

**LEGISLATIVE ANALYSIS OF PUBLIC  
PROCUREMENT IN ZAMBIA**

# **LEGISLATIVE ANALYSIS OF PUBLIC PROCUREMENT IN ZAMBIA**

*PUBLISHED BY*

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# 1

## Background

### Why Public Procurement?

The role of every government is to improve the lives of its citizens, and this means that the government and its agents will from time to time have to pay for goods, services and works to achieve this.<sup>1</sup> The process of acquiring goods and services and works by any public sector entity is public procurement. Public procurement is a government activity subject to a high potential risk of corruption, conflicts of interest and inefficient use of public resources. Some of the chief reasons why public procurement is considered a high-risk activity are the volume and the regularity of transactions, the close interaction between the public and private sectors, and the complexity of the procedures. The fact that it involves significant financial resources creates both opportunities and incentives for dishonest behavior on the part of public officials and private suppliers<sup>2</sup>.

Public procurement comprises government purchasing of goods and services required for State activities, the basic purpose of which is to secure best value for public money. In both developed and developing economies, however, the efficient functioning of public procurement may be distorted by the problems of collusion or corruption or both.<sup>3</sup> Corruption in procurement can impede economic development, distort market mechanisms and create inefficiencies reducing competitiveness, trade and foreign direct investment<sup>4</sup> while collusion, and other uncompetitive practices cause misallocation of public funds<sup>5</sup>

By law, public procurement in Zambia refers to procurement carried out by procuring entities using public funds. These procuring entities include government agencies, parastatals, and units mandated by the government to carry out procurement using public funds. It is anchored on the core principals which include economy, efficiency, effectiveness, transparency, competition, and fairness.<sup>6</sup> Article 210 of the Zambian Constitution provides that “State organs, State institutions, and other public bodies shall procure goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost effective as prescribed”.

Public procurement constitutes a considerable percentage of any country’s GDP and therefore it is vitally important that the whole process from start to finish is transparent and accountable to ensure

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<sup>1</sup> OECD Public Procurement: [www.oecd.org/public-procurement/](https://www.oecd.org/public-procurement/), 6<sup>th</sup> January 2024

<sup>2</sup> <https://www.oecd-ilibrary.org/sites/361417d7-en/index.html?itemId=/content/component/361417d7-en>

<sup>3</sup> OECD, Policy Round Table – Collusion and corruption in Public Procurement, 2010

<sup>4</sup> <https://gsdrc.org/document-library/corruption-in-public-procurement-causes-consequences-and-cures/>

<sup>5</sup> <https://blogs.worldbank.org/impactevaluations/five-things-you-wish-you-knew-about-public-procurement-guest-blog-post>

<sup>6</sup> National Assembly of Zambia, Report on the Committee on National Economy, Trade and Labour Matters- Public Procurement in Zambia, June 2023

that the public get value for money. The involvement of government in the market is estimated to account for 15-20 percent of Gross Domestic Product (GDP) in developed nations and can be as high as 35 percent of GDP in developing nations.<sup>7</sup> In Zambia, the parliamentary report of 2020 on public procurement states that public procurement accounts for 10 percent of GDP.<sup>8</sup> These are substantial amounts of resources which should be used properly to address national needs and should conform to international public procurement standards. Public procurement is vitally important to the economic system of a State.

Effective public procurement determines the quality of public infrastructure and services, and it impacts on the range and depth of infrastructure and services that a state can provide to its citizens, as money wasted because of collusion and/or corruption ultimately results in fewer public funds<sup>9</sup>. In this way, public procurement is an issue of key importance for a State's economic development. The World Bank<sup>10</sup> states that when public procurement is implemented correctly, substantial benefits accrue to the Government, the national economy, and the public. However, poorly managed public procurement can have a detrimental impact on the economic growth of the country by discouraging investment because of the poor performance of the national infrastructure. The Auditor General's report and the Financial Intelligence Centre trends report show clearly how poorly implemented public procurement can lead to loss of public resources.

#### *Outline of this Paper*

This paper attempts to explain public procurement and the areas of concern in public procurement in Zambia using the education sector as a microcosm. The paper will then discuss international best practices of public procurement outlining the elements of a good public procurement system. The European Union (EU), the Organization for Economic Cooperation and Development (OECD), the World Bank Group (World Bank) and continental or regional body resources will be consulted for international best practices. This will include the e-Government Procurement system which Zambia Public Procurement Authority (the Authority) has introduced but not successfully.

The paper will then review the relevant legislation and policies on procurement to identify gaps vis-à-vis best international practices. Finally, conclusions and recommendations will be presented.

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<sup>7</sup> World Bank, E-Procurement Preparations, Open Learning Campus, 2016

<sup>8</sup> Ibid

<sup>9</sup> OECD, Policy Round Table – Collusion and corruption in Public Procurement, 2010

<sup>10</sup> World Bank, E-Procurement Preparations, Open Learning Campus, 2016

Zambia recognizes the importance of public procurement and the ability for it to enhance development and bring micro small and medium enterprises into the mainstream economy. As such in 2020, Government enacted the Public Procurement Act number 8 with the intention of making public procurement more effective and efficient and to curb corrupt practices. The Act provides for the introduction of an electronic government procurement (e-GP) system to enhance the process of public procurement. The purpose of developing such a system was for purposes of enhancing efficiency in public procurement, to enable the government make significant savings, prevent corruption, open markets to international competition, and encourage the growth of local and small firms.<sup>11</sup>

Despite all the legislative provisions and investments in Information Technology (IT) for purposes of enhancing Public Procurement, the Auditor General's (AG) report has regularly highlighted procurement irregularities in the public sector. The AG reports raise questions about the efficiency of Zambia Public Procurement Authority (the Authority) in fulfilling its mandate of monitoring and regulating procurement in the public sector.<sup>12</sup>

In addition, the Financial Intelligence Centre (FIC), in their Trends Report for 2022 reports of cases of public institutions making payments for the procurement of goods and services which were not delivered. Specifically, the report highlights a case where a public institution made payments to a company for goods worth K2million which were not delivered. The report states that a member of the procurement committee was an associate to the company supplying the public institution and did not declare interest.<sup>13</sup> In another case reported by the FIC, a Ministry awarded an inflated United States Dollars Contract to a foreign registered company belonging to a Politically Influential Person (PIP) which had no physical presence in that country. The said ministry further failed to undertake due diligence regarding the company's physical existence, supply history and capacity. This contract was worth K345.5 million. These cases reported by the FIC show that the Zambian Government may have lost substantial amounts of funds through violation of the public procurement Act.

The FIC report identifies the following as red flags of corruption in public procurement;

- Overpricing of contract sum.
- Non-delivery of contract obligation.
- Failure to follow procurement procedure.
- Failure to disclose conflict of interest.
- Facilitation payments.

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<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> FIC Trends Report, [www.fic.gov.zm/about-us/79-fic-news/118-trends-report-2022](http://www.fic.gov.zm/about-us/79-fic-news/118-trends-report-2022), page 9

- Quick processing of tender and payments.
- Award of contracts to newly incorporated entities.

In addition, the Auditor General's annual reports over the years have shown continued misuse of public funds as they reveal issues such as failure to follow procurement procedures, wasteful expenditure and undelivered materials among other issues. Several incidents of fraud, corruption and mismanagement of public resources have compounded the already existing resource inefficiency resulting in increased poverty and reduced investments. Consequently, several large public projects have stalled at different levels of completion due to, in part, a violations of the procurement system.

The 2021 Auditor Generals' report on the education sector clearly showed these irregularities. Using this sector as a microcosm of public procurement impropriates, it may be fair to state that public procurement in Zambia still faces several challenges which require to be addressed. Furthermore, the education sector is a national sector, covering all regions of the country, thus, it exposes the irregularities that may be happening in other sectors nationwide.

# 3

## Procurement Malpractices highlighted in Auditor General Report in the Education Sector

The Auditor General's Report of 2022, highlights audit queries on procurement. This implies that even after the passing of the new Public Procurement Act, malpractices have continued to occur. Taking the education sector to represent other Ministries, the AG report notes the failure to management contracts, failure to declare interest and failure to deal with registered entities with Zambia Revenue Authority and the Authority. Below are extracts from the 2022 AG report.

Supply and Delivery of Educational Materials On 10th October 2022, the Ministry engaged Pebble Signs Advertising Company for the supply and delivery of 9,552 sign language charts and 3,821 teachers' guides and textbooks for learners with hearing impairment at Grade 1 to 3 levels at a contract sum of K8,364,000 VAT Exclusive with a delivery period of 2 to 6 weeks from the date of signing the contract. Clause 6 of the terms of the contract provided for the charging of liquidated damages of half (0.5) percent per week and not exceeding ten (10) percent of the contract price for none or delayed delivery. The supplier had not delivered the educational materials as at 31st August 2023 despite the supplier not delivering 3,821 textbooks under Lot 1 and 9,552 textbooks under Lot 2 for a delayed period of thirty two (32) weeks as at 31st August 2023, the Ministry had not enforced Clause 6 of the contract on liquidated damages.<sup>14</sup>

Section 89 (1) of the Public Procurement Act No. 8 of 2020 stipulates that a bidder is eligible to participate in a procurement if he is licensed, in good standing with the professional body to which the bidder is aligned where applicable and that bidder has fulfilled the bidder's obligation to pay taxes and social security contributions. Contrary to the Act, goods and services costing K47,465 involving twelve (12) transactions were procured at two (2) stations from suppliers who had no tax clearance certificates from the Zambia Revenue Authority (ZRA).<sup>15</sup>

<sup>16</sup>Irregular Procurements from Office Holders or their Relatives Section 15 (1) of the Public Procurement Act No. 8 of 2020 prohibits an office holder or their relative from bidding in a procuring entity by which that officer holder is employed. According to Section 3 of the Anti-Corruption Act of 2012, a relative includes persons such as a spouse, parent and child of a public officer. Contrary to the Act, during the period under review, two (2) schools procured various school supplies such as food rations and stationery in amounts totaling K362,873

<sup>14</sup> Auditor General's Report 2022, [https://www.ago.gov.zm/?wpfb\\_dl=274](https://www.ago.gov.zm/?wpfb_dl=274), Pp 133, 12 February 2024, 11:00am

<sup>15</sup> Ibid pp 153,

<sup>16</sup> Ibid pp 163

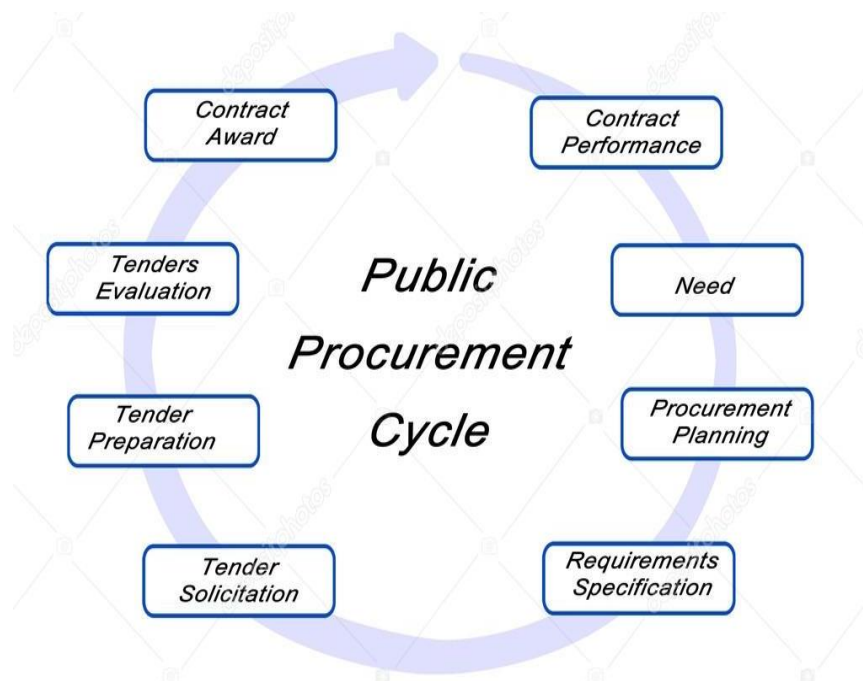
involving thirty-five (35) transactions from office holders within the schools or from relatives such as their spouses.

The FIC and Auditor general reports both flag concerns in public procurement. Some of these malpractices in and of themselves are not necessarily illegal while some are caused by structural rigidities and some are corrupt practices. For instance, it is well known that public procurement can be very complex and without a trained public procurement official, it is likely that malpractices will be encountered. The education sector is one that operates throughout the whole country and thus procurement is done at the local level where economic operators may not be present or are very few. Headmasters, with little or no procurement knowledge, may have to purchase supplies for school children while funding is delayed and this may lead to violation of the procurement Act. This defense is only for the rural PE that may not have trained procurement officers and limited EO operating in their areas.

# 4

## Best international practice on procurement

There are two major actors in public procurement, and these are Procuring Entities (PE) and Economic Operators (EO). In this case PEs include central and local government, ministries, statutory bodies, and state-owned enterprises. In accordance with the law any entity that receives public money or tax money is deemed a public entity and is thus governed by public law. Economic Operators are usually private sector supplier entities which offer the execution of works, the supply of products or provision of services.



The role of PEs in the procurement process is to issue tenders, evaluate bids and award contracts. It is also the responsibility of the PE to ensure that legal and administrative requirements are implemented. On the other hand the role of EOs is to submit bids in response to PEs' tenders and are awarded contracts.

To ensure that public procurement is transparent, accountable, with local participation and good oversight, there are several pre-requisites which need to be in place. This is because public procurement by its nature has inherent risks. Collusion and corruption can arise in any procurement procedure, whether occurring in the public or private sectors. Yet, the distinctiveness of public procurement renders it particularly vulnerable to anticompetitive and corrupt practices and magnifies the resultant harm.

Therefore, the whole sequence of public procurement, from needs assessment to award of contract and final payment must be supported by clear procurement methods.

## The Public Procurement Process

Public procurement can be split into the routine purchases of standard items, characterized by low value and high volumes, and the acquisition of complex goods, services or works, characterized by low volume and high value.<sup>17</sup>

The EU has issued directives regarding the procurement methods, to be followed by all member states for public procurements that exceed the set thresholds. The procurement procedures are categorized according to various parameters (i.e., type of contracts, types of goods/works/services). The different procurement procedures set their own limitations and thus not all methods are suitable for the procurement of all types of goods, services or works. These limitations must be taken into consideration when selecting the suitable procedure.<sup>18</sup>

The directives foresee specific instruments for covering the repetitive purchasing of PEs, whereby PEs establish agreements with specific EOs for covering their purchasing needs for a period of up to four years. In addition, other instruments are available for individual contracts concluded through one procurement process. In particular: for individual contracts, the following procurement procedures are defined:

- Open procedure
- Restricted procedure
- Negotiated (with and without advertisement) procedure
- Competitive Dialogue:

For repetitive contracts, the following procurement procedures are defined:

- Framework Agreements (FAs)
- Dynamic Purchasing System (DPS).<sup>19</sup>

At regional level, specifically, the Common Market for East and Southern Africa (COMESA) we see the similar objectives in COMESA public procurement Regulations of 2009. The Regulations state that their objectives include – (a) to foster competition and openness in public procurement procedures; (b) to foster fair management systems in procurement; (c) to promote accountability, transparency, and value for money in public procurement process for national development; and (d) promote harmonization of public procurement laws and practices for the enhancement of intra COMESA Trade. The regulations further provide for different procurement procedures similar to the EU.

Similarly, in Tanzania the procurement system is governed by the Procurement Act of 2011 and its Regulations and sets thresholds for different types of procurement. This is considering that there are mainly two types of procurement, the once off and the repetitive. The Act provides for various procurement methods, including open competitive bidding, restricted tendering, request for

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<sup>17</sup> World bank, E-Procurement Preparations, Open Learning Campus 2016

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

proposals, and direct procurement methods. The selection of the appropriate method depends on the value and complexity of the procurement.

The public procurement procedure in Tanzania includes tendering, evaluation, contracting, implementation and monitoring, procurement oversight, transparency and accountability, and preference for local suppliers.

## **Tenets of an Effective and efficient Public Procurement System**

In Tanzania the authorities have undertaken steps to enhance and improve transparency, efficiency, and effectiveness in public procurement. This includes legal and regulatory reforms, capacity building and training, technological adoption, procurement planning, monitoring and evaluation, and anti-corruption measures.

The World Bank states that an effective and efficient public procurement system can bring benefits in three broad areas of governance, effectiveness of government and market development. This encapsulates the steps taken by the European Union and the Tanzanian authorities.

### ***a. Governance***

The first broad benefit of an efficient public procurement is governance through transparency, accountability, corruption control and the rule of law. A public procurement system must be transparent with processes and procedures all made available to Economic Operators and the public. The process should be predictable, and auditors allowed to interrogate the process and the system.

Accountability is another governance benefit. This allows the stakeholders, including parliament, to quiz the PE on its methods and the PE should be able to take in the feedback. The other benefit under governance is corruption control. A transparent and accountable system greatly reduces incidents of corruption especially when the rules of public procurement are known to all key stakeholders. Following the law governing public procurement and ensuring that each public procurement is done within the confines of the law brings the benefit of rule of law.

### ***Parliamentary Oversight***

It is critical that Parliament has oversight of the procurement processes to ensure that public funds are used well by all PE. The amount of money used in public procurement is significant such that it is necessary for Parliament to have deliberate oversight to resolve any challenges that may be faced. There are structural rigidities in public procurement such as lack of internet in some areas of the country and this affects the ability of the PE to comply with the Public Procurement Act in terms of electronic government procurement. There are also challenges that many rural PEs do not have qualified procurement officers to advise on the requirements of the law.

Thus, Parliament must, through the Committee of National Economy, Trade and Labour Matters, follow all developments in public procurement to resolve outstanding issues ensuring that the Authority is well resourced, the legal framework is up to date, the PEs have necessary resources and the

procurement profession is recognized the way the accounting and legal professions are recognized. Further, Parliament should be trained on these matters to develop home grown solutions within the ambit of best international practices.

### ***b. Effectiveness of Government***

The second broad benefit of an efficient public procurement system is the effectiveness of government. This generally means that PEs can deliver goods, services and works in good time to the intended target population because the procurement system is efficient. Where procedures are unclear there are likely to be challenges in delivering goods and services and works. This is what the Auditor General's Report showed in the education sector, projects that had been fully paid for had not been completed on time.

Secondly government effectiveness is discerned in value for money, a key public procurement requirement. Resources are scarce and therefore each government wants to stretch each Kwacha as far as possible so that resources can be spread over a wide range of needs for the people. Where procurement is inefficient, the government usually pays for the same works two or more times due to poor quality of goods, services of works or no delivery of the same. The fact that the government is required to redo the works means that other needs of the people do not get the much-needed resources.

The third benefit of government effectiveness is civil society awareness. Oversight of public procurement by civil society promotes accountability and transparency, targeting to the efficient allocation and spending of public funds in a responsible manner and according to their intended cause.<sup>20</sup>

### ***c. Market Development***

Market development is the third broad benefit of an effective public procurement system. Public procurement creates competition among EOs including mainstreaming MSMEs into the economy. This leads to business development where local companies compete to gain contracts from the Government and therefore improve their goods and services. Competition will stimulate investment in research and development, efficiency, product innovation and lower prices all which would benefit the government and the public and re-position the local industry on the competitive landscape. Consequently, local companies will effectively compete in regional markets where if competition thrives will lead to regional market development.

Public Procurement can result in more Zambian owned companies participating in the mainstream economy. This is by recognizing that MSMEs constitute 97% of business and contribute about 70% to the Gross Domestic Product and create over 88% of employment in Zambia<sup>21</sup>.

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<sup>20</sup> World Bank, E-Procurement Preparations, Open Learning Campus, 2016

<sup>21</sup> Ministry of Small Medium Enterprise Development, <https://www.msme.gov.zm/>, 26 March 2024, 10:53

# 5

## Review of the legislation

In reviewing the procurement legislation, the public procurement Act of 2020 (PPA) must provide for the enabling environment which would allow for public procurement broad benefits in governance, effectiveness of government and market development. Thus, the review of the Act will be based on whether it has adequate provisions that would allow for transparency, accountability, competition, fairness, and promotion of participation of citizens. It will further review the adequacy of the provisions for corruption control and rule of law.

Other Acts to be reviewed will include the Anti-corruption Act of 2012 (ACA), the Public Finance Management Act of 2018 (PFMA), and the Companies Act of 2021 (CA). It should however be stated from the onset that these other Acts are there mainly to deter corruption and corrupt practices in public procurement. These pieces of legislation do not necessarily provide for the process of public procurement but do intersect on areas of corruption control, transparency and accountability. These Acts complement the Public Procurement Act No. 8 of 2020. The questions reviewed are;

- Whether the legal framework in public procurement is adequate to deter, prevent, and prosecute abuse of public procurement process?
- Whether the legal framework in public procurement is adequate to deter, prevent and prosecute corrupt practices in public procurement?
- Whether the legal framework is sufficient for the public procurement system to benefit from the tenets of a good public procurement system of good governance, effectiveness of government and market development?

### Public Procurement Act No. 8 of 2020

Provision	Pro or Con	Comment	Color Code
Preamble	<i>The Preamble is comprehensive enough to deal with public procurement</i>	The Act defines public procurement as “the acquisition of goods and services by: (a) government agency or parastatal body carrying out procurement using public funds or any other funds; (b) any other body or unit established or mandated by government to carry out procurement using public funds”. This definition covers all institutions and units that receive government funds or from any other funds and those that are mandated by government to carry out procurement.	Green

The preamble of the Public Procurement 2020 states that the following:

*An Act to revise the law relating to procurement so as to enhance transparency, efficiency, effectiveness, economy, value for money, competition and accountability in public procurement; regulate and control practices relating to public procurement in order to promote the integrity of, fairness and public confidence in, the procurement process; promote the participation of citizens in public procurement; continue the existence of the Zambia Public Procurement Authority; repeal and replace the Public Procurement Act, 2008; and provide formatters connected with, or incidental to, the foregoing.*

The preamble of the Act has three objectives. The first objective is to enhance efficiency, economy, and transparency in public procurement. The second objective is to regulate and control public procurement and the third objective is to promote the participation of citizens in public procurement. The preamble in its current form is adequate for a good and effective public procurement system. It covers the issues of governance, effectiveness of government and market development.

Section	Pro or Con	Comment	Color Code
Section 3	Section 3 is the scope of application, and it does allow institutions and units to amend procurement procedures where authority is sought from the Zambia Public Procurement Authority (the Authority) or where security defense contracts are being undertaken and where there is an agreement with another government or international organization.	The Authority should beforehand issues guidelines to the procuring entity for security and defense.	Orange

While it is understandable that security and defense contracts may not necessarily follow the laid-out procedures in the Act, it is advised that the Authority issues guidelines to the PEs for security and defense. If the issued guidelines are not adequate to cover the type of procurement by the PE for security and defense, the guidelines should provide for the PE to seek authority to the Authority to amend or implement a different procurement system. This would provide formal consistent and predictable public procurement procedures for goods, services and works in security and defense. Currently the status quo is that the PE provides the procurement procedure to which they make a request to the Authority for implementation. This may result in different approaches in procurement of similar goods, services and works from different PEs in security and defense. Further, this may lead to abuse of the procurement system as the PE may manipulate or circumvent the PPA to their favour.

Section	Pro or Con	Comment	Color Code
Section 4	Director General has no access to documents without letter from the President	Director General should have access to all documents and must have high security clearance	Orange

The Director General should have access to all documentation without a letter from the President as is currently the case. In other words, the Director General should have the highest level of clearance and must be vetted by the security wings. This enhances transparency and accountability for security and defense public procurement. Currently, section 3(5) states that the Director General can only have access with authority from the President.

Section	Pro or Con	Comments	Color code
Section 6	Functions of the Authority are numerous	Need to decentralize public procurement or digitalize it and requires a lot of resources	Orange

## Part II

The functions of the Authority are provided for in Section 6 of the Act. The functions include the regulation of public procurement but more so, a new function of benchmark prices and market prices for goods, services and works. The functions are many and unless the Authority is well resourced it may not be able to undertake all those functions successfully. Considering that the Authority serves the whole nation, it may be desirable that the functions of the Authority are decentralized or digitalized. Public procurement does not only happen in Lusaka but at every level of government and local government in every district of the country.

Section	Pro or Con	Comment	Color Code
Section 7	Board constitution is prescribed in the law naming public and private sector institutions with an exception of 2 members	If the Minister of Finance and National Planning does not conscientiously decide to balance the public and private sectors on the board, 8 members may come from government with only 2 members from the private sector. This may be a weakness to have such a one-sided board all representing government.	Red

The constitution of the Board for the Authority is provided for under Section 7 of the Act. There are 10 Board members coming from specific institutions named in the Act except for two members. Six of these institutions are Government institutions with 2 private sector institutions and 2 appointed for their experience and knowledge of public procurement. The latter two members may come from either the private or public sector as the Act does not specify. There is a likelihood that if the Minister of Finance and National Planning does not conscientiously decide to balance the public and private sectors on the board, 8 members may come from government with only 2 members from the private sector. This may be a weakness to have such a one-sided board all representing government. Consideration should be made to ensure that 4 members of the board come from the private sector.

Section 7	Pro or Con	Comment	Color code
Section 7(1) and 7(2)	Minister appoints Board members, the Chairman and Vice Chairman of the Board	Section 9 of the Law provides for the President to appoint the Director General. This raises governance issues	Red

The Board is appointed by the Minister of Finance (section 7(1)), who also appoints the Chairman and the Vice chairman from among the members (Section 7(2)). However, the Director General of the Authority is appointed by the President under Section 9. This raises a governance issue that while the Board is there to direct and provide direction of the Authority, the head of the institution, Director General, is appointed by a higher authority and not the Board. This clearly raises the problem of whether the Board can give instructions to the Director General and whether the Director General can receive instructions from the appointing authority directly. What may be preferred would be for the President or the Minister of Finance to appoint the Board and the Board would then subsequently appoint the Director General.

Section	Pro or con	Comment	Color Code
Section 12 (2) and 12(4)	Procuring Entity shall procure standard goods with the market price index	This index can distort competition and PE may not get value for money.	Orange

### Part III

Public procuring entities are now required to procure standard goods and services in accordance with the Market Price Index. Specifically, sections 12(2) and 12(4) of the PPA provides that;

*“A procuring entity shall procure standard goods, services and works in accordance with the price index issued by the Authority.”*

*“A procuring entity shall, where an item to be procured is not covered in the quarterly market price index (MPI), undertake a price reasonableness analysis subject to the approval of relevant approvals Authority, as prescribed.”*

“We are cognizant of the Government’s effort to minimize the wastage and misappropriation of public funds through procurement of highly priced goods and services. The introduction of the MPI is aimed at benchmarking the reasonable price range at which goods and services will be procured within the public service. However, the introduction of the MPI in the manner it has been done is likely to affect competition which the Public Procurement Act No 8 of 2020 and the Competition and Consumer Protection Act No. 24 of 2010 seek to promote. The current approach to the MPI will:

- a) Serve to eliminate price competition – the MPI has the effect of setting prices for all market players in violation of section 9 of the competition and consumer protection Act;
- b) Justify uncompetitive prices – the MPI may Justify uncompetitive prices for example if prices in the market decrease, the MPI may justify higher prices. The amendment of the in 2023 now allows the PE to negotiate the price if the MPI becomes outdated due to inflation or deflation;
- c) Create foreclosure effects – the MPI may prevent companies with superior products but at higher prices from entering the market.”<sup>22</sup>

<sup>22</sup> Competition and Consumer Protection Commission submission to National Assemble Committee on National Economy Trade and Labour Matters

Section	Pro/Con	Comment	Color Code
Section 12(5) and 12(7)	Sanction for an office holder who pays an over inflated price	This is meant to curb corruption	Green

The Act under Section 12(5) and 12(7) provides for punitive actions to be undertaken against an office holder who willfully or negligently pays an over inflated price for goods, services or works. This provision is meant to curb corruption and bring about the rule of law.

Section	Pro/Con	Comment	Color Code
Section 13	Provides for non-discrimination and if so must provide reason	Provision does not define reason. This can be manipulated	Orange

Under section 13 the Act provides for non-discrimination and where this applies the PE must provide reason. This may be of concern as the word reason for discrimination has not been defined and does not necessarily say that the reason must be good or bad. Granted that the legislature must have provided that the reason must be good, however, being specific would make the provisions much stronger to stop office bearers from manipulating the system.

For example, when the Ministry of Local Government bought 42 fire trucks at a cost of USD42 million in 2017 they provided a reason as to why the fire trucks costed USD 1 million each. In the eyes of the public the cost of the fire trucks was exorbitant but the PE provided reasons and thus it may not be viewed as a corruption matter. Honorable Minister for Local Government Garry Nkombo is quoted by Diggers Newspaper of 24 February 2022 as having said the following in parliament:

“ I wish to state that I am aware that some sort of investigation occurred on the procurement of these fire tenders whose details of conclusion I do not have... I am aware that the procurement of these fire tenders went through the Zambia Public Procurement process...If the House so desires I can go to ZPPA to check whether the processes were followed and whether the ACC’s investigation has revealed anything or if the matter is still ongoing...”<sup>23</sup>

Section	Pro/Con	Comment	Color Code
Section 14	Standard procurement documents	These may not be accessible to rural enterprises. lack of Infrastructure can exclude MSMEs	Green Red

The Act under section 14 provides for standard procurement documents. While this is a welcome move and does enhance participation, but the lack of internet in rural areas may limit participation of rural entities considering the medium of communication provided for in Section 14(4). The issue here is not the provision in the Act but the lack of infrastructure which is likely to affect the participation of rural enterprises.

<sup>23</sup> <https://diggers.news/local/2022/02/24/nkombo-updates-parley-on-status-of-42m-fire-trucks/>, 12<sup>th</sup> February 2024, 12:47pm

Section	Pro/Con	Comment	Color Code
Section 14(5)	Information that can be shared	Increases transparency and accountability	Green

Section 14(5) provides for what information can be shared and the time frame for which that information can be shared with the public. Confidential information may not be shared as provided for under Section 20. This increases transparency and accountability.

Section	Pro/Con	Comment	Color Code
Section 16	Provides for E-Government Procurement	Good provision but to implement one needs resources, standards, training, adoption of E-GP. It has not fully been implemented	Green Red

Section 16 provides for the Electronic Government Procurement (e-GP). This type of procurement system is considered the best because it achieves many benefits including governance, effectiveness of government and market development when implemented correctly. This requires the following to be in place:

- Resource availability
- Management of standards
- Design of the e-GP implementation
- Adoption and use of the e-GP system
- Training and support

The Report on the Committee on National Assembly Committee on National Economy, Trade and Labour Matters – Public Procurement in Zambia, 2<sup>nd</sup> Session of the 13<sup>th</sup> National Assembly, June 2023 noted that the Authority had introduced the e-GP system and yet the Auditor General report reported discrepancies in public procurement. It can be safe to assume that the Authority did not have the necessary pre-requisites elements stated above in place as the e-GP Programme has been piloted for some institutions while other institutions and ministries continued with the paper-based procurement systems.

Section	Pro/Con	Comment	Color code
Section 18 and 19	Curb corrupt practices	This is a good provision	Green

The Act under Section 18 and 19 provides to curb corrupt practices. The amendment of 2023 to section 18(4)(a) provides for a bidder who engaged in corruption to be suspended. These provisions speak both to the bidders and the office holders who may engage in such vices.

Section	Pro/Con	Comment	Color code
Part IV	Functions of PE	Detailed duties and responsibilities of everyone involved in public procurement	Green

#### Part IV

The part provides for the functions of the PE, The Chief Executive Officer, Procurement Committees, Procurement Units and the User Departments. It also provides for the duties and responsibilities of each of these functions. These will be discussed later in the paper.

Section	Pro/Con	Comment	Color Code
Part V	Methods of procurement	Detailed provisions of methods of procurement	Green

#### Part V

This Part provides for the methods of procurement with detailed provisions for each type of procurement method. This includes when to use what type of procurement method i.e. whether it is open bidding (national or international) or open selection (national or international), Limited bidding and Limited Selection, Simplified bidding and simplified selection, Direct bidding and direct selection, electronic reverse auction, Force Account, purchases from other PEs, Procurement for Infrastructure for private financing and award for concessions and community participation in procurement.

Section	Pro/Con	Comment	Color Code
Part VI	Provides for Procurement process	Detailed provisions	Green

#### Part VI

This part provides for the procurement process. Specifically, these provisions cover choice of procurement procedure, pre-qualification, commencement of procurement to award of contracts, deviation of contracts to accreditation of procurement system. It deals with the procurement process from the beginning, the middle and the end. Since not all provisions are contentious, only those identified as being critical will be discussed.

Section	Pro/Con	Comment	Color Code
Part VII	Stores management in PPA and PFMA not aligned	Management of stores in the two Acts is not aligned	Orange

#### Part VII

This part deals with inventory control asset and stores management and distribution. The PFMA also has a provision on stores management and the two should complement each other. This is not the case, however, the non-complementarity is not fatal.

Section	Pro/Con	Comment	Color Code
Part VIII	Compliance monitoring and enforcement	Provides the Authority with power to monitor PEs	Green

## Part VIII

This part provides for compliance monitoring and enforcement. Basically, it gives power to the Authority to monitor PEs and obligates PEs to send reports and information to the Authority. (Green)

Section	Pro/Con	Comment	Color Code
Part IX	Provides for eligibility, conduct, qualification of Economic Operators	Allows Authority to determine the beneficial owners of companies	Green

## Part IX

This part deals with the conduct of bidders and suppliers. It provides for their eligibility, their conduct, qualification, reservation schemes, and participation of a public body in procurement. The Part also provides subcontracting policy, suspension of bidders and supplier and the grounds, a supplier database, and when a supplier or bidder can be barred from participating in procurement permanently. Further, it provides for rejection of bid or offer and the appeal process against suspension.

This part is progressive because the Authority can use the eligibility criteria to and registration to know the beneficial owners of companies registered with the Authority. The Authority can use the Companies Amendment Act No. 12 of 2020 which broadened the definition of beneficial ownership as follows:

“beneficial owner” means a natural person who—

- (a) directly or indirectly, through any contract, arrangement, understanding, relationship or any other means ultimately owns, controls, exercises substantial interest in, or receives substantial economic benefit from a corporate;
- (b) exercises ultimate and effective controls over a legal person or legal arrangement; or
- (c) effectively controls a legal person or legal arrangement on whose behalf a transaction is conducted; and the terms “beneficially own”, “beneficial ownership” and cognate expressions shall be construed accordingly;

Further the Companies Amendment Act defined substantial economic benefit and substantial interest as follows:

“substantial economic benefit” means the benefit realised by a natural person from a body corporate legally or equitably, of at least five percent of the—

- (a) distribution of dividends; or
- (b) proceeds of a transaction; and

“substantial interest” means at least five percent ownership of shares of a body corporate by a natural person, legally or equitably.

This amendment of the Companies Act allows for transparency in the ownership of the registered entities with the Authority. Thus, where individuals fail to declare interest, the Authority using Section

89 can obtain better particulars of a company from the Patents and Companies Registration Agency on the beneficial owners.

Section	Pro/Con	Comment	Color Code
Part X	Provides for appeals	Provides for due process	Green

#### Part X

This part provides for appeals, not for suspension but to a procurement that may have been awarded. The Act provides that should the parties fail to reach an agreement arbitration will be carried out.

Section	Pro/Con	Comment	Color code
Part XI	General Provisions	Provide for good enforcement of the Act	Green

#### Part XI

This part provides for the general provisions of the Act including provisions on framework agreements, code of conduct, conduct of bidders and supplier, offenses, limitation of liability of controlling officer, general penalty provision and offence by principal officers of body corporate. The other provisions include compensation, transfer of functions of procuring entity to others, circulars and publication, regulations and repeal of the Act No. 12 of 2008.

# 6

## Interface of the Public Procurement Act and other legislation

This report will analyze the intersection of other pieces of legislation with the public procurement Act. Specifically, the analysis will look at the Anti-corruption Act and the Public Finance Management Act to see if they are in harmony with the Public Procurement Act. It is safe to state that these two pieces of legislation are generic and do not necessarily focus on public procurement but on corruption and public finance management. Thus, the intersect with the public procurement relates to corrupt practices and how public finance is utilized by those entrusted with it.

To guide the analysis, the report will review the FIC red flags for corruption in public procurement to systematically look at the legislation and how they affect public procurement.

### Over pricing of contract Sums

One of the most common infringements of public procurement is over pricing of contract sums. The Parliamentary report states that delays in payment and corruption are some of the elements that lead to EO overpricing. Their defense is that they need to over price to cater for the delays in receiving timely payments. Where an EO has had to borrow funds from a financial institution, delays in payments by a PE result in default in paying back the loans with extra charges or penalties. Thus, the EO provides for this by overpricing the contract sums. Another defense is that of office bearers soliciting bribes for the EOs to win the tenders. Therefore, the EO will factor in the bribe in the pricing and overstate the contract sum.

To curb overpricing of contract sums, the PPA provides under section 12 that a PE must refer to the price index of goods which the Authority will publish every quarter. Where a good or service is not covered by the price index Section 12(4) states that the PE must undertake a price reasonableness analysis subject to the approval of the Authority. Any office bearer who negligently or willfully violates section 12 commits an offense. In addition to this provision, both the PMFA and the ACA under sections 11(j) and 21 respectively further strengthen law to deal with willfully and negligent conduct and corrupt practices.

Specifically, the Anti-corruption Act compliments the PPA and provides that it is illegal for a public officer to solicit for a bribe in exchange for gratification under section 19. This section states the following:

*Section 19 (1) A public officer who, by oneself, or by or in conjunction with, any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person or for oneself or for any other person, any gratification as an inducement or reward for doing or forbearing to do; or for having done or forborne to do, anything in relation to any*

*matter or transaction, actual or proposed, with which any public body is or may be concerned, commits an offense.*

This provision does not only criminalize the act of solicitation for a bribe, it criminalizes the intent to solicit for a bribe. In other words, it is enough to arrest an individual for attempting to solicit even if the whole act does not materialize. This is a very progressive provision. In section 19(2), the Act provides for a person who corruptly gives or promises or offers any gratification to a public officer. Thus, where a corrupt act occurs, both the public officer and the person offering gratification can be criminally charged and arrested. Furthermore, the ACA provides under section 21 for abuse of authority of office. Where a public officer decides to procure goods without following the market price index, to the detriment of the government or the PE, the officer may be charged with and investigated for abusing their authority of office. Specifically, section 21(1) states that

*A Public officer commits an offense who (a) does, or directs to be done, in abuse of the public officer position, office or authority any arbitrary act prejudicial to the rights or interest of the government or any other person:*

The implication of section 21 in its entirety, is that the public officer may be investigated both under the PPA and the ACA.

The PFMA under section 11(1) (j) states the following;

**11. (1)** A controlling officer is responsible for planning and controlling of revenue collection and expenditure of public funds appropriated under that controlling officer's control including (j) preventing irregular or wasteful expenditure, misapplication of funds, theft, or losses resulting from negligence or criminal conduct and immediately report, in writing, particulars of that wasteful expenditure, misapplication of funds, theft or loss to the Secretary to the Treasury;

This provision in the PFMA identifies negligent and criminal conduct and places a responsibility on the controlling officer to report such to the Secretary to Treasury (ST). Where there is overpricing of a good or services, this is wasteful expenditure, and the onus is on the controlling officer to report to the ST. The PFMA also provides that an officer who may be negligent resulting in loss by government can be disciplined and may be asked to repay to government the loss incurred. And where the conduct is criminal the officer may be reported to law enforcement agencies such as the Anti-corruption Commission. This provision should deter would be offenders to desist from such conduct.

The PPA, in trying to curb overpricing and dealing with the delayed payments provides that a PE should not publish a tender if it has no budget for the tender and the necessary approvals. The PPA in defining the procurement process prescribes that each PE should have a procurement plan and budget for it. The responsibility is placed on the procurement committee, the board and the Chief Executive officer that this is undertaken, and the procurement plan must be approved by the Authority. The Public Finance Management Act, on the other hand, places responsibility on the CEO and the controlling body to ensure that all public procurements are done within a budget under section 11 (j). In addition,

controlling officers and controlling bodies must adhere to the PPA as stated under section 11(h). It also places fiduciary duties in controlling officers and controlling bodies under section 12. Violation of these two provisions may result in disciplinary action and even prosecution under section 49 of the PMFA. Thus, it is expected that, where there is no procurement plan and budget, the PE cannot publish a tender or even receive goods and service and works as this would violate the PPA and PMFA. The Anti-corruption Act may consider this corruption as it relates to abuse of authority under section 21.

- Non-delivery of contract obligation.

Public procurement in Zambia has suffered from no delivery of contract obligations. In the education sector, the Auditor General's report noted that there were incidents of government having paid for the contraction of a university in Luapula Province in full, but the reality was that the university was never built. There are many other examples like this not only in the education sector but in the public sector in general.

When goods and services are not delivered to a PE it usually is because of corruption, negligence, or lack of due diligence on whether the providers have the capacity to deliver the goods and services or works. Where a Politically influential Person (PIP) is involved, usually resulting in corrupt practices, the PE may be put in a situation where it fails to fully carry out its due diligence in accessing the EOs that have tendered. These PIP if in public office abuse their authority by giving, usually verbal, directives as to who should awarded a tender by PE. Examples of such have been highlighted by the Financial Intelligence Centre (FIC) Trends Reports of 2022.

There are also instances where public officers due to negligence may not necessarily follow the contract terms resulting in them paying upfront and not receiving the goods and services or works. Other instances are where the bidders<sup>24</sup>, provide contractual terms and conditions that require that payment is made up-front, and the PE accepts these terms and conditions to the detriment of the PE. This raises the question of competence of the Chief Executive Officer, the procurement unit and even the procurement Committee. The PFMA places responsibility on authorizing officers under Part IV for any loss that may occur from such. In other words, a loss resulting from incompetence of personnel can be placed on authorizing officers.

The PPA in dealing with non-delivery of goods have made several provisions which in concert should help a PE to receive the good and services they may have paid for. The PPA first and foremost has created separation of powers under Part IV for the procurement entities. This is vital in monitoring whether the goods, services or works have been delivered or not. The procurement entity under section 24 has the controlling officer, the procurement committee, the procurement unit and the user department. Any procurement must be initiated by the user department which is also in charge of eventually receiving the procured goods from the stores department. Section 82 of the PPA relates to the management of procured goods. It states that the goods should be received by the stores department and then released to the used department. Each of these levels created by the PPA act as checks and balances.

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<sup>24</sup> Bidders at times would like upfront payments to avoid delayed payments

Further all procurement made by a PE should be reported to the Authority in a prescribed form. This also acts as another layer of checks and balances as the Authority should be able to note through the minutes of the procurement committee whether goods and services procured were delivered.

The PPA secondly under section 19 provides to curb corrupt practices. This section states the following:

19. (1) A person shall not engage or be involved in a corrupt, coercive, obstructive, collusive or fraudulent practice or conflicts of interest in any procurement proceeding.

Subsection 1 of section 19 is very general and does capture most conduct that has been discussed in relation to non-delivery of good and services to a PE. Specifically, where a PIP is involved, this provision clearly states that they shall not engage or be involved in corrupt, coercive, obstructive, collusive, or fraudulent practice or conflicts of interest. This prohibition is not only for the PIP but to public officials and EOs too. This provision sits well with Section 19 of the Anti -corruption Act.

The second subsection of section 19 of the PPA, provides the PE of recourse should section 19(1) be violated. The PE may void the contract and seek other legal means available to it and may even institute criminal proceedings against any person who violates section 19. There is, however, a weakness in the practicality of seeking legal means available. This is because the process of seeking legal means through the judiciary is usually very tedious and slow. This encourages EOs, even when in direct violation of the contract, to blatantly refuse to cooperate, because they know that the legal recourse will take a long time. Subsection 19(3) provides for the conduct of an employee of the PE who may have interest in an EOs that is tendering. The principle of this subsection is that the employee should first and foremost declare interest and secondly must not participate in the assessment of the tenders. Other subsections of section 19 further provide for conduct of an individual who has interest.

In the Anti-corruption Act, conduct which would result in corrupt practices would be captured under section 19. Again, in this Act both the public and the private officers involved in such practices can be arrested and prosecuted. The Public Finance Management Act compliments the PPA especially under sections 11, 12 and 49. However, the PMFA provides that stores and procurement units should be separate with the former unit falling under the Department of Finance and the latter under the Chief Executive Officer. This further separation of powers is meant to bring about accountability and to some extent deal with non-delivery of goods. The Zambia Institute of Purchasing and Supply do not believe this arrangement to be good. The following is their response to the parliamentary committee:

“The Institute's firm stance is to settle the dispute between PFMA and PPA. In the submission, the Institute is of the view that Procurement and Stores are inseparable and are intertwined just as receivables, payables and treasury are inseparable. The Institute noted that PPA Act is not clear as to where store’s function falls. It observed that one part says those handling stores should have a qualification in Procurement and Supply while on the other hand the subjects the Stores practitioner to fall under Finance as guided by the Public Finance Management Act,2018. The Institutes notes disjoint and the ZIPS delegation’s plea to the Committee was that Stores reverts to its rightful place.”

We however noted that the PFMA stands to deal with conflict of interest in the procurement unit by ensuring there is a separate set of eyes on items procured. This could be because of many incidents of non-deliver of goods or delivery of goods not according to specifications.

- Failure to follow procurement procedure.

Procurement procedures or in other words bureaucracy have been put in place to safeguard the public procurement process. This builds confidence in the process in all stakeholders and allows for predictability, transparency, and accountability. Therefore, a breach or departure from the prescribed process, even when there is no malpractice on the part of the stakeholders involved, may lead to loss of confidence in the procurement process and disciplinary and in some cases criminal action, or both, against the public officers who have not followed the process.

The FIC report shows that where procedures were not followed or quickened, there was a possibility that there were corrupt practices. The PPA under section 3 and 89, clearly states that before a contract between a PE and EOs the necessary approvals must be granted by the authorizing bodies. In some cases, this may mean getting approval from the Authority, the Treasury, and Attorney General. This does not exclude PE from getting approval from the Authorizing body such as the Board of Directors, and the Procurement Committee.

Different procedures are set out for different types of tenders and PE is tasked to ensure that they follow all the procedures. The downside of all these approvals is bureaucracy and delays in execution of tasks, however, this is meant to reduce the incidents of fraud and corruption. These approval processes offer an extra layer of transparency and accountability.

Not following procedure, in the ACC Act can be considered an abuse of office especially if the office bearer or any other person will benefit from the procurement in one way or another. To prove this, the elements should include the fact that the office bearer benefits, directly or indirectly, or that he/she acted in such a way that another person benefited from that conduct or omission to the detriment of the PE. Usually, when such procedures are not followed, the conduct will result in someone benefiting and it would be to the detriment of the PE. Where such is true, the officer may be disciplined and even prosecuted under Part IV of the PFMA. However, if lack of following procedure is because of negligence, the public officer may be disciplined and may even be required to compensate government for loss incurred.

The anti-corruption act and the public finance management Act provide provisions that should deter a public officer. The provisions give responsibility and ownership to the public officers for their actions including when they conduct public procurement. If they are not responsible for the conduct, they have been granted powers in the PFMA under section 11 to bring the culprits to book and to discipline them if necessary as provided in Part IV.

- Failure to disclose conflict of interest.

Failure to disclose conflict of interest has been highlighted as one red flag which occurs in public procurement. This conduct occurs when a member of the procurement committee has direct or indirect connections with the EO that is tendering for delivery of goods, services or works. Best international practice suggests that when a member is so conflicted, they need to declare interest in the matter stating their reason for conflict and thereafter not participate in the procurement process. This is done to ensure that the member with conflict does not influence the procurement process. There are also incidents where PIP has influence over a member of the procurement committee. Where such occurs the member of the committee who has a relation with the PIP should declare interest and not participate in the procurement process. The PPA under section 19 (3) provides that a member of procurement entity who is conflicted should declare interest and not participate. This is in accordance with international best practice. However, the PPA does not end there but provides for procedure during a procurement committee on declaration of interest. It states under section 30(6) and 30(7) provides the following:

30 (6) A member or person who is present at a meeting of a Procurement Committee or a subcommittee of a Procurement Committee at which any matter, in which that person or that person's relative or associate, is directly or indirectly interested in a private capacity is the subject of consideration, shall, as soon as is practicable after the commencement of the meeting, disclose that interest and shall not take part in any consideration or discussion of, or vote on any question relating to that matter.

30 (7) A disclosure of interest made under this section shall be recorded in the minutes of the meeting at which it is made.

These provisions clearly state that the members shall not take part in the process relating to the matter for which they have interest. Further, to enhance transparency and accountability, section 30(7) requires that the declaration of interest be recorded. Therefore, where a contract is granted to an EO, when a member of the procurement entity did not declare interest, the PE may terminate or cancel the procurement proceedings. Specifically, section 69 (g) and (j) provide for cancellation when there is evidence of corrupt practices and material governance issues are detected respectively.

The ACA under section 28 deals with declaration of interest. It states that where one has an interest in a matter, they should disclose in writing to the public body that they are conflicted and the reason thereof. In addition, the public officer will not take part in the voting or discussion of the matter in which they have an interest. Failure to disclose interest and not participate in the matter is a criminal offense. The PPA and the ACA are harmonized on the issue of conflict of interest. The elements to prove are the same and the provisions are similar.

Under the PFMA under section 12 (2)(B) states that a controlling officer may not

*12(2)(b) use the position or privileges of, or confidential information obtained as, controlling officer or a member of a controlling body, for personal gain or to improperly benefit another person.*

The principle of this provision is that one cannot use their position to benefit themselves or other persons. This provision is further strengthened with Section 12(3) which states that:

*12(3) A controlling officer, or a member of a controlling body shall (a) declare any direct or indirect personal or private business interest that member or spouse, partner or relative may have in any matter before that controlling officer or the controlling body; and (b) withdraw from the proceedings when that matter is considered.*

All the three pieces of legislation are in harmony regarding declaration of interest. The PFMA provides for disciplinary action and reporting the conduct to law enforcement agencies under section 12 (4). A public officer may be suspended or have their employment terminated. The Companies Act makes it easier for law enforcement agencies to know the beneficial owners with the beneficial owner's registry. This makes it easier for law enforcement.

- Facilitation payments.

Facilitation payments are corrupt practices usually undertaken by a member of the PE. There are usually two sides to facilitation payments, the first where the public officer solicits payment to facilitate an award of contract and secondly where the EO makes the solicitation to be awarded a contract. Both conducts are expressly prohibited not only in the PPA but the ACC and PFMA. Sections 19 of both the PPA and the ACA prohibit corrupt practices under which facilitation payments falls.

A public officer in soliciting a facilitation payment is basically taking a bribe so that they can influence the procurement process in favour of the EO that is providing gratification. Thus, such conduct is a direct violation of section 19 of the PPA and section 19 of the ACA. The ACA states that even the intent to solicit for a facilitation payment is a bribe and violation of the ACA. This is meant to act as a deterrent to public officers and EOs so that they do not engage in this conduct.

Facilitation payments simply mean that the public officer will not act in the best interest of the PE. Section 12(1)(a) and (b) of the PMFA, clearly provides the following:

**12. (1)** A controlling officer or controlling body shall—  
(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of a public body; (b) act with fidelity, honesty, integrity and in the best interests of the public body in managing the financial affairs of the public body;

Violation of this provision may result in disciplinary action or reporting to law enforcement agencies or to both (section 12(4)).

- Quick processing of tender and payments.

The quick processing of tenders and payments though in itself may not be a violation of any law, provided all procedures were followed and due diligence was carried out. Usually where processes are hastened, tender procedures and processes are not followed. This leads to a loss for PE in that they do not get value for money as competition may have been foreclosed, or goods and services are not

delivered or if delivered are of substandard. It is not always the case, but the reason for quick processing of tender payments is because there may be something wrong with the tender process or the goods and services to be delivered. PE, therefore, has legal options which it can undertake, including cancelling the contract. But when payments have been made, the bargaining power and legal options of the PE are drastically reduced.

For example, in an open tender, the PPA prescribes time frames for every step of the procurement process. Shortening this time frame disadvantages some EOs and is therefore not fair for others that may want to submit their bids. While it may be understandable, especially in emergency situations to quicken the process, there is however no excuse as the PPA provides for what should be done in that case. It can only mean that a process or procedure has been quickened because of a benefit that may accrue to one of the EO, possibly one that has influence or one that has been promised with an award in exchange for gratification.

Quick payments after the award of the contract are usually problematic when goods have not been delivered or are not to the specifications. Thus, the quick payment is meant to rob the PE resources without providing and service for the amount paid. Again, without following the contractual terms of how payments should be made and whether the contract is being managed properly for the benefit of the PE, decisions to make any payment outside the terms of the contract robs the PE of vital resources. This is more so when payments of invoices are not chronological and without good reason.

Under the ACA this quickening of tender process and payments can be an abuse of authority under section 21. Like, it has stated earlier under failure to follow procurement procedure, the conduct of a public officer to do or direct the shortening of the process, without good reason and authority is criminal.

Quick payments that result in loss to the PE can be a violation of section 11 and 12 of the PFMA. As has been stated above the PFMA places responsibility on the public officer to ensure that the PE does not lose finances through negligence or criminal conduct. Thus, the PFMA provides for action to be taken against public officers who may engage in such conduct under section 12 and Part IV.

- Award of contracts to newly incorporated entities

The PPA under section 13 states that there should be no discrimination in awarding of contracts. However, under Part VI all bidders and suppliers should be vetted and authorized. In other words, there is no provision that prevents a newly incorporate entity from participating provided the PE take time to verify that the entity is registered and have presence in the jurisdiction they claim to be incorporated.

Due diligence is critical for any PE to undertake. Where there is little or no information on the EO, the PE can request more information and assurances from the newly formed enterprises to satisfy itself. Unfortunately, some PEs have awarded contracts to newly formed companies with no reputation or history of having been in the industry. In some cases, this has resulted in non-delivery of goods and services to the PE. Basically, PEs have been satisfied with the information provided without taking

further steps to find out more about the capabilities of the new companies. But it is noted that this has been true where the owners of the company are known individuals to the PE staff members and therefore find no need to carry out due diligence assessments. In other words, the PE is compromised by either, directives from PIP, or because they are conflicted. This violates section 19 of the ACA and sections 18, 19 and 26 of the PPA.

Under the PFMA it is not a crime or a disciplinary issue for a PE to grant an award to a newly incorporated company. This red flag highlighted by the FIC is not that newly incorporated companies should not be granted any awards, but that they should be a basis and assurance for awarded a newly incorporated company a contract because they have no history or reputation on the market of having delivered the goods or service or works. This comes down to the PE undertaking appropriate due diligence and satisfy themselves that the newly incorporated company can undertake the contract and deliver on it. Section 12 of the PFMA as earlier stated ensures that public officers carry out their duties for the benefit of the PE.

This paper has focused on three issues. These are whether the public procurement legal framework can prevent abuse of office and provides adequate provisions to discipline and prosecute an offender. Secondly, the paper reviewed whether the legislation could prevent corruption and is adequate to prosecute those engaged in corruption in public procurement. Lastly the paper focused on whether the public procurement framework in Zambia meets international best practices.

On the part of the legal framework, the elements analyzed were whether the pieces of legislation reviewed were in harmony and thus, able to deter would be offenders from engaging in abuse or corrupt practices. The analysis focused on the red flags identified by FIC as those appear to the violations/concerns that happened in 2022 after the passing of the Public Procurement Act 2020.

We can conclude that the pieces of legislation reviewed are in harmony. In some instances, the provisions are almost identical, i.e. provisions on declaration of interest. There is no conflict in the laws reviewed. In tackling the issues raised by the FIC, the laws complement each other with the PPA dealing with actual behaviour when conducting public procurement. The ACA would deal with issues of corruption and abuse of office while the PFMA highlights those responsible for public finance and how they should use it. All these pieces of legislation provide for civil and criminal cases and are adequate for deterrence and prosecution.

The question that may be asked is why then do we still have audit queries in public procurement? There are several reasons that can be put forward. The first is that while the legislation aims at eliminating corruption and abuse of office, it appears the public officers have found ways to circumvent the provisions of the law. This is a matter where public officers willfully engage in such conduct and the authorizing bodies do not question their conduct, thus training is required for all who participate in procurement. This training should aim more of changing the mindset of those involved in procurement,

The second reason is that the current procurement system, paper-based system is not necessarily the most secure in preventing corruption. The PPA provides for an e-Government procurement system, but this has not been implemented yet. This system will greatly reduce incidents of corruption if implemented properly. The Authority must be granted all the resources they need to implement this e-Government procurement system.

Thirdly, for there to be deterrence in committing crimes, the legal system needs to be efficient and corrupt free. Only when public officers that have been found wanting are prosecuted successfully, will the legislation be a deterrence. This is not about the provisions of the laws but the conduct of investigators and the judicial authorities. In other words, the fight against corruption has been weak in both detection and prosecution. This also goes to poor coordination among agencies with a role to

play in procurement and in fighting corruption, while in the recent years there have been some successful prosecutions, many more cases need to be brought to the courts and prosecuted successfully. We are happy that the cases raised by the FIC have been reported to the law enforcement officers. Zambia is number 98 out of 180 countries on the Transparency International corruption index. Since 2022 Zambia's index has improved by 4 points to 37 out of 100.<sup>25</sup>

Fourthly, public officers placed with the responsibility to oversee public finances and procurement, must take up responsibility to ensure that systems are put in place that would protect public funds. While the law, specifically the PFMA has the provisions, little has been done to enforce these provisions. This raises the question of capacity of the PE to actually implement the said provisions.

The other element that the paper reviewed was whether the legislation provides to best international practices and whether this would culminate in good governance practices, effective government implementation and market development.

A review of best international practices from world institutions such as the World Bank and the OECD show that the current PPA in Zambia meets the standards. The law is modern and provides adequately for a good procurement system. The issue, already highlighted, is that of implementation. The PPA provisions have not all been fully implemented and this has caused public procurement in some PEs to continue using the old system. It is clear that section 16 of the PPA needs to be implemented (e-Government system) but this requires the following to be in place:

- Resource availability
- Management of standards
- Design of the e-GP implementation
- Adoption and use of the e-GP system
- Training and support

## Recommendations

1. Implement the PPA fully. It is clear from the report of the Auditor General that the Public Procurement Act is not fully enforced. For example, no tender should be published without a procurement plan or budget for the good or service. Therefore, it is expected that the issue of non-payment of Economic Operators should be a thing of the past. However, there are still incidents of this happening. A lot of public funds are lost as shown in the discussion above by not fully implementing the PPA.
2. Train all procurement bodies and authorities and civil society so that the level of checks and balances are enhanced. Have procurement officers in all PEs. This may mean the Authority developing a simplified training course on procurement to reduce incidents of procurement malpractices.

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<sup>25</sup> <https://www.transparency.org/en/cpi/2023>, 12 February 2024. 13:11

3. Fully enforce section 14 on information that can be made public as this would enhance the checks and balances of the PE conducting procurement.
4. Enhance Parliamentary oversight – for example Constituency Development Fund (CDF) should be closely monitored by members of Parliament in their own constituency and the Committee on National Economy, Trade and Labour Matters. Further, Parliamentarians should be trained in public procurement matters.
5. Implement the PFMA fully. Controlling officers and controlling bodies are not taking adequate steps to discipline erring officers under this Act. There is a need for training on this Act too. It would be advisable to train the supervisors on their role in enforcing the Act to ensure that they are able to bring to book officers who may abrogate the law.
6. Fund the Authority adequately – The Authority requires a lot of resources to train all stakeholders on the Public Procurement Act and its provisions. Further, the mandate of the Authority is wide and covers many aspects that require a lot of resources both financial and human. Good and adequate funding will allow the full implementation of the PPA.
7. Improve the efficiency of the investigative wings and the judiciary – this will lead to deterrence.
8. Train law enforcement agencies on white collar crimes – this will lead to airtight cases brought before the judiciary.

# References

## Legislation


1. Anti-corruption Act No. 3 of 2012
2. Companies Amendment Act No. 12 of 2020
3. Companies Act CAP 388 of Laws of Zambia 2017
4. Public Procurement Act No.8 of 2020
5. Public Finance Management Act No. 1 of 2018

## Other Referenced Material

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2. Financial Intelligence Centre – Trends Report of 2022: [www.fic.gov.zm/about-us/79-fic-news/118-trends-report-2022](http://www.fic.gov.zm/about-us/79-fic-news/118-trends-report-2022), 6<sup>th</sup> January 2024
3. Ministry of Small Medium Enterprise Development, <https://www.msme.gov.zm/>, 26 March 2024, 10:53
4. National Assembly of Zambia, Report on the Committee on National Assembly Committee on National Economy, Trade and Labour Matters – Public Procurement in Zambia, 2<sup>nd</sup> Session of the 13<sup>th</sup> National Assembly, June 2023
5. OECD, Policy Roundtables – Collusion and Competition in Public Procurement, Global competition Forum, 2010
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8. World Bank, E-Procurement Preparations, Open Learning Campus, 2016

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