be a result of the confusion in identifying and applying minor differences in the regimes appropriately. Indeed, capacity erosion is a problem in aid-dependent developing countries such as Ghana where the issue of multiplicity is prevalent.

In some cases, a group of procurement officers, usually in the minority, may be able to assimilate the differences in the rules which may even serve as a means for improved procurement skills of those individual officers. However, the majority of procurement officers fall outside this category, especially in developing countries where facilities and policies to stimulate the development of procurement skills are usually not available. Failure to identify and apply these insignificant differences appropriately will constitute non-compliance which may attract rather significant consequences. The procurement process may experience substantial delays as a result of donors' refusal to grant approval or perhaps due to pending complaints from aggrieved suppliers. Donors may also have recourse to a number of other actions including withholding funds. Genuine efforts at avoiding the consequences of non-compliance may result in a focus on ensuring compliance rather than value for money. Procurement officers may become too conscious to comply with requirements of individual regimes instead of focusing on the achievement of value for money as a paramount object of the domestic system.

8.4 Implications for Capacity Development

As indicated in previous chapters, even in the absence of multiple systems, capacity constraints are inherent problems in many developing countries such as Ghana.

Multiple regimes may provide some benefits in ensuring proper implementation of particularly complex donor projects in states such as Ghana where procurement capacity is deficient. For example, the use of individual donors' procedures could mitigate fiduciary risks of donors and provide assurance of expected outcomes in order to meet accountability obligations to lenders and taxpayers. It may also bypass domestic bureaucracies to ensure that projects are measurable, delivered on time and demonstrate the evidence of project outcomes. For the domestic system, benefits could be a faster service delivery or perhaps less constraint on existing domestic capacity and resources.

However, the adverse effects of multiplicity may become more pronounced in the long run, with the potential to offset any benefits. In other words, the multiple system could

¹¹ P. Trepte, 'Building Sustainable Capacity in Public Procurement', in S. Arrowsmith and R. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011), Chapter 12.

sabotage efforts of donors to assist the domestic system in developing domestic capacity. As noted in previous chapters, donors' institutional structures tend to bypass existing domestic institutions established to perform similar functions thereby causing duplication.¹² These multiple institutions created by donors usually attract competent civil servants from the public sector which reduces the capacity in those domestic institutions needed to implement procurement funded from domestic resources. In some other cases, donor agencies are connected with selected domestic institutions at different levels in order to meet specific project needs.¹³ Moreover, some institutions relevant for donor-funded procurement such as the NAO under EU regime have less clearly defined responsibilities which results in duplicating functions.¹⁴ These institutional arrangements demonstrate an unsystematic coordination between the entities involved in procurement. The interest and concentration of donors on specific areas of intervention also renders development priorities of the domestic system ineffective and tends to drain existing domestic institutional capacity. For example, supposing several donors in Ghana are concentrating on projects relating to good governance and regulatory reform. Donors will usually depend on senior project staff who are familiar with the way the public sector functions and the key people within it. Such senior project staff is likely to be found in the public sector within the civil service. Competent domestic civil servants are usually offered higher salaries and other benefits which encourage them to join the donor project teams, creating capacity gaps within domestic institutions. Where the competence of these officials is inadequate for the specific donor project, they undergo specialist training relevant for the funded project. In this respect, domestic officials may lack the skills needed to implement specific projects funded from domestic resources in other areas such as healthcare and food production. The lack of strategic coordination between entities could limit institutional performance and impact on the proper implementation of well-defined procurement policies. These institutional challenges tend to weaken existing administrative capacity in the domestic system and renders policies on capacity building less effective.

The current focus of capacity building, largely on compliance requirements, is aimed at equipping institutions and personnel engaged in donor-funded procurement through training programmes.¹⁵ However, such capacity may be lost after donor projects have successfully been implemented. In some cases, the capacity training may not be transferable or may be incompatible with domestic requirements due to the specificity of donors' demands. As a result, the domestic system may not benefit from previous knowledge on capacity building to conduct procurement beyond donor-funded projects. In this regard, multiplicity may not promote policies on sustainable capacity building and any policy on capacity development may not provide desired long term results.

¹² See discussions in section 4.4; section 5.4; section 6.4.1.

¹³ Ibid; see also J. Ruche and E. Garandau, *The Mali Donors' Public Procurement Procedures: Towards Harmonisation with the National law*, (OECD, 2000), p.14.

¹⁴ See discussions in section 5.4.

¹⁵ See discussions in section 4.5; section 5.5.

One needs to make a clear distinction between compliance capacity building¹⁶ on one hand – where capacity building focuses on ensuring compliance with individual donors’ rules - and competence capacity building on the other hand – where the focus is on skills and competence to achieve desired procurement outcomes. Non-compliance with the multiple rules and procedures by procurement officers does not necessarily mean its lack of skills and competence in achieving value outcomes. The existing low skills and competence of procurement officers in Ghana is worsened by requirements to comply with multiple rules. The focus on building compliance capacity for a set of donors’ rules may be less relevant for another and may not build on the knowledge and competence of procurement officers to achieve efficient procurement outcomes. The complex nature of the rules to be applied by the same procurement officer, may significantly constrain existing low capacity. The occasional application of some donor rules mean that compliance capacity may not be enough for each new project since the procurement officer is likely to forget or be confused on the manner of application of one set of rules with another as discussed above. As a result, both competence and compliance capacity building may be required for each new project which perhaps works against the fundamental purpose of capacity development.

Moreover, some procurement requirements of donors which are usually beyond those required under the domestic system may also have implications for policies on capacity building. Some donor procedures require specific skills and technologies that are usually neither permitted under the domestic rules nor obtainable within the domestic context of procurement. For example, the multiple supplier framework agreements under the EU external aid regime, is not available under the domestic rules as discussed earlier.¹⁷ The domestic system operates a rather simple, single supplier framework agreement which is usually in the form of Service Level Agreements. Also, the use of e-procurement under the World Bank’s rules is not available under the domestic rules. The domestic context of procurement in Ghana is also less supportive of e-procurement and private sector entities in Ghana for example, could only to a limited extent, make use of e-procurement facilities.

A potential benefit of such high donor requirements however, is that, it could trigger the development of new technologies and procurement skills for the benefit of the domestic system. For example, the use of multiple supplier frameworks under EU external aid regime could lead to the development of unique expertise for domestic officials through the transfer of skills, which could be relevant for procurement funded with domestic resources. This could improve local capacity and generate domestic support to drive reform of the procurement system from within the domestic regime. Also, Ghana is currently implementing an e-procurement system as part of an e-Ghana project that will support the use of e-procurement.¹⁸ The e-Ghana project, funded mainly by the World Bank, could provide a platform for both private and public sector engagement in e-procurement.

¹⁶ Ibid.

¹⁷ See section 5.6.1.

¹⁸ Ghana Public Procurement Authority, *E-Procurement Bulletin*, (Nov-Dec 2010).

8.5 Relevance of Domestic Rules to Donor-Funded Procurement

As indicated earlier, procurement rules of donors are applicable in Ghana and are usually made part of the Financing Agreement, which forms the contract between the donor and the Government of Ghana.¹⁹ The Financing Agreement has the status of an international agreement, which is governed by the law of treaties under international law.²⁰ As a result, the Government of Ghana cannot rely on national regulations as a reason for not implementing its international obligations including obligations under the Financing Agreement.²¹ However, there are gaps and overlaps in the nature of relationship between international law and constitutional law in Ghana, which may have implications for the relevance of domestic rules to procurement usually governed by the rules of donors.

Ghana operates a dualist legal system as inherited from the British through colonial rule, whereby the Constitution is sovereign in the hierarchy of laws of the land.²² The Constitution is regarded as the supreme law from which other national laws and international agreements are derived.²³ This means the Constitution has precedence over the Financing Agreement as the basis for implementing rules donors in Ghana. Rules of donors could have precedence over national legislations other than the Constitution to the extent that the two conflict. The Constitution empowers the President to execute treaties, agreements or conventions in the name of the State²⁴ which “shall be subject to ratification by an Act of Parliament or resolution of Parliament ...”²⁵ In this respect, legislative or executive action is needed to give effect to obligations arising out of international agreements and such obligations cannot go against constitutional principles. This imposes a legal obligation on national authorities not to conclude agreements that contravene constitutional principles. The sovereignty of the Constitution implies that the courts will generally apply international agreements when they have been incorporated into domestic law.²⁶ In such cases, the text of the international agreement will usually be relevant in the interpretation of the statutory language under the various theories of domestic jurisprudence.²⁷

As a result of the nature of relationship between international law and constitutional law of Ghana, procurement- related provisions under the Constitution of Ghana will have precedence over procurement rules of donors to the extent that the two conflict. For example, supposing the Constitution requires the Energy Commission in Ghana to establish a state-owned-enterprise as the sole supplier of oil and other sources of energy in Ghana as a measure to protect national security, performance of the State’s

¹⁹ See discussions in Chapter 4, section 4.2.

²⁰ M. Meireles, “The World Bank Procurement Regulations: A Critical Analysis of the Enforcement Mechanism and of the Application of Secondary Policies in Financed Projects” (2006), Unpublished PhD thesis, available at <http://www.nottingham.ac.uk/law/pprg>, p.41.

²¹ Ibid.

²² The Constitution of the Republic of Ghana (1992), art. 2; art. 11.

²³ Ibid.

²⁴ Ibid, article 75(1).

²⁵ Ibid, article 75(2).

²⁶ *NPP v Attorney-General*, (1996-97) SCGLR 729.

²⁷ Ibid.

obligations under its financing agreement with some donors who usually require non-participation of state-owned-enterprises in their funded procurement, could be rendered inapplicable. In this respect, procurement officers who are usually required to apply both sets of rules, may find themselves in difficult situations and may not be able to use donor funds in support of some essential development projects.

However, where there is an apparent conflict between donor requirements and national legislations other than the Constitution, the latter may be rendered inapplicable for reasons as discussed above. For example, the Procurement Act of Ghana recognises the precedence of external rules over its provisions and explicitly allows their application to donor-funded procurement as indicated above. The Criminal Code of Ghana, 1960 (Act 29), is also a national legislation applicable to procurement funded from domestic resources particularly on corruption.²⁸ However, the World Bank rules on corruption may have precedence over provisions under the Criminal Code of Ghana where there is apparent conflict between the two. National legislation may still play an important role in enforcing the rules of donors particularly where there is no direct conflict between the two. For example, the World Bank may rely on provisions under the domestic legislation to sanction violations of the World Bank rules on corruption. The authority of the World Bank is limited to ensuring that its funds are used properly. The Bank does not have the authority to prosecute persons engaged in corruption under its funded procurement and will usually refer such cases to domestic authorities to be dealt with in accordance with domestic law.

The situation raises further complexities when there are several external regimes interacting with the domestic regime. The different external regimes may provide different norms that conflict with different aspects of domestic legislation which creates more difficult legal problems. The remaining part of this section provides further discussions on the problems arising from the nature of interaction and their possible impacts.

8.5.1 Difficulties Arising from the Application of Domestic Constitutional Principles on Enforcement

Problems arise from the application of the general administrative principles under the Constitution which provides that "...persons aggrieved by the exercise of acts and decisions of administrative bodies shall have the right to seek redress before a court or other tribunal."²⁹ This provision allows decisions of administrative institutions and their officials to be challenged by aggrieved persons in the Courts of Ghana.

One could argue that constitutional principles as stated above applies to rules that have legally binding and enforceable character whiles donors' rules have a character of administrative instructions. However, as discussed in previous chapters,³⁰ the rules of donors are usually incorporated into the financing agreement which becomes part of

²⁸ Ghana, Procurement Act, s. 93 (2).

²⁹ The Constitution of the Republic of Ghana (1992), Art. 23.

³⁰ See discussions in section 4.2; section 5.2; section 6.2.

obligations imposed on the state. Moreover, the rules of donors are in fact, relied upon and enforced as if they were binding on the state.³¹ Non-compliance with the rules provides donors with recourse for action including cancellation of funds which constitute a powerful enforcement tool.³² Though there is no case law in this specific respect, the courts in Ghana are usually prepared to consider not only the non-binding status of donor rules but also the actions of the State and its intentions to be bound by such external rules as the case in other fields of international law including human rights and environmental law.³³ It is deduced from the above general rules that decisions under donor rules are subject to challenge by aggrieved persons by means of judicial proceedings in the Courts of Ghana.

Significantly, this implies suppliers have a general right to challenge decisions under donors' rules in the Courts of Ghana. For example, a breach of the World Bank's guidelines by a procurement entity in Ghana is subject to challenge by aggrieved suppliers in accordance with domestic law in the Courts of Ghana. The significance of this rule lies in the recognition of the rights of suppliers to enforce compliance with rules of donors. Moreover, formal rights of suppliers to challenge is usually not available under donors' rules as will be discussed below. The right to challenge donors' rules under the domestic law reinforces the general directive principles of domestic state policy, including the principles of equality and fairness as enshrined in the Constitution of Ghana for the protection of all citizens.³⁴ It also supports the objective principles of fairness and equal treatment provided in the rules and procedures of donors applicable in Ghana as seen above.

The nature of remedies available to aggrieved suppliers is based on the jurisdiction of the Courts in Ghana. The courts have powers to offer a wide range of remedies including damages and annulment of contract as discussed under the domestic regime.³⁵ However, the court's is likely to have little financial implication for donors since many donors including the World Bank, exclude financing of expenditures arising from procurement misconducts.³⁶ In this respect, funds received from donors could not be used to settle procurement disputes. As a result, scarce domestic resources may need to be drawn upon for the settlement of disputes.

However, there is the problem of drawing the line between decisions attributable solely to domestic authorities and those ordered by donors as discussed earlier.³⁷ Even where donors are responsible for the conduct of procurement as the case with some donors in Ghana,³⁸ decisions of donors may be challenged under domestic law. Though donors

³¹ Ibid.

³² Ibid.

³³ *NPP v Attorney-General*, (1996-97) SCGLR 729; see also R. F. Oppong, 'Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa', (2006) 30 *Fordham International Law Journal*, p.296.

³⁴ The Constitution of the Republic of Ghana (1992), Chapter 6.

³⁵ See section 3.11.8.

³⁶ World Bank, Procurement Guidelines, section 1.14; Consultant Guidelines, section 1.19.

³⁷ See discussions in section 5.7.2.

³⁸ See discussions in section 5.4; section 6.4.1.

have immunities against law suits under domestic law, such immunities oblige them to provide appropriate modes for settling particularly non-contractual claims of private persons.³⁹ The concept of immunity depends on how effective alternative dispute mechanisms provided by donors are in limiting the adverse effect of immunity upon the evolving views on the fundamental right to a fair trial.⁴⁰ In this respect, a waiver of immunities of donors could be relied upon to challenge decisions of donors.⁴¹ This challenge right may be exercised through contractual relationship or liability in tort and such rights may be protected based on several grounds including public policy, fair dealing or misrepresentation.⁴²

8.5.2 Difficulties Arising from the Application of Domestic Rules on Conflict of Interest

Difficulties also arise from the application of domestic rules on conflict of interest to procurement funded by donors. Domestic rules on conflict of interest enshrined in the Constitution are applicable to donor-funded procurement in Ghana. Conflict of interest rules impose obligations on public officers in the conduct of public duties and requires that “a public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office”.⁴³ This provision set out the standards of conduct for public officers in avoiding potential conflict of interests. The significance of this provision lies in the fact that rules of donors usually do not deal with possible sanctions on public officers who engage in procurement misconducts. In other words, regulation of issues on conflict of interest with regards to domestic public officials has received little attention from donors. Donors usually have limited recourse when government officials engage in misconducts arising from donor-funded procurement. In extreme cases, donors may cancel funds for the procurement. In other cases, donors may refer findings of misconduct to national authorities to be dealt with under domestic law as discussed in the section above. In this respect, donors may rely on provisions under domestic law to ensure compliance with their rules. The nature of this interaction is based largely on the contractual relationship between donors and the domestic system as sovereign parties and seeks to avoid interference of donors in domestic affairs but rather provides alternative recourse for action as indicated earlier.⁴⁴ However, even where the rules of donors explicitly impose sanctions on domestic public officials who engage in procurement misconduct, the constitutional principles on conflicts of interest will still apply to procurement usually governed by external rules.

³⁹ R. S. J. Martha, 'International Financial Institutions and Claims of Private Parties: Immunity Obliges', in H. Cisse et al. (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance*, (World Bank Publications, 2011), p.118.

⁴⁰ W. M. Berenson, 'Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial', in H. Cisse et al. (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance*, (World Bank Publications, 2011), p.137.

⁴¹ Meireles, (note 20 above), p.117.

⁴² Ibid.

⁴³ The Constitution of the Republic of Ghana (1992), art. 284.

⁴⁴ See discussions in section 4.13.

8.5.3 Difficulties Arising from the Application of Domestic Rules Explicitly Permitted by the Rules of Donors

Problems also arise from the fact that donors explicitly allow application of some domestic rules to specific stages in the process of procurement funded by donors. As discussed earlier, donors rarely rely entirely on domestic procedures for the conduct of their funded procurement.⁴⁵ The explicit permission to use some domestic rules allows these rules to supplement the rules of donors.

For example, the use of domestic methods of procurement such as national competitive method is expressly permitted under World Bank and EU funded procurement as discussed above.⁴⁶ The World Bank also permits the use of framework agreements available under the domestic law.⁴⁷ The significance of these provisions is the possible use of other related domestic procedures including review procedures as will be explained below. Moreover, the use of domestic review procedure is explicitly required under procurement funded by donors such as the EU.⁴⁸ In this case, applicable EU rules are displaced. However, even where domestic review procedures are not explicitly allowed in the rules of donors, review in accordance with domestic law will still be available based on the general administrative principles on enforcement discussed in section 8.5.1 above.

8.5.4 Difficulties Arising from the Possible Application of Other Domestic Rules

Difficulties also arise due to the possible application of domestic rules in situations other than those explicitly permitted by donors discussed above. These situations may arise due to complexities in the interaction between regimes. In some cases, the applicable rules of donors may be unclear on what course of action could be taken or the rules may simply have no provision to address the subject matter as will be seen below. In this case, it may become necessary to rely on some domestic provisions in resolving issues in the multiple system. Some situations which may allow the use of domestic procedures are as follows.

Firstly, the express requirement for entities to resolve complaints on donor-funded procurement provides the possibility for applying domestic review procedures before entities for donor-funded procurements. In many cases, the rules of donors provide little guidance on how entities may arrive complaint decisions. However, the effective resolution of complaints is usually a pre-condition for donors to grant approval of contract award.⁴⁹ Donors may recommend possible course of actions. There is however, little information on the nature and scope of donor recommendations. Entities are likely to refer to their own review procedures under the domestic law for guidance. The implication is the availability of administrative review specifically before entities in accordance with domestic law. Donors may not prevent entities from applying domestic

⁴⁵ See section 4.5.1; section 5.5.1; section 6.4.2.1.

⁴⁶ See discussions in section 4.7.2; section 5.6.1.

⁴⁷ Ibid.

⁴⁸ See discussions in section 5.7.3.

⁴⁹ See discussions in section 4.13.3; section 6.4.4.3.

review procedures since they support requirements under the rules of donors as discussed above.

Secondly, application of domestic methods of procurement to donor funded projects implies the possible use of domestic procedures in some stages other than review stage discussed above. For example, the World Bank's application of NCB as a domestic method of procurement could mean that entities may follow domestic NCB rules on publicity and evaluation of tenders when conducting procurement funded by the Bank. A procurement process is usually made up of several stages and some domestic rules may apply to specific stages of the process.

8.6 Implications for Remedies Systems

The nature of interaction between the multiple regimes presents challenges for the enforcement of procurement rules. The complexities in the application of multiple rules may create a system of multiple remedies where aggrieved suppliers can potentially challenge the same decision in different review forums and obtain the same or multiple remedies. For example, supposing a supplier is aggrieved by a breach of evaluation rules under EU aid rules where a domestic entity acts as implementing agency. In accordance with domestic law, the aggrieved supplier could challenge such decision before the procurement entity with appeal to the PPA and the High Courts of Ghana in a sequential manner. The aggrieved supplier could also arguably challenge the same decision in accordance with EU rules before the European Ombudsman and the European Court of Justice where it believes the European Commission has influenced the decision.⁵⁰ It is not a common practice for aggrieved suppliers in Ghana to challenge the same decision in different forums and it is not clear whether or not the courts will grant the remedies.⁵¹

The nature of remedies available to aggrieved suppliers depends largely on the applicable procurement rules and the review forum where the complaint is initiated. Although alternative review forums may provide the benefit of reinforcing the rights of aggrieved suppliers and ensure compliance with the rules, the multiple system in Ghana operate as parallel forums rather than alternative review forums. The remedies systems of donors have seen less of the generally detailed and lengthy nature of the rules of donors on other areas of regulation. For example, there is less detail and clarity on the remedies system under the World Bank's rules compared to other areas of regulation such as publicity and correction of errors in tenders as discussed in previous chapters.⁵² In some cases, the rules of donors provide no explicit remedies and aggrieved suppliers may need to identify possible chances of obtaining remedies under the domestic law as discussed above.⁵³ In some other cases, the rules of donors simply refer aggrieved suppliers to the domestic remedies system as the applicable rules.⁵⁴

⁵⁰ See discussion in section 5.7.2.

⁵¹ Ibid.

⁵² See discussion under the World Bank regime in Chapter 4.

⁵³ See discussions in section 8.6.

⁵⁴ See discussions in section 5.7.2.

8.7 Implications for Exclusionary Grounds

Exclusions to participation in procurement which are applicable under donor funded procurement as indicated,⁵⁵ have significant implications for domestic policies. For example, exclusions based on origin of goods and services is a common practice particularly among bilateral donors such as the EU and the US.⁵⁶ The remaining part of this section discusses the implications of exclusions and other eligibility criteria.

8.7.1 Exclusion on Grounds of Corruption

As indicated above,⁵⁷ regimes under review have rules which exclude participation of persons on grounds of fraud, corruption and other criminal offences. These are positive exclusions, referred to as debarment which could ensure integrity in government business. Donors have taken a broad approach, not only to fight corruption in their funded procurement, but also to assist states such as Ghana on its domestic anti-corruption policies.⁵⁸

Nonetheless, multiplicity of regimes presents significant threats to the effectiveness of domestic anti-corruption policies. As indicated earlier, the domestic regime has provisions on positive exclusions where tenderers under sanctions for fraud, corruption and other criminal offences issued under any regime are excluded from participation in procurement funded from domestic resources.⁵⁹ For example, suppliers debarred for corruption under donors' rules shall be excluded from procurement funded with domestic resources.

However, suppliers debarred under domestic laws of Ghana may still have a general right to participate in donor-funded procurement as discussed below. Exclusion on grounds for corruption and other criminal offences under donor-funded procurement is generally limited to sanctions issued through a judgement of a competent authority – usually the courts - in accordance with the rules of donors or in accordance with the national rules of the donor country.⁶⁰ The rules of donors usually require as benchmark, conviction for corruption and criminality based on concepts such as due process and transparency as defined in the rules of donors.⁶¹ This implies that persons debarred under domestic concepts of corruption may be allowed to participate in donor-funded procurement. Moreover, there is a practical difficulty for the Ghanaian courts in applying concepts of fraud and corruption in accordance with external rules.

In exceptional cases and subject to specific conditions, some donors including the World Bank may exclude suppliers debarred under domestic law from participating in its funded procurement.⁶² These conditions provide that the debarment sanction shall be

⁵⁵ See Chapter 4, section 4.13.4; Chapter 5, section 5.7.4; Chapter 6, section 6.4.4.4.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ghana, Procurement Act, s. 22(1)(e).

⁶⁰ World Bank, Procurement Guidelines, sections 1.17 and 3.3; PRAG, section 2.3.3; also see Chapter 6, section 6.4.4.

⁶¹ Ibid.

⁶² See section 4.13.4; section 5.7.4; section 6.4.4.4.

issued by appropriate judicial authority and acceptable to the donor perhaps through a review.⁶³

In practice, these exceptional cases may have limited effect in Ghana due to the nature of the procurement regulatory framework. Firstly, the domestic legislation on procurement empowers PPA as the body with the authority to issue debarment sanctions in Ghana.⁶⁴ However, PPA has not yet issued any debarment sanctions since its ten years of existence as indicated earlier.⁶⁵ Secondly, even where PPA actively imposes debarment sanctions, its authority as an administrative rather than a judicial body as required by donors, may render the debarment sanction unacceptable to donors. In other words, the administrative authority of PPA to impose debarment sanctions may not be considered acceptable for the purposes of donor-funded procurement in Ghana. As a result, suppliers who may be debarred by PPA could be allowed to exercise their rights and participate in procurement funded by donors which offers perhaps more attractive high value contract opportunities due to the large proportion of procurement funded by donors in Ghana. Domestic anti-corruption policies may become ineffective.

In some cases, as explained earlier,⁶⁶ some donors including the World Bank may require persons participating in donor-funded procurement to comply with domestic rules on anti-corruption through the use of integrity pacts. These measures ensure that suppliers comply with domestic anti-corruption rules and abstain from corrupt practices during the process of procurement funded by donors. However, this measure does not prevent persons already debarred for corruption under domestic law from participating in donor-funded procurement. Though donors encourage compliance with domestic anti-corruption rules in funded procurement, donors may not generally accept debarment decisions arising from domestic rules. This could undermine the sovereignty of the state in enforcing law and order through sanctions within its territory. This could have wider implications for the effectiveness of regionally coordinated policies of the domestic system such as the anti-corruption policies of the African Union and the Community of West African States. Fulfilment of obligations imposed under these regional policies may be frustrated by the effect of the multiple debarment policies of donors. This could also have implications for donors' assistance on domestic anti-corruption policies.

8.7.2 Other General Grounds for Exclusion

As indicated above,⁶⁷ many procurement regimes usually exclude participation of suppliers on grounds for lack of integrity including corruption. A ground for exclusion other than corruption is failure to fulfil tax and social security obligations. Under the domestic law of Ghana, goods and services are subject to taxation and a supplier will be

⁶³ Ibid.

⁶⁴ Ghana, Procurement Act, s. 3(q).

⁶⁵ See discussions in section 3.11.9.

⁶⁶ See discussion on section 4.13.4.1.

⁶⁷ See discussions in section 8.5.

excluded from participating where it has not “fulfilled its obligations to pay taxes and social security contributions...”⁶⁸ This provision ensures the enforcement of domestic rules relating to tax and social security obligations and allows only suppliers with integrity to participate in procurement. The provision also secures generation of revenue for the domestic government through taxation to enable it finance domestic development and perhaps become less reliant on donor funds. However, many donor-funded goods and services benefit from tax exemptions, which may undermine the quality of tax generation in the domestic system.⁶⁹ Moreover, suppliers who fail to fulfil their tax and social security obligations under the domestic system may be allowed to participate and enforce their rights in procurement funded by some donors as discussed in previous chapters.⁷⁰ For example, a supplier who does not fulfil its tax obligations under the domestic rules of Ghana may be allowed to participate in World Bank funded procurement.⁷¹

This approach could also be explained by the operational boundary of donors imposed by their fiduciary duty. The authority of donors to ensure proper use of funds do not extent to regulating non-fulfilment of domestic tax obligations which does not involve the use of donors’ funds. However, these arguments may be less convincing when considering the long term implications for the domestic system and the fundamental purpose of development assistance. After the second world war where development assistance found its origin, the underlying concern was the need to respond to problems of poverty and underdevelopment through nurturing domestic capabilities so that developing countries can take charge of the pace and direction of their own development.⁷²

Multiplicity of regimes create ineffectiveness of domestic tax policies which may contribute to the loss of revenue for the State to finance domestic development. The loss of tax revenue is a major issue in South Africa where Black Economic Empowerment policies have been adopted to address historical inequalities.⁷³ The issue of tax revenue is also relevant in Ghana as another developing African country where public procurement represents a significant proportion of government tax revenue.

⁶⁸ Ghana, Procurement Act, s. 22(1)(d).

⁶⁹ See discussions in section 4.13.4; section 5.7.4; section 6.4.4.4; also see J. Boyce and S. Forman, *Financing Peace: International and National Resources for Post-Conflict Countries and Fragile States*, (World Development Report 2011), Background Paper.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² OECD, *Sustainability in Development Programmes: A Compendium of Evaluation Experience, Selected Issues in Aid Evaluation 4* (OECD, 1989), p.17; D. Ellerman, *Helping People Help Themselves: From the World Bank to an Alternative Philosophy of Development Assistance*, (University of Michigan Press, 2006), p.14; R. C. Riddell, ‘The moral case for post-Cold War development aid’, (1996) 51(2) *International journal*, p.191-210.

⁷³ P. Bolton, ‘Government Procurement as a Policy Tool in South Africa’, (2006) 6(3) *Journal of Public Procurement*, p.210.

Chapter 9: Conclusion

9.1 Introduction

As set out in Chapter 1, the aim of this thesis was to examine the issues of multiple procurement rules in Ghana, arising from the application of both domestic rules and other external rules for donor funded procurement in Ghana. The research sought to: (1) identify the nature of the interaction of the different procurement regimes operating in Ghana; and (2) identify and analyse the policy implications arising from the interaction of the multiple regimes. The objective of the research was to provide information on the issue of multiple regimes and its policy implications, to inform policy making in steering procurement reforms. It will also enhance understanding on the nature of interaction between the multiple regimes and provide potential directions for further research.

In order to answer the research question and satisfy the above objectives, the research set out with a case study analysis on the rules and practice of the major regimes in Ghana (Chapter 3-6). The research also examined the manner of interaction between the regimes and the possible policy implications (Chapter 8). In order to study more closely the issue of multiplicity, further analysis was conducted in a case study on the specific issue of correction of tenders as one of the complex stages in the procurement process (Chapter 7).

9.2 Reflections on the Research

For many decades, developing countries such as Ghana have relied on foreign aid to undertake major development projects. Foreign aid has however been widely criticized as an ineffective instrument for development.¹ The different modalities for aid delivery have received a fair share of the criticism. The process of acquiring goods and services financed by foreign aid - referred to as aid procurement - could be located in this context. A large proportion of foreign aid to Ghana is delivered through aid procurement.² In this respect, any little improvement in aid procurement could have significant positive impact on the effectiveness of development aid. In the context of effectiveness in development aid procurement, the policy and practice of multiple procurement regimes, where rules of donors are applicable in addition to existing domestic rules, deserve considerable attention.

The issue of multiple procurement regimes is prevalent not only in Ghana but also in many other developing countries where donors provide assistance. The rules of donors are applied parallel to existing domestic rules on procurement. In Ghana, domestic procurement rules explicitly allow application of the rules of donors to procurement funded by the latter as discussed above.³ The application of multiple rules is often justified by unreliable domestic systems which could not provide assurance for donors

¹ A. Alesina and D Dollar, 'Who Gives Foreign Aid to Whom and Why?', (2000) 5(1) *Journal of economic growth*, p33-63; D. Moyo, *Dead Aid: Why Aid Is Not Working and How There Is Another Way for Africa* (Penguin, 2009).; W Easterly, *Reinventing Foreign Aid*, vol. 1 (The MIT Press, 2008).

² Further information is available at <http://www.oecd.org/dac/stats/> (accessed 3 March 2016).

³ See discussion under section 2.5.1.

on the proper use of funds. Indeed, the high level of corruption and the lack of integrity, particularly in aid dependent developing countries such as Ghana, could present significant risks to the activities of donors.

However, the long term implications of multiplicity for the domestic system need a careful consideration. Moreover, the practice of multiplicity seems to suggest other reasons for its application such as promoting the interests of donors and minimising their reputational risks. For example, some donors require visibility of their procurement activities with unique identification of the source of funds as seen above.⁴ However, these risk mitigating measures seem to have little effect on the uniqueness of donors in terms of the content of their procurement rules.

This study has shown that, essentially, procurement rules of the multiple regimes in Ghana are largely similar with only some minor differences which are insignificant. In this respect, the content and substance of the rules under the various regimes in Ghana are similar to each other. Differences in the rules are usually insignificant and are merely in the appearance of the rules and such differences largely reflect the manner in which the rules are formulated.

While the many similarities in the rules of the multiple regimes could reinforce international best practices and facilitate harmonisation of procurement rules, differences in the regimes could also provide useful insights into the diverse regulatory approaches that could be adopted to achieve similar results, particularly under complex and technical procurement projects. In the context of Ghana and perhaps in some other developing countries however, arguments for the benefits of the differences in the rules and procedures are weak. The nature of interaction and the possible implications of multiplicity discussed in this research indicate that the long term adverse implications may offset any potential benefits. Multiplicity is a constraint on the effectiveness of governance policies of the domestic system including policies on integrity and the rule of law. Multiplicity also frustrates the effectiveness of donor policies aimed at assisting the domestic system to achieve development objectives including anti-corruption, thereby limiting the impact of development aid.

Firstly, it has been seen at section 8.2 that the multiple procurement system creates a significantly high level of complexity in the procurement rules. This complexity arises from the application of different sets of largely similar rules with different terminologies and different ways of doing basically the same things. This has resulted in a situation where the rules may become unduly difficult to understand and implement. The complexity in the system could frustrate any policies on simplification by any individual regime in the system. As a result, domestic procurement reforms and other policies on simplification of procedures, without the engagement and coordination with other regimes in Ghana may have limited effect.

⁴ See section 5.5.2.

Secondly, it has been shown at section 8.3 that multiplicity of rules imposes undue administrative burden on procurement officers which could make the procurement profession unattractive. As noted earlier,⁵ Ghana decentralised its procurement function with the aim of improving efficiency and to allow the identification of capacity needs for development. However, the duty imposed on the same procurement officer to implement the rules of donors in addition to regular implementation duty under the domestic system, raises concerns on the effectiveness of policies on efficiency and capacity building in Ghana. The problem is further complicated by the co-financing arrangement of donors in Ghana where a single procurement officer could be responsible for implementing several and different sets of rules at the same time as discussed earlier.⁶ Implementation of different sets of rules, either at the same time or one after the other, is required under different financing arrangements which becomes a source of confusion for procurement officers and could drain the existing low capacity.

Furthermore, it was noted at section 8.4 that multiple procurement systems also frustrate the effectiveness of policies aimed at dealing with the inherent lack of capacity in Ghana. Domestic capacity building on one hand, may become a stage in a process to ensuring ownership of development whereby domestic officials could be equipped with the knowledge and skills necessary to manage their own development process. On the other hand, ownership of the development process may form part of a capacity building programme where domestic officials are fully engaged at the onset of projects in order to identify and design capacity and development needs. The latter approach perhaps acknowledges that capacity building and ownership are learning processes that may develop overtime.

However, the approach to capacity building in Ghana appears to focus on ensuring compliance with rules rather than building competence and skills of domestic officials to make value adding decisions. Non-compliance with the rules of donors may arise due to the confusion caused by the very minor nature of differences in the several rules to be applied by a single procurement officer – referred to as capacity erosion. This form of non-compliance could be addressed through policies on simplification rather than what appears to be the current focus of capacity building policies under donor funded procurement. These capacity building policies of donors are unsustainable and less supportive of domestic capacity needs beyond funded projects.

A broad approach to capacity building may be needed to deal with the issue of competence and skills of procurement officers on one hand, whiles simplification and harmonisation policies are likely to reduce non-compliance with the rules on the other hand. Initiatives of donors and the domestic system on the use of country systems could be located in this context. The use of country systems is likely to eliminate the problem of multiplicity in Ghana which could reduce the confusion and burden on suppliers as well as procurement officers. Indeed, many donors including the World Bank and the EU have indicated the possibility of relying on domestic systems for their funded

⁵ See discussion in section 2.2.1.2.

⁶ See section 4.6.1.

procurement which is preceded by a series of assessments on the health of the domestic system.⁷ However, results of assessments conducted so far have been discouraging as indicated in previous discussions.⁸ Whether or not a broad approach, if any, to the use of country systems may be required, perhaps through its use at specific stages of the procurement process rather than across the whole procurement process or even in the entire project, the findings in this research are relevant for those debates.

Moreover, it was noted at section 8.5 that some domestic rules are relevant and indeed applicable to procurement usually governed by the rules of donors. This situation arises due to the gaps and overlaps in the nature of relationship between regimes the complexities in their interaction with one another.⁹ Some domestic rules, particularly procurement related provisions under the Constitution, has precedence over the rules of donors.¹⁰ In some other cases, the applicable rules of donors may be unclear on what course of action could be taken or the rules may simply have no provision to address the subject matter. In this case, it may become necessary to rely on domestic rules to resolve issues in the multiple system.

An important consideration for multiplicity is whether the domestic rules have adequate provisions to regulate the practice and interaction between multiple regimes in Ghana. Gaps and overlaps in the interaction between the multiple regimes could generate undue complications and uncertainties in the applicable rules or in the extent of application of the rules. Indeed, the domestic rules have provisions that deal with the interaction between the multiple regimes as outlined in previous discussions.¹¹ However, these domestic provisions are inadequate to guarantee legal certainty and efficiency in the system. The nature of interaction between the regimes in Ghana as analysed in this study,¹² demonstrate the inadequacy of domestic provisions to regulate and support the practice of multiplicity in Ghana. In other words, domestic rules may not support or prevent duplication of procedures in the system. This inadequacy could be seen in two main respects.

Firstly, domestic provisions do not allocate procurement responsibilities in an efficient manner to support the practice of multiplicity in Ghana. Responsibility for procurement under the regimes in the multiple systems is usually imposed on a single procurement officer with adverse implications for efficiency and capacity development as discussed above.¹³ The allocation of procurement responsibility to domestic institutions and personnel for the conduct of donor funded procurement is incidental rather than systematic. In this regard, institutional functions are usually duplicated and resource capacity of the domestic system may not be appropriately supported.¹⁴ The complex

⁷ See discussions in section 4.5.1; section 5.5.1; section 6.4.2.1.

⁸ Ibid.

⁹ See discussions in section 4.13.3; section 5.7.3; section 6.4.4.3.

¹⁰ See discussions in section 8.5.1.

¹¹ See discussions in section 2.5.1.

¹² See discussions in section 8.5.

¹³ See discussions in section 8.3.

¹⁴ See discussions in section 8.4.

nature of the resulting institutional arrangements could work against the achievement of efficiency and value for money in the system.

Secondly, provisions under the domestic system do not adequately regulate the jurisdiction or the boundary of application of rules in the multiple systems in Ghana. In this respect, there is little limitation on the extent to which the rules of donors could apply to procurement funded from domestic resources. The domestic rules do not prevent donors from exercising powers beyond their funded procurement.¹⁵ This implies that the influence of donors on domestic policies in ways that could be remotely related to their funding activities may not be prevented. This form of influence from donors is distinct from those voluntarily adopted by the domestic system, for example in situations where rules of donors could serve as a guide for procurement decisions taken under procurement funded from domestic resources.¹⁶

However, Ghana's domestic law cannot realistically regulate multiplicity in Ghana. It is simply the decision of donors to require application of procurement rules set out by the donor and there is little Ghana's domestic law can do to address that. Nevertheless, a systematic approach may be required to address the issue of multiplicity as part of a reform process, particularly in aid dependent countries such as Ghana.

Indeed, the role of foreign aid in the development of Ghana's economy requires redefining the nature of Ghana's relationship with the different donor regimes in order to ensure efficiency and legal certainty.¹⁷ The problem of multiplicity could not be dealt with by the domestic system alone but rather requires donors to coordinate with the domestic system in this respect.

¹⁵ See discussions in section 6.4.4.

¹⁶ See discussions in section 3.10.

¹⁷ See discussions in section 8.2; section 8.3; section 8.6.

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