

(Conference Draft)

“Corruption in Public Procurement in Lesotho”

Thato Toeba*

2017 Law and Development Conference

Cape Town, South Africa
September 2017

* Ph.D candidate, University of Western Cape (South Africa)

1. Introduction

In March 2016, a senior official in the Ministry of Finance in Lesotho Mosito Khethisa pleaded guilty to charges of corruption under a plea bargain with the country’s anti-corruption Authority DCEO, ending a long drawn two year court battle. His cardinal sin? Flouting procurement procedures to award a government contract to his relative without a tendering process.¹ Sitting in an interview with SABC correspondent Nthakoana Ngatane later that month, apparently to absolve himself, Khethisa startlingly revealed verbatim;

Even now if you go to finance you will find a list of requests for retrospective approval where somebody has already provided work to somebody else not following procurement. What I have done is something that in Lesotho is being done every day. But these are administrative and there are penalties for not following procurement.(Sic)²

Khethisa’s claims illustrate the callous complacent and systemic manner in which rules of engagement with public finances are flouted and how this has become culturally embedded in the country’s administrative system. This is incredibly detrimental because these rules exist to guard against corruption that is especially rampant in public procurement processes. The sheer bureaucracy and volume of transactions involved in the procurement process renders it susceptible to manipulation and exploitation, particularly where procedural discretion is too wide. Stringent rules of process and legal guidelines informing procurement procedures are instrumental, therefore in ensuring integrity and accountability in public procurement transactions.

This paper discusses the problem of corruption in public procurement in Lesotho, particularly how corruption manifests in the process. Further, the paper engages in an assessment of the causes of corruption in public procurement and the residual effects there from. I analyse international law on public procurement processes, particularly Article 9 of UNCAC as well as the public procurement legal regime in Lesotho. I argue that existing legal framework around public procurement is insufficient to ensure transparency and accountability. Ultimately, I suggests legal reforms to strengthen Lesotho’s procurement process.

1.2 Corruption in Lesotho

Lesotho is a small landlocked kingdom in Southern Africa, surrounded in all fronts by the Republic of South Africa. It is a democracy and a constitutional monarchy in terms of the its 1993 Constitution.³

Anti-corruption efforts in the Kingdom have been commended globally, particularly following successful prosecutions of the LHDA cases in the late 1990s.⁴ In terms of external assessments on the perception of corruption in the country, Lesotho had been faring well above its counterparts in Africa in tackling corruption. Recently however, Transparency International’s Corruption Perception Index (CPI) of 2016 shows an increase in the perception of corruption in the country. CPI which measures perceptions of corruption using a scale of 0-100, 0 being the most corrupt and 100 the least corrupt ranks Lesotho at no 83 most corrupt country in the world out of the 176 in the

¹ See Sunday Express (15 March 2016) *Thahane cleared of another fraud case*<http://sundayexpress.co.ls/thahane-cleared-of-another-fraud-case/>

² Interview available at <https://nthakoana.wordpress.com/2016/03/28/what-thahane-and-khethisa-did/>

³ Sec 1 of the 1993 Constitution, available at

http://www.gov.ls/gov_webportal/important%20documents/lesotho%20constitution/Lesotho_Constitution.pdf

⁴ See Kapa M in OSISA (2017)105.

2016 index. Lesotho scored 45 on the index in 2012 which improved to 49 in 2013 and 2014, however its score declined to 44 in 2015 and dropped significantly to 39 in 2016.⁵ The Mo Ibrahim African overall governance index ranks Lesotho at 57.8 out of 100 in overall governance, a deterioration from 61 in 2012. In Sustainable Economic Opportunity, which also covers corruption, Lesotho showed a marginal decline of (-0.3), driven to a large extent by negative trends in Business Environment, its most deteriorated sub- category. The country ranks at no 15 of 54 countries on overall governance, dropping out of the top 10. It ranks 6th in Southern Africa, dropping from position 5 in overall governance and ranks 8th in Sustainable Economic Opportunity and Human Development, one of only four countries in the region to decline.⁶

In terms of these external indices, the state of corruption is worsening. Internal indicators point to a similar conclusion. A number of high profile cases have emerged in local media platforms with some before courts, involving corruption by senior government officials and millions of Maloti. In 2009, the government of Lesotho instituted criminal proceedings LHDA cases against Masupha Sole and Ret'selisitsoe Mochebelele in which they were charged with numerous counts of bribery and fraud. These highly publicised cases brought the problem of grand corruption into focus.

In June 2013, Lesotho times broke a story of a corruption scandal involving an Israeli company Nikuv which was enlisted to produce identification documents and passports in Lesotho. According to Lesotho times, Nikuv had billed the government R231.3 million for the entire project, but before the contract was signed some senior government officials were alleged to have then told the company to bill R261.9 million, overcharging the government by an extra R30 million. Among those implicated in the scandal was former Home Affairs principal secretary Retšelisitsoe Khetsi. In November of the same year, Tim Thahane was removed from his office as a Minister following an appearance in court on corruption charges. He was alleged to have defrauded the government of Lesotho of M43 million through misrepresentation to a commercial bank of the scope of a government programme to help small farmers. By the end of 2014, charges had been brought against two more high profile public officials including current deputy Prime Minister Mothejoa Metsing and Minister of Police Monyane Moleleki.⁷

As in elsewhere in Africa, the worst brunt of corruption in the country has been felt particularly in the process of procurement of goods and services by the government in order to sustain the daily operations of the state. Despite elaborate laws on the procedures of procurement in Lesotho, the biggest corruption scandals involve the manipulation of these procedures to benefit the elite few.⁸

2. Definitions

2.1 Corruption

Generally, the definition of corruption is elusive and is often a subject of strenuous debates in the anti- corruption discourse. The most commonly cited definitions include those by Transparency International (TI) and World Bank (WB). According to TI, corruption refers to "abuse of entrusted power for private gain",⁹ whereas WB defines corruption as "the abuse of public office for private

⁵ See https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table

⁶ http://s.mo.ibrahim.foundation/u/2017/03/08200225/Lesotho-Insights-2016-IIAG.pdf?_ga=2.230145756.1158028254.1499955646-1022938129.1499955646

⁷ See Mail & Guardian, (12 December 2014) *Lesotho wrestles with corruption* <https://mg.co.za/article/2014-12-11-lesotho-wrestles-with-corruption>

⁸ Article 9 UNCAC.

⁹ Transparency International (2015).

gain”.¹⁰ Two recurring ideas arise from the WB and TI’s definitions, being (a) the existence of some power and (b), abuse of that power for private gain. Private gain in both definitions may accrue to a third party and not necessarily to the person in power.¹¹ The definitions differ in the type of power susceptible to abuse. While TI speaks of entrusted power, suggesting power in both the private sector and the public sector, WB specifically refers to power in the public sector.¹²

The distinction above is indicative of two forms of corruption, being public sector corruption and private sector corruption. Public sector corruption is confined to the public service and often involves a public official and private person. Private corruption on the other hand refers to corruption between and within private persons.¹³ Corruption in public procurement focuses mainly on public corruption because in the acquisition of goods and services, the state is the main actor.

2.1.1 Petty v Grand corruption

As will be discussed in the paper, corruption in public procurement infiltrates every step of the procurement process; from highest ranks of the decision making process to the lowest rank in the implementation and administration of public procurement policies. It is important in the public procurement discourse therefore to draw a distinction between grand or political corruption and petty or bureaucratic corruption. This distinction is valuable as far it helps to measure the extent of corruption and appropriate remedial responses thereto. According to Tanzi,¹⁴ corruption at the budget preparation phase, when political decisions are made, constitutes political corruption. On the other hand corruption committed during the implementation of the budget mostly constitutes petty corruption. Amundsen¹⁵ goes further to extend the definition of grand corruption to every corrupt practice committed by policy-makers. According to Amundsen, “political corruption may thus also take place when the improved procurement procedure is implemented, resulting for instance in political disagreement with a contract assignment.”¹⁶

2.2 Public Procurement

Public Procurement is the "purchase of commodities and contracting of construction works and services if such acquisition is effected by resources from state budgets, local authority budgets, state foundation funds, domestic loans or foreign loans guaranteed by the state, and foreign aid as well as revenue received from the economic activity of the state”.¹⁷ A state may carry out the procuring itself or sub-contract a private entity to procure on its behalf. The fundamental inference is that the procuring entity uses public funds to purchase the required goods or services.¹⁸

2.2.1 Methods of Public Procurement

There are various methods under which the tendering process may be instituted. UNCITRAL Model Law, the World Trade Organization Government Procurement Agreement (WTO GPA) or the EU Directives, all have different ways of categorising procurement methods. UNDOC relies on these instruments to identify the following four general methods of procurement which the Public

¹⁰ World Bank (1997) 8.

¹¹ See Boersma (2012) 27.

¹² Boersma (2012) 27.

¹³ Boersma (2012) 27.

¹⁴ (1998) 119.

¹⁵ (1993) 5.

¹⁶ Amundsen (1993) 5. See also Mbaku (1997) 24.

¹⁷ Søreide (2002) 4.

¹⁸ See World Bank (1995) in Williams (2011) 339.

Procurement Regulations in Lesotho have adopted;¹⁹

2.2.1.1 Open procedure (sealed bidding)

In this method, the tendering process is open to all prospective bidders and there is no pre-determination of who can bid; the government normally issues very detailed tendering terms of reference and the contract is awarded to the contractor with the lowest bid.²⁰ This method requires extensive advertisement of the tender, thus it allows for optimal transparency and a larger pool of competitors.²¹ Further, sealed bidding includes comprehensive technical requirements and contractual terms, public opening of tenders and leaves very little room for negotiation of the tender.

2.2.1.2 Restricted procedure

Prospective qualified bidders are pre-identified under the restricted procedure, and only these pre-selected entities can bid. Bidders may have been pre-identified following a public advertisement or on the basis of disclosed minimum and/or selection criteria, as is done under the EU Directives.²² Under this method, the requirement of public advertisement of a contract opportunity may be dispensed with since it may not be necessary. For example, if the product being procured is supplied by a limited number of entities, it may not be necessary to advertise.

2.2.1.3 Negotiated procedure

A negotiated procedure is often used in cases where comprehensive technical specifications and contractual terms cannot be easily formulated such that it becomes necessary to enter into negotiations with the bidder to come to an agreement regarding the contract. According to UNDOC, a negotiated procedure is also often used to determine terms of reference of in a failed tendering procedure, for instance, where there are no tenders to bid or only disqualified tenders were submitted. Another frequent reason for a negotiated procedure is circumstances of urgency or a catastrophic event.

2.2.1.4 Single-source procurement (direct award or limited tendering)

This is a special procurement process which departs almost entirely from the general requirements of a tendering process. It allows the procuring body to select a supplier or service provider without compliance to any form of transparency or competition.²³ Situations that warrant single source procurement may include the low estimated value of the contract, the fact that the goods or services at issue can be obtained exclusively from a specific provider, emergencies, additional supplies being procured from an existing contractor, or because of policy considerations like national defence or national security. In South Africa for example, Practice Note Number SCM 2 of 2005 provides for the non-use of tender procedures if it is “impractical to invite competitive bids”, for instance, in the case of 'emergencies' or a 'sole supplier'.²⁴

3. Causes of public procurement corruption in Lesotho

¹⁹ UNDOC (2013) 5.

²⁰ UNDOC (2013) 5.

²¹ UNDOC (2013) 6. See also Bolton (2006) 5.

²² UNDOC (2013) 6.

²³ UNDOC (2013) 6.

²⁴ Bolton (2006) 9.

The apparent incentive for the demand aspect of corruption in public procurement is to derive some form of undue benefit. The general presumption is that human greed explains most of corruption. In many developing countries, however, where monthly wages barely cover the cost of living, actual lack may be the cause for rampant corruption, especially petty corruption.²⁵ It is nevertheless argued that for several countries, the supplementation of salaries with bribes is not a guarantee that once the gap between the salaries earned and the cost of living is bridged, the public officials will stop being corrupt.²⁶

On the supply side, the most apparent incentive is that bribes act as an assurance that the company will obtain the government contract. Corruption thus becomes a necessary expense to guarantee returns on the often costly and time consuming process of preparing a tender. Further, beyond obtaining a single contract, corruption may guarantee a company monopoly over a particular product or services.²⁷ For Søreide, corruption in public procurement is caused by the presumption that the public procurement process is inherently corrupt and that all parties involved in the process are degenerate and normatively cut corners.²⁸

4. Instances of Corruption in Public Procurement

Appolloni and Mushagalusa identify three stages in which corruption can manifest in a public procurement process. These include planning and budgeting of procurement; solicitation of procurement; and award of contract and performance.²⁹ Søreide further breaks the process into various sub- stages including the structuring of the tender and evaluation and controls of performance.³⁰ All the steps in a procurement process are separately predisposed to corruption in its many different forms.

4.1 Commencement Phase

In the commencement phase, also known as the pre-tendering phase,³¹ the government identifies the goods or services needed and determines the adequate budget for their acquisition. Both the identification of the required product and the drawing of the budget are prone to corruption; a public officer could misrepresent the quantity or value of the goods or services required so as to create an excess supply that could be diverted for corrupt purposes.³² In addition a public officer could draft a tender in such a way that it favours a specific bidder. On the other hand, budgets could be explicitly inflated such that excess allocations are embezzled.³³ The case of *Matete v R* is in this respect illustrative.³⁴ This involved a former clerk of the national assembly, who in procuring a heavy duty photocopier for the national assembly inflated the price to R1 475 259.29, about three times its actual price from Konica Enterprises (Pty) Ltd, trading as Itec Lesotho, which was also charged as second accused. The offence took place between March 2005 and March 2006. He was convicted and sentenced to seven years in jail by the high court. This conviction was confirmed by the Court

²⁵ Søreide (2002) 4.

²⁶ See Søreide (2002) 4.

²⁷ Søreide (2002) 4.

²⁸ (2002) 5.

²⁹ Appolloni & Mushagalusa (2013) 4.

³⁰ Søreide (2002) 16.

³¹ UNDOC (2013).

³² See Article 17 of UNCAC on criminalisation of diversion.

³³ Article 17 of UNCAC (2005).

³⁴ *Matete v R* (C of A (CRI) 4/2010), available at <https://www.lesotholii.org/ls/judgment/court-appeal/2010/27>

of Appeal. Matete manipulated the budget in order to keep the surplus for himself, a risk the procurement process is at this initial stage prone to.³⁵

4.2 Tendering Phase

The tendering phase involves the compilation of the bid invitation, identification and drafting of specific technical tender requirements and criteria for an evaluation.³⁶ This step could be manipulated by drafting the evaluation criteria in the invitation to bid in a biased manner in order to benefit a specific service provider or supplier, or to accentuate the deficiencies of a particular competitor.³⁷ In that case, a public officer would be criminally liable for abuse of function under article 19 of UNCAC or trading in influence under article 18.

A public officer can further manipulate the process by vaguely drafting tender specifications in order to create speculation on the accurate application of the rules.³⁸ This would in turn allow such public officer to later, during the evaluation of the proposals or tenders to make further additions or amend the specifications after the proposal or tender receipt. It is also possible at this point for a public officer to advance information to a particular bidder which would give such bidder advantage over other bidders.³⁹ It is at this tendering stage that alleged corruption in the Metsing investigations currently being probed by the DCEO occurred. Metsing who at the time of the alleged offence minister of local government and chieftainship affairs was accused of undeservingly and illegally awarding a tender to construct roads in Ha Matala and Ha Leqele villages to Big Bravo Construction (Pty) Ltd, allegedly in exchange for bribes. Investigations by the DCEO found that Metsing had appointed the deputy principal secretary as his delegate on the evaluation and adjudication panel, which assessed the tenders. The initial evaluation report was found to have been revised to favour the company.⁴⁰

Corruption techniques in this regard may further include "failing to solicit proposals or tenders from the competitors of a favoured supplier, wrongfully restricting the tender pool, soliciting offerors known to be inferior to a favoured supplier, simply misrepresenting tender documents, accepting late proposals or rejecting legitimate proposals can all be utilised to corrupt the procurement process".⁴¹ In 2002, Masupha Sole, then CEO of Lesotho Highlands Development Authority (LHDA), in charge of overseeing Lesotho Highlands Water Project (LHWP), one of the biggest hydropower projects in the world was convicted on counts of bribery in a Lesotho court. Sole was charged with accepting millions of Maloti in bribes from several foreign construction companies; in return he awarded construction contracts to the companies on a “sole source” basis, meaning the tendering process was not open to competitive bidding.⁴²

4.3 Post-tendering phase

The last stage is the post- tendering phase which consists essentially in the performance of the request is also prone to corruption. In this phase, potential corruption also emanates from the supplier or service provider offered the procurement contract. The offeror could make a remarkably

³⁵ see Brousseau and Glachant (2005) in Appolloni & Mushagalusa (2013)5 . See also Lamming (1993) Appolloni & Mushagalusa (2013) 5.

³⁶ Appolloni & Mushagalusa (2013) 6 and UNDOC (2013) 5.

³⁷ Appolloni & Mushagalusa (2013) 6.

³⁸ Appolloni & Mushagalusa (2013) 6. See also Article 18 and 19 of UNCAC (2005).

³⁹ Appolloni & Mushagalusa (2013) 6.

⁴⁰ As contained in *Metsing v DCEO & Ors*, CC11 of 2014 available at <https://www.lesotholii.org/ls/judgment/high-court/2015/1>

⁴¹ Appolloni & Mushagalusa (2013) 7.

⁴² See Earle (2005) 3.

high quality offer at the bidding process in order to meet the bid requirements and utilise products personnel of inferior value in the actual performance of contract.⁴³ In this phase, a public officer may, after evaluation, "award a contract that materially differs from the terms of the original solicitation in terms of specifications, quantity, or delivery schedule".⁴⁴ In terms of performance of the contract, the supplier may restrict or contravene reporting requirements, thus making it difficult for the evaluation of the contract. Further, the supplier or service provider can in some cases overrun the cost of the performance giving a corrupt justification for the excess. Lastly, supporting documentation could be intentionally lost or destroyed, killing the paper trail for the detection and making prosecution of corruption crimes difficult.⁴⁵

5. Effects of corruption in public procurement

Undeniably one of the greatest costs of corruption is the money wasted on bribes. Tanzi argues however that this is not the most damaging effect. According to her: "The total economic and social effects of corrupt actions might be very costly and out of proportion to the bribes received by corrupt officials in terms of resources wasted, the opportunity cost of resources misused, and the inefficiencies introduced in the system."⁴⁶

A useful illustration of these deeper economic effects is the theory of rent seeking. Søreide notes that rent seeking becomes corruption when competition for preferential treatment is designed narrowly for the benefit of a chosen few. This propensity by public officials to generate rents exclusively has several welfare implications:

First, public official’s decisions are biased, thus the procurement process becomes perverted. Selection of the best bid is based on the "best briber" rather than based on the bidder who represents as close as possible the terms of reference of the tender. Consequently the project may be far more costly than it could have been and with the quality of the project compromised.⁴⁷ Further, corruption in public procurement increases expenditures. Søreide observes that a bribe is usually calculated as a percentage of the total sum of the project, such that companies will actually charge the bribe off the procurement cost. For example Halliburton was charged a \$579 million fine in a US court for paying about \$182 million in bribes to Nigerian government to secure a six-billion dollar contract in Nigeria.⁴⁸ According to Adegbola, given the prevalence of inflated contracts in Nigerian public procurement, this amount could probably have been eventually built into the contract sum, thereby depleting the public treasury.⁴⁹ The more expensive a project is, the higher the risk of taking bribes, thus the cost of bribes to be paid also rise.⁵⁰

Corruption affects the allocation of public spending as investment decisions are prioritised by which project is lucrative and thus profitable to a corrupt public officer rather than on the actual welfare need.⁵¹ In the process, the state incurs redundant expenditures which results in increased public spending and which do not even generate revenue for the state. These misguided investments may

⁴³ Appolloni & Mushagalusa (2013) 7.

⁴⁴ Appolloni & Mushagalusa (2013) 7.

⁴⁵ Appolloni & Mushagalusa (2013) 7. See also UNDOC (2013) 6.

⁴⁶ Søreide (2002) 5

⁴⁷ See Tanzi (1998) and Davoodi (1997) in Søreide (2002) 5.

⁴⁸ See Butty,(2009) in Søreide (2002) 5.

⁴⁹ Adegbola (2006) in Søreide (2002) 5.

⁵⁰ See Lambsdorff (2000) in Søreide (2002) 5.

⁵¹ See Tanzi 1998 in Søreide (2002) 6.

also explain in part gaps in budget deficits facing many countries in which corruption is comprehensive.⁵²

When the public procurement process favours those with inside connections rather than include all potential candidates, the pool from which the ultimate service provider or supplier is selected is restricted. As a result, triggers that reduce competitiveness are generated and normative benefits actuated by the principle of competition, like attaining best value for money, rational allocation of resources, are obstructed.⁵³

A tender afflicted by corruption often illustrate inefficient and wasteful investment of public assets; this is because such tender often involves inflated prices and generally because a flawed public procurement process will usually yield selection of an inefficient contractor. Further, systemic corruption may obviate international interest in both trade and foreign direct investment lowering the GDP of a country.⁵⁴

6. Public Procurement Legal Regime in Lesotho

6.1 Public Procurement Bodies in Lesotho

According to UNCAC, appropriate and effective systems of procurement based on the fundamental principles of transparency, competition and objective criteria in decision-making must be established in order to prevent corruption. In this regard, Lesotho adopted the Public Procurement Regulations in 2007 (The Regulations). The Regulations create two important institutions to forward the provisions of UNCAC.

Procurement Unit

The Procurement Unit (the Unit) is envisaged to comprise an individual or a group of individuals authorised to carry out public procurement.⁵⁵ The unit is not a permanent office but an ad hoc body duly sanctioned to carry out public procurement which includes ministries, district councils, state owned legal entities, any other institutions under public law as well as projects implementing authorisation to perform duties of public procurement funded through foreign loans, grants or assistance.⁵⁶ The purpose of the Unit is to apply appropriate public procurement procedure and to maintain, update and disseminate the standard conditions for a specific contract.⁵⁷ This is the body that places advertisements for procurements and awards of contracts in the Government Contracts Bulletin.⁵⁸

Procurement Policy and Advice Division

The Procurement Policy and Advice Division (PPAD) is a department within the Ministry of Finance and Public Planning (the Ministry).⁵⁹ It is established to ensure legality, accountability, efficiency, transparency and overall value for money in the implementation of public procurement, in line with UNCAC’s proscriptions.⁶⁰ Its functions are long and broad and range from initiation,

⁵² Søreide (2002) 6.

⁵³ Søreide (2002) 7.

⁵⁴ Søreide (2002) 7.

⁵⁵ Reg 3(1) of the PP Regulations (2007).

⁵⁶ Reg 3(2)(a-e) of the PP Regulations (2007).

⁵⁷ Reg 4(1) of the PP Regulations (2007).

⁵⁸ Reg 4(1) of the PP Regulations (2007).

⁵⁹ Reg 6(1) of the PP Regulations (2007).

⁶⁰ Reg 6(1) of the PP Regulations (2007).

development and implementation of public procurement law, policies and best practice, acting as as advisory to the Ministry on implementation of said legislation and policies as well as monitoring compliance with procurement laws and policies.⁶¹

Further PPAD is tasked to provide annual reports, with recommendations detailing performance of the public procurement system to the Principal Secretary of the Ministry.⁶² It is its responsibility moreover to establish a communique to handle enquiries from the Unit, the businesses sector and other individuals,⁶³ to plan and coordinate the requirement for foreign technical assistance in respect of procurement⁶⁴ as well as to determine and monitor professional standards and qualifications for those responsible for carrying out public procurement.⁶⁵ Lastly, the PPAD is required to set up an Appeals Panel to deal with complaints and appeals from suppliers and companies.⁶⁶

6.1.2 Limitations of Public Procurement Institutions in Lesotho

Independence and Accountability

The institutional position of both the Unit and the PPDA is concerning, particularly in the Lesotho context where democratic dispensation is not solid and there are frequent interventions with various institutions of integrity. First, there are obvious questions of institutional independence and freedom from interference. The Unit for example is a floating body within different public offices rather than an identifiable, ascertainable office. Whoever constitutes a Unit for an authorised procurement at a particular time therefore has prerogatives that cannot be monitored or curbed, thus providing fertile ground for corruption. While the regulations make the PPDA accountable to the PS of the Ministry of Finance and Planning, there is no clear accountability structures for the Unit. The fact that there is no legislation from which the Regulations glean power and direction means its even harder to identify accountability structures for the Unit.

The PPDA on the other hand has broad functions that extent to other structures within government, however, there is no mention of the relationship between these structures and the PPDA. By virtue of its functions, the PPDA is an oversight body for the Unit, thus it monitors and evaluates a range of public officials including ministries, state owned legal entities etc, which institutions are not necessarily under the authority and reach of the Ministry of Finance and Planning. The extent of the efficacy of PPDA’s oversight in this regards is highly questionable. It would be helpful to elaborate the nature and logistical aspirations of the relationship between the PPDA and the public institutions it relates to.

Institutional Reach

The second limitation concerns the reach of the PPDA, particularly in Lesotho’s situation where governance is quite densely centralised. One of the general constraints of a centralised government is its inability to reach communities in remote areas removed from the place whereat power is centralised. Operationally speaking, it is not feasible that the reach of the PPDA would extend to remote areas in Lesotho where some of the offices included in the Unit are situated. The office of the Directorate on Corruption and Economic Offences in Lesotho poignantly illustrates this

⁶¹ Reg 6(2)(a-c) of the PP Regulations (2007).

⁶² Reg 6(2)(d) of the PP Regulations (2007).

⁶³ Reg 6(2)(g) of the PP Regulations(2007).

⁶⁴ Reg 6(2)(h) of the PP Regulations (2007).

⁶⁵ Section 6(2)(i) of the Regulations.

⁶⁶ Section 6(2)(m) of the Regulations.

restriction. One of the inhibitions of this office is its inability to detect and deal with corruption in district administration because it is centralised primarily to national government.

Collaboration with anti-corruption institutions

The institutional framework of the regulations is lastly limited in that it fails to define the relationship between the Unit, PPDA and other institutions of integrity tasked with tackling corruption. The DCEO is one such office. As illustrated in the beginning of this paper, corruption in Lesotho is predominantly rampant in public procurement. It is important therefore to establish clear mechanisms for the cooperation with and collaboration between PPAD as the key procurement authority and authorities in the criminal law system that are tasked to investigate and prosecute corruption. The DCEO for example proscribes that corruption constitutes *inter alia* the intentional abuse of functions of office in violation of any law in order to obtain undue advantage. One of the functions of the PPAD is to monitor compliance with procurement procedures, deviation from which would ordinarily constitute offences under the mandate of the DCEO. It is therefore vital not only to acknowledge other like-mandated institutions but to prescribe the manner in which they relate to avoid duplication or ambiguity of functions.

6.2 Procurement Process (Article 9 of United Nations Convention against Corruption r/w Public Procurement Regulations of 2007)

Article 9 (1) calls upon members to adopt the following five prerequisites to ensure a corruption free public procurement process.

6.2.1 Publication of tendering information

An open procurement process is regarded as a prerequisite for securing transparency of process and accountability of officials. UNCAC asks for public distribution of information on tendering opportunities through advertisement of prospective procurements on accessible and normative public platforms.⁶⁷ In this regard, regulation 7(e) of the Public Procurement Regulations require that tenders be advertised in the mass media or the contracts bulletin of the government of Lesotho in either one or both official languages. Public awareness of potential contracts is aimed at ensuring that the contract being publicised is not directly awarded to a favoured company without potential of competition.⁶⁸

6.2.2 Establishment and publication of preemptive conditions for participation

Article 9(1)(b) OF UNODC proscribe for pre-established conditions of participation, including publication of criterion for selection and award as well rules of tendering. To this end, Regulation 7(f) of the PP Regulations provide that “methods used in the evaluation of bids and the awards of contracts shall be objective and made known to all bidders in the bidding documents, and the results shall be published.” Formulation and subsequent publication of antecedent terms of reference for procurement procedures is essential to ensuring that companies submit bids which best match the procuring entity’s requisites. Publication furthers anti-corruption efforts in that it acts as a check and balances mechanism for whether the procedures and conditions for award co-ordinate with

⁶⁷ 9(1)(a) of UNODC (2005)

⁶⁸ 9(1)(a) of UNODC (2005) 10. See also Article 5 of UNCITRAL (2014).

applicable procurement laws.⁶⁹ The mechanism thus provides ample room for appeals and/or prosecutions where rules are not complied with.⁷⁰

6.2.3 Use of objective and predetermined criteria for public procurement decisions

Closely linked to Article 9(1)(b) is Article 9(1)(c) which calls for the “use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures”. This provision stems from the principles transparency and the use of objective criteria in decision-making. An objective selection criterion is achieved when the discretion of the procuring body is curbed in order to eliminate prejudices or arbitrary evaluations. Criteria for awarding a contract must be comprehensively and preemptively particularised so that bidders are able to accurately evaluate their qualifications for the tender. PP Regulations require that “methods used in the evaluation of bids and the awards of contracts shall be objective and made known to all bidders in the bidding documents, and the results shall be published.”⁷¹

A predetermined criteria for public procurement decisions further means that a procuring body is in principle, restrained from making arbitrary changes to the terms of reference after those requirements have been determined and after they have been published.⁷²

6.2.4 Effective system of domestic review

States parties are called on to create an "effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to (Article 9) are not followed".⁷³ In Lesotho the PPAD is envisaged as such body in terms of Reg 6(1)(m) which provides that the PPAD shall “set up an Appeals Panel to deal with complaints and appeals from suppliers and companies, and shall provide the Secretariat service to the Appeals Panel”. The requisite for instruments of appeal is fundamental to an efficient system of procurement contemplated by article 9. The official decision of the procurement body must, in terms of this sub article be subject to a formal appeal.⁷⁴ Article 9(1) (d) however is silent on the threshold for when a domestic remedy system is considered to be effective and it fails to establish the means through which such systems may be created. It does not require for instance, special mechanisms such as “interim measures to maintain the status quo during the challenge procedure, set asides or the annulment of procurement decisions or damages”.⁷⁵

The Convention also fails to provide time frames within which a challenge of procedure may be instituted, and does not elaborate on the composition and characteristics of the review body.

7. Conclusion

The process of public procurement involves administration of large volumes of money, thus it is a breeding ground for potential corruption. The idea that corruption is a victimless crime exacerbates the plundering of public coffers by entrusted bodies. The dire effects of corruption in public procurement however are telling of how corrosive it is to national economies and to the proper

⁶⁹ UNODC (2005) 10. See also Article 6 of UNCITRAL(2014).

⁷⁰ See UNODC (2005)10.

⁷¹ Reg 7(g) of the PP Regulations (2007).

⁷² See UNODC (2005) 10.

⁷³ Article 9(1) (d).

⁷⁴ UNODC (2005) 11.

⁷⁵ UNODC (2005) 11.

distribution of welfare. Even though Article 9 of UNCAC, comprehensively supplemented by UNCITRAL law model deals with corruption in public procurement, the fact that a bulk of it is hortatory means that corrupt administrations are left to self-supervise. This lack of checks and balances mechanism means that public procurement systems remain vulnerable. Public Procurement regulations in Lesotho on the other hand are spectacularly insufficient to cope with the rising rate of corruption in public procurement. The fact that public procurement legal regime in the country is regulated through regulations which comprise soft law rather than an Act of parliament which would afford it some legal certainty is in itself concerning. There is need to adopt legislation that comprehensively puts public procurement laws within the broader scope of anti-corruption legal framework. Public procurement is not a mere administrative process as is illustrated by the number of cases emerging in Lesotho with regard to flouting of public procurement regulations. It is a highly susceptible process that warrants independent legal protection.

Bibliography

Primary Sources

International Instruments

- United Nations Convention against Corruption, adopted on 9 December 2003 and entered into force on 14 December 2005.
- United Nations Commission on International Trade Law Model Law on Public Procurement United Nations Office at Vienna

Laws

- Constitution of the Kingdom of Lesotho, 1993.
- Public Procurement Regulations Legal Notice no.1 of 2007.
- Prevention of Corruption and Economic Offences Amendment Act No 63 of 2006.

Cases

- *Masupha Sole v R (2001) LSCA 19.*
- *Matete v R (2010) LSCA 27.*
- *Metsing v Director General, DCEO & Others (2015) LSHC 1.*

Secondary Sources

Books

- Amundsen I, *Political Corruption: An Introduction to issues* (1999) Chr. Michelsen Institute, Bergen.
- Boersma M, *Corruption, A Violation of Human Rights and a Crime Under International Law?* (2012), Intersentia Ltd, Cambridge.
- Girling J, *Corruption, Capitalism and Democracy* (1997), Routledge, New York.
- Mbaku, Williams-Elegbe S, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measure*, (2011), Hart Publishing, Oxford.
- UNDOC, *Guidebook on anti-corruption in public procurement and the management of public finances, Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, (2013) United Nations, Vienna.

Journal Articles

- Appolloni J & M Mushagalusa, “Public Procurement and Corruption in Africa: A Literature Review”(2013) April/June, *Rivista di Politica Economica*, 1-24.
- Bolton P, “Grounds for Dispensing with Public Tender Procedures in Government Contracting” (2006) 9(2) *Potchefstroom Electronic Law Journal* 10-24.
- Søreide T, “Corruption in public procurement Causes, consequences and cures” (2002)1(R) *Michelsen Institute Development Studies and Human Rights*, 1-50.
- Tsabora J, “Public Procurement in Zimbabwe: Law, Policy and Practice” (2014)1 *African Public Procurement Law Journal* 1-22.

Internet Sources

- Earle A, *No Duck No Dinner: How Sole Sourcing triggered Lesotho’s Struggle against Corruption* (2005) available at http://www.acwr.co.za/pdf_files/07.pdf (accessed on 10 July 2017).
- Ngatane N, *What Thahane and Khethisa Did* (28 March 2017) <https://nthakoana.wordpress.com/2016/03/28/what-thahane-and-khethisa-did/> (Accessed 13 July 2017).
- OSISA *Effectiveness of Anti-corruption Agencies in Southern Africa* (2017) Available at <http://www.africanminds.co.za/wp-content/uploads/2017/04/OSISA-ACC-Text-29MAR1130-WEB.pdf> (Accessed on 13 July 2017).
- Sunday Express, *Thahane cleared of another fraud* (15 March 2016) case <http://sundayexpress.co.ls/thahane-cleared-of-another-fraud-case/> (Accessed 13 July 2017).
- Transparency International, *Corruption Perception Index 2016* available at https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table