



THE CENTER TO COMBAT
CORRUPTION AND CRONYISM

POLICY PROPOSAL TO THE MALAYSIAN GOVERNMENT:

The Procurement Act



Policy Proposal for the Malaysian Government:

The Procurement Act

The Center to Combat Corruption and Cronyism (C4 Center)

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Introduction

The Government Procurement Act was first introduced in 2018 under the Budget 2019.¹ The Federal Government announced a historic inaugural budget with massive plans of implementing progressive policies and reducing costs for the benefit of its citizens. One of the new laws proposed included the Government Procurement Act.

After the Pakatan Harapan government came to power in 2018, the National Anti-Corruption Plan (NACP)² was also introduced that included reforming the procurement system under Strategy 3. In addition, as Malaysia is a signatory to the United Nations Convention Against Corruption, this would bring national legislation in line with Article 9 which encourages each State Party to establish a proper procurement system

[1]. Sim, Steven. "Budget 2019: More for the People, Less for the Gov't." Malaysiakini. Last modified November 7, 2018. <https://www.malaysiakini.com/news/450818>.

[2]. Prime Minister's Department. "National Anti-Corruption Plan 2019-2023." Prime Minister's Office of Malaysia. Last modified 2019. https://www.pmo.gov.my/wp-content/uploads/2019/07/National-Anti-Corruption-Plan-2019-2023_.pdf.

that promotes transparency.³ Less than a year later, Putrajaya revealed that it is expecting to table a new bill relating to public procurement by July the following year.⁴ In line with their promises of good governance and transparency, the government seemed to be keeping their promise of cleaning up the public procurement system.

However, with the onset of the COVID-19 pandemic and the sudden change in government, progress with the bill slowed to a halt. In August 2020, the Malaysian Finance Minister said there is nothing wrong with conducting direct negotiations,⁵ signalling a period where it seemed like government was unconcerned with transparency. Despite this setback, along with the LCS scandal that broke out in 2022, the government currently appears to have re-committed on progressing forward with the Government Procurement Bill. The newly-elected Prime Minister stressed that approvals for government procurements can no longer be conducted without tender in November 2022.⁶ Mention of the Bill appeared again in February 2023 during discussions about the 2023 Budget.⁷ With a Government Procurement Act hopefully on the horizon, this policy paper seeks to highlight the pressing issues that must be considered within the drafting of the Act.

[3]. United Nations. "Article 9, United Nations Convention Against Corruption (UNCAC)." United Nations Office on Drugs and Crime. Last modified September 2004. https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[4]. Malaysiakini. "Government to Table New Procurement Bill Next July." Malaysiakini. Last modified July 15, 2019. <https://www.malaysiakini.com/news/483878>.

[5]. Bernama. "Tengku Zafrul: Direct negotiations not wrong under law." The Star Online. Last modified August 27, 2020. <https://www.thestar.com.my/news/nation/2020/08/27/direct-negotiations-not-wrong-under-law-says-tengku-zafrul>

[6]. Bernama. "No More Approvals for Procurements Without Tender - PM." Malaysiakini. Last modified November 29, 2022. <https://www.malaysiakini.com/news/646123>.

[7]. NST Team. "2023 Budget: Govt Will Table Postponed Government Procurement Act to Improve Transparency." NST Online. Last modified February 24, 2023. <https://www.nst.com.my/news/nation/2023/02/883248/2023-budget-govt-will-table-post-poned-government-procurement-act-improve>.

CHAPTER ONE

Executive Powers

1.1 THE EXISTING ROLE OF MINISTERS IN PUBLIC PROCUREMENT

The mechanisms that presently oversee and direct government expenditure favour ministers, both at the Federal and State levels. The Federal Government's financial authority is vested with the Minister of Finance and the Secretary-General of the Ministry of Finance with directions from the Minister. In the case of State Governments, the financial authority is vested with the respective Chief Ministers, and the respective State Financial Officers with directions from the respective Chief Ministers. Ministers derive their financial authority directly from **Section 6** of the **Financial Procedures Act 1957**, which covers "Management and control of Consolidated Funds".

6. (1) *The management of the Federal Consolidated Fund and the supervision,*

control and direction of all matters relating to the financial affairs of the Federation not specifically assigned to any other person by any other law shall, subject to the Federal Constitution and this Act, vest in the Minister.

(2) The management of the Consolidated Fund of a State and the supervision, control and direction of all matters relating to the financial affairs of a State not specifically assigned to any other person by any other law shall, subject to the Federal Constitution, the Constitution of the State and this Act, vest in the State financial authority.

This power is further expanded upon in **Section 15A**, on “Controlling officers”.

15A. (1) *The Minister or the Menteri Besar or Chief Minister, as the case may be, may appoint, in respect of each purpose of expenditure provided for any financial year in the estimates, a controlling officer to control, **subject to any directions given by the financial authority**, the expenditure authorized under that purpose and to be the chief accounting officer in respect of all public moneys collected, received or disbursed and all public stores received, held or disposed of by or on account of the department or service for which the purpose is provided.*

From this, it is inferred that at the level of respective Federal ministries, the ministers overseeing respective ministries hold a strong influence on how their ministries conduct procurement under their ambit e.g., the Minister of Education would have financial authority to sign off on procurements undertaken by the Ministry of Education such as the building of new schools. Additionally, the Chief Ministers of respective States would hold a strong influence in deciding what procurements are undertaken at the individual state level e.g., the Chief Minister of Perak state would have the financial authority to perform maintenance

on public infrastructure within the state.

While the financial authorities in and of themselves do not immediately support the notion of a minister's absolute power over government expenditure, the minister is empowered both indirectly and directly to influence these matters through the application of further legal instruments. For example, the **Government Contracts Act (GCA) 1949** empowers the respective Ministers in the respective ministries to enter into contracts and also empowers the respective ministers to delegate powers to Government Officers to enter into contracts on behalf of the Government.

Section 2 of the Government Contracts Act 1949 states:

2. *All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.*

These powers are equally afforded to Chief Ministers as the de facto financial authority of the respective states they govern over, as expanded upon in **Section 3** of the same Act:

3. (1) *All contracts made in Malaysia on behalf of a State Government shall, if reduced to writing, be made in the name of the Government of that State, and may be signed by the Chief Minister of the State, or by any public officer duly authorized in writing by the Chief Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.*
 (2) *In the application of this section to Sabah and Sarawak "Chief Minister" includes any State Minister.*

Currently, two Agency Procurement Boards have been established in all federal ministries i.e. Agency Procurement Board 'A' and Agency Procurement Board 'B'. The Agency Procurement Board 'A' is empowered to decide on tenders up to RM50 million for supplies and services, and up to RM100 million for works. The representative from the Ministry of Finance is the permanent member of the Agency Procurement Board 'A' and his presence is mandatory to validate the decision of the Board. This requirement is mainly to ensure that all procurement principles, policies, rules, regulations and procedures are strictly adhered to. The Agency Procurement Board 'B' is empowered to decide on all tenders below RM20 million without the presence of a representative from the Ministry of Finance.

Tenders above the values of RM50 million for supplies and services and RM100 million for works for Government Ministries/Departments and tenders above RM100 million for statutory bodies must be forwarded to the Ministry of Finance for final decision. Any decisions of the Agency Procurement Boards that are not unanimous must also be forwarded to the Ministry of Finance for final decision.

1.2 IDENTIFYING THE PROBLEMS

1.2.1 INSTITUTIONAL STRUCTURE OF EXECUTIVE FUNCTION AND POWER

As the de facto authority on financial matters taking place in agencies and ministries under their control, ministers are afforded a high degree of control over procurements under their purview. This was identified as an area of reform under the **National Anti-Corruption Plan 2019 – 2023** under **Strategic Objective 3.1.6**, “To create accountability and transparency in defining the exercise of power of Minister as stipulated in legal provisions especially in procurement and financial system.”

Ministers themselves do not sit on the procurement boards, are not empowered to handpick or appoint those who sit on procurement boards, and are not directly involved in the evaluation process of tenders. However, the aforementioned Financial Procedures Act 1957 and Government Contracts Act 1949, when read conjunctively, ensure that Ministers are at the very least empowered to appoint the controlling officers that in turn appoint the procurement boards. Whilst this is by no means a direct implication that all government officers below the minister in hierarchy are bound to follow the minister's directions, the risk of patronage politics is still very real and present. Ministers are able to appoint controlling officers that are loyal to them with the understanding that they appoint officers in charge of procurement that will favour the ministers' personal interests. This factor is exacerbated due to the lack of accessibility of procurement-related information – the rationale for the awarding of tenders is not published nor made available. As such, tenders could at present easily be awarded to companies that are politically linked or tied to politicians and businesses (information accessibility will be covered in **Chapter 3** of this report).

However, it is also important to note that while patronage politics does indeed persist as an endemic problem within the Malaysian civil service, it would be a mistake to attribute all dubious tender awards to this factor alone. The lack of clear guidelines concerning what does or does not constitute ministerial powers in the area of public procurement consequently means that the civil service is more inclined to follow through with the instructions to approve certain tender applications even when it may seem irregular or against established procedure when the instructions directly come from ministers, their deputies, or the heads of departments or agencies. This is commonly known as *“arahan dari atas”* or “instructions from above”. Professor Khairul Saidah Abas

Azmi in her PhD thesis, “*Procurement Fraud in Malaysia: A Political Economy Approach*”⁸ presents findings from interviews conducted with both public procurement officers as well as with “public professionals” i.e. public auditors and enforcement officers that there indeed exists a culture of compliance to hierarchy, and that some of them follow these orders or face consequences for not doing so.

The wide power of ministers, and by extension, the Executive, over procurements does not always operate within the exact legal framework but can be seen through how it plays out in real-life examples.

Example 1 – Littoral combat ships (LCS)

Zahid Hamidi, who was the Defence Minister during the initial stages of the LCS project, was revealed to have signed-off on a letter by Boustead Naval Shipyard (BNS), the contractor for the LCS project, evidenced by his handwriting stating “*sila laksanakan* (please get this done)” on the letter, together with his signature and stamp.⁹ Zahid had also gone against the Royal Malaysian Navy’s wishes regarding the design of the LCS, changing it from the Dutch’s Sigma to the French’s Gowind as per recommendations by BNS. BNS had adamantly decided on the Gowind design after their own discussions with DCNS, a French company, now known as Naval Group. BNS was to procure the ships from DCNS. Zahid seems to not only have had a personal and direct say in approving the procurement but also in deciding on the specifications of the procurement.

Example 2 – Ventilators

[8]. Abas Azmi, K. S. (2016). Public procurement in Malaysia: A political economy approach. PhD thesis, University of Essex. <https://repository.essex.ac.uk/17883/> (page 260-261)

[9]. Yunus, Arfa. “LCS Scandal: Report Reveals Zahid Involved in Procurement Process.” NST Online. Last modified August 17, 2022. <https://www.nst.com.my/news/nation/2022/08/823186/lcs-scandal-report-reveals-zahid-involved-procurement-process>.

The Auditor-General's 2021 Report (Series 2) revealed that the procurement of 93 defective ventilators that resulted in losses of RM 13.07 million was made by a Cabinet meeting on 25 March 2020. On the very same day, the Ministry of Finance (MOF) approved emergency procurement for the ventilators, enabling the Ministry of Health (MOH) to make advance payment of RM30 million to Pharmaniaga Logistics for the procurement of 500 ventilators worth an estimated RM50 million.¹⁰ Notwithstanding that this was considered an emergency procurement, Cabinet – comprising only of Ministers – was able to make this decision and MOF approved the decision instantly.

For procurements below RM500,000, the Agency Procurement Boards need not be consulted and thus ministers are afforded a great degree of control over procurements below this value as stated above. Subsequently, procurements within all ministries that cost above RM500,000 are subject to the scrutiny of the Minister of Finance-appointed Agency Procurement Boards or require the agreement of the Ministry of Finance in some other ways, ostensibly to act as a check and balance against unscrupulous expenditure by individual ministries. However, this gives rise to wide powers being inadvertently afforded to the Minister of Finance over all procurements across all ministries, which places the office of the Minister of Finance in a very powerful position, having oversight over the Federal Consolidated Fund and also over ministry-level procurement to a certain degree.

Direct negotiation as a method of procurement has long been criticised for its lack of transparency and potential for abuse. The conditions for the use of direct negotiation are set out under Treasury Circular PK 2.4 including: urgency for public benefit; for the purposes of uniformity;

[10]. CodeBlue. "Audit: Pharmaniaga Logistics Supplied 93 Defective Ventilators Costing Government RM13 Million Losses." CodeBlue. Last modified February 16, 2023. <https://codeblue.galencentre.org/2023/02/16/audit-pharmaniaga-logistics-supplied-93-defective-ventilators-costing-government-rm13-million-losses/>

single supplier; involving security or strategic matter; or when it involves a contract with a Bumiputera-owned business. There are further explanatory criteria, but these conditions serve as the baseline – what is relevant here is that direct negotiations are also entirely sanctioned by the Ministry of Finance alone. Hence, this further reinforces the point that the Minister of Finance occupies a very powerful role in being able to direct and control procurements across all ministries and agencies, especially notable in a process that lacks transparency.

1.2.2 GOVERNMENT-LINKED COMPANIES (GLCs)

Executive power in public procurement as well as within the scope of their financial authority as a whole should also be examined through the lens of their involvement in GLCs, which are private companies that public agencies such as ministries and statutory bodies hold shares in. The purpose and subsequent problems with GLCs are highlighted here by Prof Edmund Terence Gomez:

“GLCs serve as a major source of revenue for parties in control of federal and state governments. Public resources, such as procurement contracts and licences, are awarded through GLCs to well-connected businesspeople and politicians, while party members receive huge stipends as directors of these enterprises, some of which are used to fund political activities.”¹¹

GLCs remain a staple of the public procurement process, with most procurements of public goods and high-cost projects being conducted via GLCs. The most relevant examples in recent memory is the near monopoly of Pharmaniaga Berhad's procurement of medical supplies for Malaysia, having been awarded the contract to supply the nation with the Sinovac vaccines through a direct tender amidst the COVID-19

[11]. Business in Politics: Seeking Control of Malaysia's Political System <https://c4center.org/wp-content/uploads/Business-in-Politics-by-Dr-Terence-Gomez-20221102-12-07pm.pdf>

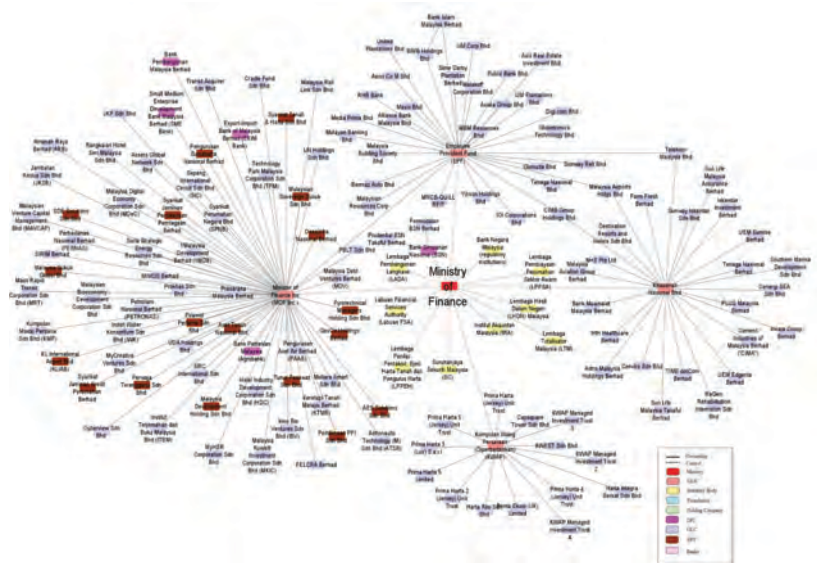


Figure 2: GLCs connected to the Ministry of Finance through its subsidiaries: Khazanah Nasional Berhad, Employee Provident Fund (EPF), and Minister of Finance Inc.

The Ministry of Finance is in a similar position, overseeing Khazanah Nasional Berhad, Malaysia's sovereign wealth fund; the Employees' Provident Fund (EPF), a statutory body that manages the retirement savings for Malaysians working in the private sector; and Minister of Finance Incorporated (MOF (Inc.)), a corporate body established under the Minister of Finance (Incorporation) Act 1957. The act provides the authority for MOF (Inc.) to enter into contracts, acquisitions, purchases, possessions, holdings and maintains tangible and intangible assets.

Due to the fact that ministers are the financial authority over their ministries, this would necessarily extend to the GLCs that fall under the oversight of their ministries as well. On this point, it is vital to understand that the minister themselves is not always orchestrating the entire procurement process from bid to award to personally benefit themselves but rather that the inordinate control afforded to ministers places them

in an advantageous position to engage in rent-seeking behaviours and patronage politics, sometimes instigated by members of the private sector who wish to seek preferential treatment for procurement tenders.

One of the key ways in which the executive control over GLCs manifests is through political appointments – one relatively recent example of this was in March 2023,¹⁵ taking place despite Prime Minister Anwar Ibrahim's earlier claim that political appointments would be abolished under his administration. The four appointments were:

- i. Asyraf Wajdi Dusuki as chairman of **MARA (Majlis Amanah Rakyat)** which is a government agency formed to aid, train, and guide Bumiputera in the areas of business and industry. It reports to the Ministry of Rural and Regional Development (MRRD). Asyraf was a former UMNO Youth Chief – it is worth noting that MRRD is also part of the portfolio of Ahmad Zahid Hamidi, Deputy Prime Minister and President of UMNO.
- ii. Bakhtiar Wan Chik as chairman of **MyCreative Ventures Sdn Bhd** which is a wholly owned subsidiary of the Minister of Finance. Bakhtiar is a member of Parti Keadilan Rakyat (PKR), which is the party led by Prime Minister Anwar Ibrahim.
- iii. Ahmad Sabki Yusof Sabki as chairman of the **Companies Commission of Malaysia**. The commission is an agency under the Ministry of Domestic Trade and Cost of Living. Before the appointment, Sabki served as political secretary to Amanah deputy president Salahuddin Ayub who was at the time Minister of Domestic Trade and Costs of Living.

[15]. Ganesan, Reshna R. "GLC Political Appointees: Who Are They?" Free Malaysia Today | FMT. Last modified March 16, 2023. <https://www.freemalaysiatoday.com/category/nation/2023/03/16/glc-political-appointees-who-are-they/>

- iv. Ahmad Jazlan Yaakub as **Felcra** chairman – Felcra is a corporate organisation wholly owned by the government, under the Minister of Finance (Incorporated). He served as Deputy Minister of Rural and Regional Development under Najib Razak from 2015 to 2018. When Muhyiddin Yassin was prime minister, he was appointed chairman of the Malaysian Palm Oil Board (MPOB). He was then appointed as Felcra chairman in October 2021 under the Ismail Sabri Yaakob administration.

All four appointments comprised of politicians either from parties that constituted Anwar's Pakatan Harapan (PH) coalition or were from the United Malays National Organisation (UMNO) party, which PH had formed the unity government with.

To complicate matters further, it is worth noting that many government-linked entities and projects are not even subject to the same procurement frameworks and accountability mechanisms that government ministries and agencies are subject to.¹⁶ GLCs that are either in part or even wholly owned by the government but that are not funded by the government (but rather their own capital) are not subject to the provisions under the Financial Procedures Act 1957. Public-private partnerships (PPP) are managed under Unit Kerjasama Awam Swasta (UKAS) which falls under the purview of the Prime Minister's Office, establishing its own policies for PPP-related projects.

Additionally, the law does not prohibit politicians from engaging in business practices, and the lack of an adequate asset declaration framework consequently encourages involvement of politicians' families from engaging in businesses that seek government contracts i.e., nepotism.

[16]. Mansor, Junaidi. "Government Procurement in Preferential Trade Agreements: Key Considerations for Malaysia." *Malaysia's Trade Governance at a Crossroads* edited by Pierre Suavé, Khazanah Research Institute, 2018, p. 243, 264. https://www.krinstitute.org/Publications-@-Malaysia%E2%80%99s_Trade_Governance_at_a_Crossroads.aspx

1.3 RECOMMENDATIONS FOR REFORM AREAS

Bearing in mind the above discussions, it is still important to acknowledge the important roles that ministers play in directing the operations of their respective ministries. Crucially, it must be stressed at this juncture that although the role of the Executive has been historically been used to commit procurement fraud by some individuals, the goal of systemic reform is not to strip them of their power over financial matters, but rather to ensure that the exercise of this power is not shielded from scrutiny and oversight. This policy paper recommends the following:

1.3.1 ROTATE PROCUREMENT BOARD OFFICERS

Officers involved in the procurement process should be periodically rotated and subjected to periods of mandatory leave to allow a covering officer to take over the procurement process and they should be placed under regular security vetting. The vetting process should include checks with credit bureaus and on assets held by the officers and their family members to identify any unexplained wealth. This would allow any possible patronage and cronyism to be disrupted by the ensuring that no individuals occupy a position for too long that their position can be exploited. The rotation of public servants holding sensitive posts is set out in Strategic Objective 2.1.1 of the National Anti-Corruption Plan (NACP).

Presently, this is codified in the Government Public Service Circular on Vol. 3 of 2004, where the Heads of Department may rotate the officer to another position on the basis that they have been in a “sensitive position” for at least 3 years but for no more than 5 years. It is suggested here that the Government Procurement Act may integrate a similar provision directed specifically at Procurement Board officers, such that it may be enforced, unlike in a circular.

1.3.2 MANDATE ASSET DECLARATION BY PUBLIC PROCUREMENT OFFICIALS

Public officials, especially ministers, high-ranking public officials and procurement officials, who are involved in public procurement processes should be made to declare their assets annually to the Malaysian Anti-Corruption Commission (MACC) and would enable the MACC to monitor possible abuse of power, corruption, cronyism and nepotism in public procurement by public officials.

Much like the above recommendation, a similar policy of asset declaration also exists under the Government Public Service Circular Vol. 3 of 2002 on Property Ownership and Declaration by Public Servants that requires all public servants to declare their assets according to set guidelines pursuant to Regulation 10, Public Officers (Conduct and Discipline) Regulations 1993. For public servants serving in positions related to government procurement, this regulation should be integrated into the Government Procurement Act as well to ensure it can be legally enforceable.

Despite a large part of the earlier discussions being dedicated to the role of high-ranking members of the Executive having a high degree of control over government procurements, the above regulations that mandate asset declaration do not actually cover these members of the executive. The Federal Court stated in *Tony Pua Kiam Wee v. Government of Malaysia*¹⁷ that Ministers are not considered part of the public service, and thus, are not bound to follow these regulations and neither can they face consequences for not adhering to them. For the Government Procurement Act to function effectively, it must impose some level of obligation upon those empowered to make financial decisions on behalf of the government.

[17]. [2020] 1 CLJ 337 (FC).

1.3.3 IMPOSE STRICTER REGULATIONS ON GLCs

As mentioned above, many GLCs fall under the control of ministries who themselves are largely controlled by ministers. Hence, GLCs must provide detailed explanations as to how leakages recorded by the Auditor-General could have taken place, and the steps to be taken in order to rectify the situations that gave rise to them in the first place. Chairpersons and Directors must also be held responsible, with the possibility of investigations launched against them if the company is unable to provide satisfactory explanations for those leakages – the Auditor-General should be empowered to call for such further investigations to take place.

Many previous governments had practised the appointment of its political party members to various positions in GLIC or GLCs or statutory bodies. Appointments such as these are not merely a form of reward, but serve as a form of control by the government over such entities. These appointments open up opportunities for potential abuse and conflict of interest and hence must be limited. This would be in line with the principles established in the NACP under Strategic Objective 1.4.10 which proposes a Public Appointments Bill, as well as under Strategic Objective 2.1.2 which proposes that the involvement and appointment of Senior Government Officials into leadership positions in state-owned enterprises and statutory bodies is adequately managed.

CHAPTER TWO

Punitive elements against procurement officers

In announcing their plans for a Government Procurement Act, there was discussion and speculation that Act would contain a punitive element in the sense of imposing sanctions upon procurement officers and other civil servants that are found to be non-compliant with the procurement procedures that will also be incorporated into the Act. This section assesses the validity and effectiveness of sanctions to enforce discipline as well as deter non-compliance with procurement procedures amongst the civil service.

2.1 EXISTING FRAMEWORKS FOR HANDLING NON-COMPLIANCE

2.1.1 PUBLIC SERVICES COMMISSION

Article 139(1) of the **Federal Constitution** stipulates the creation of a Public Services Commission whose jurisdiction is stated in Article 144 in relation to the Functions of Service Commissions:

144. (1) *Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends.*

The disciplinary aspect of the Public Services Commission is to be interpreted in tandem with the **Public Officers Regulations (Conduct and Discipline) 1993**, which sets out codes of conduct and disciplinary guidelines to be taken against members of the public service who are found to be in contravention of the codes of conduct. The codes of conduct can be found under **Regulation 4(2)**:

An officer shall not—

- (a) subordinate his public to his private interests;*
- (b) conduct himself in such a manner as is likely to bring his private interest into conflict with his public duty;*
- (c) conduct himself in such a manner likely to cause a reasonable suspicion that*
 - (i) he has allowed his private interests to come into conflict with his public duty so as to impair his usefulness as a public officer; or*
 - (ii) he has used his public position for his personal advantage;*
- (d) conduct himself in such a manner as to bring the public service into disre-*

- pute or bring discredit to the public service;*
- (e) lack efficiency or industry;*
- (f) be dishonest or untrustworthy;*
- (g) be irresponsible;*
- (h) bring or attempt to bring any form of outside influence or pressure to support or advance any claim relating to or against the public service, whether the claim is his own claim or that of any other officer;*
- (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate; and*
- (j) be negligent in performing his duties.*

In the case of a violation of the codes of conduct as listed in Regulation 4, **Article 144(5B)** of the Federal Constitution stipulates that the power of disciplinary action – as with any other function of the Public Services Commission – may be exercised by a board appointed by the Yang di-Pertuan Agong.

Subsequently, the Disciplinary Board proceeds with the disciplinary action protocol – depending on the severity of the offence and grounds for action, the officer facing could be reduced in rank or dismissed entirely, especially if the officer faces a conviction for a criminal offence.¹⁸

2.1.2 MALAYSIAN ANTI-CORRUPTION COMMISSION (MACC) ACT 2009

The MACC Act 2009 establishes the MACC as the prime government agency empowered to investigate and bring prosecutions against individuals found to have committed offences relating to corruption – those offences are also stipulated and defined in the Act and apply to both members of the public and private sector. Offences stipulated in this Act

[18]. Public Services Commission of Malaysia, “Series 5 – Disciplinary Procedures In Relation To Officers Convicted of Criminal Offence”

are criminal in nature and consequently carry criminal sanction.

Multiple provisions of the MACC Act are applicable in terms of offences that could possibly be committed by members of the public service working on government procurement. As an investigatory body, the MACC is empowered to receive complaints by members of the public if there is suspicion that procurement officers were involved in some manner of corruption in the course of awarding tender. Some relevant provisions are listed here below:

Section 16—*Offence of accepting gratification*

Section 17—*Offence of giving or accepting gratification by agent*

Section 23—*Offence of using office or position for gratification*

The provision that stipulates the penalty for offences committed in contravention to offences as stated in the MACC Act is Section 24:

Penalty for offences under sections 16, 17, 18, 20, 21, 22 and 23

24. (1) *Any person who commits an offence under sections 16, 17, 20, 21, 22 and 23 shall on conviction be liable to—*

- (a) imprisonment for a term not exceeding twenty years; and*
- (b) a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.*

Additionally, if instance of bribery or attempted bribery are known by a public officer but not reported to the relevant authorities, this would also constitute an offence under Section 25 of the Act:

Duty to report bribery transactions

25. (1) *Any person to whom any gratification is given, promised, or offered, in contravention of any provision of this Act shall*

report such gift, promise or offer together with the name, if known, of the person who gave, promised or offered such gratification to him to the nearest officer of the Commission or police officer.

(2) Any person who fails to comply with subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

2.1.3 PUBLIC COMPLAINTS BUREAU (PCB)

The PCB was established in 1971 in order to receive complaints regarding government maladministration from members of the public with a view of providing a resolution to those grievances raised. Its main role is to serve as a monitoring body to ensure that other government agencies are handling complaints made to them in accordance with established procedure. Hence, the duties of the PCB can be described as follows:

1. Receiving complaints from individuals who remain dissatisfied after raising their complaints to the relevant government agency (termed “2nd-tier complaints”);
2. Investigating and coming up with recommendations of proper corrective or preventive actions for the relevant government agency;
3. Monitoring the performance of the complaint resolution process in all government agencies through periodic inspections, audits, and “mystery shopping”; and
4. Researching and recommending improvements in the provision of public services and complaint handling.

Within the context of public procurement, the PCB is entitled to re-

ceive complaints from members of the public and private sector about tender awards suspected not to have been conducted in accordance with proper procurement guidelines, but only after a complaint has been lodged with the relevant government agency or ministry conducting the procurement, and further action was either not taken or unsatisfactory to the complainant.

The PCB is not without its flaws – one of the criticisms often levelled at it is its lack of independence as it is an agency under the purview of the Prime Minister's Office. Additionally, it reports to the Permanent Committee on Public Complaints, which is in turn responsible to the Cabinet.¹⁹ As established in Chapter 1, from an institutional standpoint, procurements are largely under the control of ministers and the ministries that they govern – Cabinet being the final authority for a complaints board that may very well receive complaints regarding tenders that were awarded and rejected under their purview makes the PCB ill-fitting to fulfil that function in its current iteration. Nonetheless, the PCB here is useful as a point of reference for the following discussion.

2.2 ASSESSMENT REGARDING THE NEED FOR A SEPARATE PUNITIVE FUNCTION UNDER THE PROCUREMENT ACT

The mechanisms for regulating procurement officers' conduct as introduced above are non-exhaustive, as there exists other legal provisions and agencies that form the collective mechanism by which non-compliance to procurement procedure can be "corrected", such as the Offences against Property under the Penal Code and the ability to surcharge public officers under Section 18 of the Financial Procedure Act 1957. Despite their existing flaws, there are presently institutions and mechanisms

[19]. C4 Center. "LETTER | Malaysia Needs an Ombudsman - Now - C4 Center." C4 Center. Last modified May 13, 2022. <https://c4center.org/letter-malaysia-needs-an-ombudsman-now>

that are at least established and equipped to a certain extent to receive reports and can dole out disciplinary measures both internally within government agencies and also at the level of criminal law, demonstrably in the form of offences under the MACC Act. This begs the question of whether or not additional sanctions would even benefit efforts to reduce non-compliance in the procurement process.

In assessing the requirement of novel punitive provisions being introduced into the proposed Procurement Act, the position this paper takes is one of measured caution in the way offences, its qualifications, and corresponding sanctions would be defined in the Act, the reasons for which shall be expanded below:

2.2.1 LEGAL CULPABILITY

According to the fraud theory, there are three factors that contribute to an individual committing fraud; the pressure or an incentive to engage in fraud; a perceived opportunity; and the ability to rationalise fraudulent behaviour.^{20, 21} This statement, taken at face value, is largely reflective of the public's perception of the civil service as being willing accomplices in government corruption, especially in the realms of public procurement. This is not an unfair assumption to make as the Malaysian Anti-Corruption Commission (MACC) has reported that complaints and investigations against the civil service rank the highest of all amongst

[20]. Cressey, D. R. (1953). *Other People's Money: A Study in the Social Psychology of Embezzlement*. The Free Press, Glencoe, IL

[21]. Albrecht, W. S., Hill, n. C., & Albrecht, C. C. (2006a). The ethics development model applied to declining ethics in accounting. *Australian Accounting Review*, 16(38), 30-40.

other groups subject to investigations,²² with further reports of cartels forming within the civil service²³ in order to engage in corrupt practices.

However, more holistic view of fraud theory would necessitate the interpretation of it to include structural and external motivations that inform the public officers' own motivations as in reality, those two cannot exist completely separate from each other.

For example, qualifying the condition of "the ability to rationalise fraudulent behaviour" would not just mean the public officer making excuses in order to directly benefit from fraudulent behaviour, but could also refer to situations where public officers' rationalisations about how their actions in flouting procurement procedure was the result of exceptional circumstances and the more pressing need to carry out instructions from their superiors due to ingrained workplace cultures, unclear chains of command, or wide powers being normally afforded to Ministers to direct procurements giving rise to the mistaken assumption that their say overrides written protocol.

"Pressure or incentive to engage in fraud" could also refer to the anxieties faced by public officials for the consequences if they were to pushback against these established workplace cultures or not follow direct instructions from someone perceived to hold powers in directing procurements.

Due to circumstances such as these, it would be unwise to impose harsh sanctions over non-compliance without first understanding the

[22]. A study conducted by the MACC between 2013 to 2018 shows 63.3% of the complaints received were on the public sector – 42.8% of the complaints were with regards to the procurement sector, 23.9% enforcement while 8.69% on licensing and permits. The three sectors contributed 75.39% of the overall complaints received by MACC during the period.

Bernama. "63.3pct of Corruption Complaints Involve Public Sector - Azam Baki." Malaysiakini. Last modified November 6, 2019. <https://www.malaysiakini.com/news/498884>.

[23]. FMT Reporters. "Corrupt Contractors, Civil Servants Work in 'cartels', Says MACC." Free Malaysia Today | FMT. Last modified December 4, 2022. <https://www.freemalaysiatoday.com/category/nation/2022/12/04/corrupt-contractors-civil-servants-work-in-cartels-says-macc/>.

implications of committing to such an a course of action as it would simply fail to address deeper institutional issues that form our current understanding of procurement fraud. The deterrent effect of imposing criminal sanctions upon procurement officers in order to reduce instances of fraud or corruption is at times overstated and oversimplified, with many stakeholders arguing that it is simply the best course of action to impose progressively harsher sanctions. Baer (2008) makes clear that simply increasing sanctions is one of the ways least likely to produce a deterrent effect to fraud offences.²⁴ The paper additionally goes on to assert that the practice of ratcheting up sanctions to a high degree is termed a “Draconian sanction” which, amongst others stated, has the potential effect of increasing the scope and effect of the fraud:

“Because draconian sanctions force the MFP (mid-fraud perpetrator) to bear additional risk or reduce that risk through costly detection avoidance measures, the MFP may compensate for those costs by seizing more benefits than he originally intended. In other words, the MFP will steal more and use more deceptive efforts to do so than he otherwise would have in order to compensate for draconian sanctions that he previously failed to take into account.”

Further to this is the argument that punitive elements within the Procurement Act would disproportionately punish members of the civil service, many of whom only serve as the red tape and the bureaucratic rubber stampers for the grand corruption perpetrated by those in power such as ministers and politicians who are ultimately the greatest beneficiaries of corruption – the phenomenon of procurement officers doing merely as instructed by higher-ups has been discussed earlier in this paper. These individuals will more likely than not be made into scapegoats

[24]. Baer, Miriam H. (2008). “Linkage and the Deterrence of Corporate Fraud.” *Virginia Law Review* 94 September 2008, p. 1295-1365. <https://www.virginialawreview.org/wp-content/uploads/2020/12/1295.pdf>.

on the basis of procedural violations. That is not to say that every civil servant who is involved with procurement fraud is acting under orders only, but we should caution against overusing heavy-handed methods that do not address the problem at its root.

2.2.2 AVOIDING OVER-REGULATION

Even in the case where civil servants are knowingly engaging and in corrupt practices, there already is a case to be made for the strengthening of existing mechanisms of punitive measures instead of resorting to enacting new laws.

As a point of comparison for our reference, the Australian Capital Territories' (ACT) **Government Procurement Act 2001** contains provisions that prescribe offences that result in imprisonment:

15. *Abuse of position*

- (1) *A person commits an offence if—*
 - (a) *the person uses information gained because of being a member of the board; and*
 - (b) *the person does so with the intention of dishonestly obtaining a benefit for the person or someone else.*

Maximum penalty: imprisonment for 5 years.

- (2) *A person commits an offence if—*
 - (a) *the person has stopped being a member of the board; and*
 - (b) *the person uses information that the person obtained because of being a member; and*
 - (c) *the person does so with the intention of dishonestly obtaining a benefit for the person or someone else.*

Maximum penalty: imprisonment for 5 years.

- (3) *In this section:*
dishonestly—a person acts dishonestly if—

- (a) *the person's conduct is dishonest according to the standards of ordinary people; and*
- (b) *the person knows that the conduct is dishonest according to those standards.*

The Section 15 of the ACT Government Procurement Act 2001 as highlighted above, “board” refers to the Government Procurement Board whose function is to review and evaluate procurement proposals.

With the above Australian provision, two issues become very clear if we were to attempt to compare it to the discussion at hand: 1. the legal provision very clearly lists “intention” and “dishonesty” as being key elements of the offence, meaning that procedural violations are not subject to criminal sanction; 2. the MACC Act already contains a very similar provision under Section 23:

Offence of using office or position for gratification

- 23. (1) *Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.*

While there is no way of knowing definitively at time of writing the contents of the Procurement Act and the exact nature of punitive elements to be written into the law, from this comparison we are able to put forward the inquiry as to the need to repeat and re-enact provisions for offences that are already provided for. This is true for both situations where the procurement officer may have conducted procurements against established procedure due to mistake or incompetence, as well as in situations where they have knowingly acted in self-interests to gain a benefit or gratification – such examples are listed in the previous section 2.1 of this report.

An additional consideration is that the existence of too many regu-

latory bodies or agencies or mechanisms established to handle emerging issues that are similar in nature is bound to cause some jurisdictional grey area and conflict. If multiple mechanisms can be employed in order to deal with a single issue, more likely than not the result will be one of responsibility shifting between agencies who each are of the opinion that it is the jurisdiction of another agency.

This is more so pertinent to enforcement and good governance measures to be conducted externally of the ministries where procurement operations take place – the MACC is empowered to receive complaints regarding suspected corruption, investigate public officers, and bring prosecutions against them; the PCB is the empowered to also receive complaints while monitoring the administration of other governmental agencies in their internal complaints resolution processes. The government has also already announced tentative plans to replace the PCB with an Ombudsman, and improve its existing functions, enabling it to better monitor and provide oversight over maladministration.²⁵

This begs the question as to how disciplinary provisions included in a proposed Procurement Act would be regulated and enforced. As established, procurement is highly ministry-specific, hence, the enforceability of disciplinary provisions and the agency or body responsible for enforcing these remain unclear and speculative.

[25]. Bernama. "Ombudsman Malaysia to Replace, Improve Functions of PCB." Malay Mail. Last modified June 14, 2023. <https://www.malaymail.com/news/malaysia/2023/06/14/ombudsman-malaysia-to-replace-improve-functions-of-pcb/74290>.

2.3 EXPLORING ALTERNATIVES TO SANCTIONS IN IMPROVING GOVERNANCE

At present, disciplinary measures against public officers in respective ministries found to be in contravention of their duties are subject to the oversight of their direct superiors and disciplinary boards operating within their own ministries i.e., the standard protocol to ensure compliance takes place in the immediate vicinity of the officer themselves, rarely ever being referred to outside the ministry.

It is argued here that strengthening discipline and compliance within ministries is paramount to ensuring good governance as these are the structures most prepared to deal with compliance issues imminently as they emerge. This argument is further supported by reasons of pragmatism – Malaysia retains a large civil service, and measures to ensure compliance and good governance cannot be addressed by a singular agency alone, nor can issues such as a culture of non-compliance be left to calcify only to be elevated to the level of prosecution once the commission of an offence takes place. Curbing procurement non-compliance necessitates the exploration of alternative or additional measures outside those designed to be punitive.

2.3.1 INTEGRITY OFFICERS AND UNITS

One of the main reasons that procurement is perceived to be so vulnerable to corruption is because of the lack of an ethical climate within these government departments and agencies. Hence, there is a need to elevate and highlight the responsibilities of Chief Integrity Officers (CIO) in order to maintain ethical standards of conduct in governance. This section references study conducted by Sajari et al. (2019) on the relationship between the quality of CIOs and the ethical climate in Malaysian

public sector organisations.²⁶

“Meanwhile, organizational ethical climate refers to a few models of ethical judgment support that has a significant relationship with perceived ethical problem. Hunt and Vitell's Theory of Ethics (1986) also posit that organizational environment influences people in perceiving ethical problems. Similarly, prior studies indicate that the more ethical the employees perceived the climate in their organization, the higher their ability to perceive ethical problems (Marta, 1999; Patterson 1994). Hence, the less likely an unethical judgment can occur.”

The study lists several factors that are used to rate the quality of CIOs that the competence of the CIO was found to have a positive relationship with the level of ethics and integrity in the Malaysian public sector organisations studied – competence here referring to working experience and level of education. This finding is consistent with previous research that officers who are more competent will be able to influence the development and integration of good ethics programmes.

A competent Chief Integrity Officer would also have completed professional qualification courses related to ethics and integrity, the minimum being the six-month Certified Integrity Officer (CeIO) course provided by the Malaysia Anti-Corruption Academic (MACA). The objectives of the programme are (i) promote compliance in terms of laws and regulations, system and procedure, (ii) foster zero tolerance towards fraud, corruption and abuse of power, and (iii) consults and advise the organisation's management on awareness and preventive measures against corruption.

Equipping government agencies and departments each with its own integrity unit that are adequately funded would allow for the main-

[26]. Sajari, A., Haron, H., and Ismail, I. (2019) “Effectiveness of Quality of Chief Integrity Officer, Ethical Climate on the Level of Ethics and Integrity in the Malaysian Federal.” *Journal of Governance and Integrity* 3, no. 1 (2019), p. 50-68. doi:10.15282/jgi.3.1.2019.5422.

tenance of an ethical organisational climate, such that the CIO is able to promote ethics and integrity in their respective departments. The CIOs will head teams of Certified Integrity Officers (CeIOs) whose main task is centred around detecting and verifying complaints of crimes and violations of codes of conduct, and lodging reports with the enforcement agencies.²⁷ Increasing the capacity and presence of CeIOs would allow them to collect feedback and identify ethics-related issues taking place at the ground level, allowing them to be key stakeholders to be consulted in drafting workplace policies to improve public sector integrity.

2.3.2 INTERNAL AUDITING

Another mechanism to be strengthened in order to maintain standards of compliance at the ministry-level is the internal audit, with potential to be an important and effective way to ensure that maladministration by public service is minimised. The benefit of this mechanism over an external audit is that internal audits can be performed more frequently and will be able to detect corrupt practices earlier on before they grow in intensity. This is particularly pertinent in public procurement, whereby patronage and the giving of gratification is employed over a long period of time in order to establish connections that can be exploited in the commission of procurement fraud. Internal audits are also useful for aspects other than corruption such as detecting wastage, non-compliance of procedures, project management, etc.

Ismail et al. (2018)²⁸ highlights the previous work done by other researchers on internal auditors, namely that they should be competent

[27]. Shah, Aliza. "[Exclusive] 28 Integrity Officers to Be Reinstated." NST Online. Last modified July 16, 2018. <https://www.nst.com.my/news/exclusive/2018/07/391197/exclusive-28-integrity-officers-be-reinstated>.

[28]. Ismail, Aida Maria and Hasan, Mohammad Rizal and Clark, Colin and Mohamed Sadique, Raziah (2018) *Public sector procurement: the effectiveness of monitoring mechanism* / Aida Maria Ismail ...[et al.]. *Asia-Pacific Management Accounting Journal (APMAJ)*, 13 (2). pp. 147-172. ISSN 2550-1631

and capable to prevent and detect fraud;²⁹ that their deficiencies contribute to an increase in the misuse of public funds and financial corruption in Sudan;³⁰ that internal auditors are in the best position to prevent, deter, and detect fraud within their respective organisations;³¹ and that the role of an internal auditor can be a mechanism to assist the management in providing for better control over the organisation.³²

However, evidence has shown that Malaysia's internal audit mechanisms in the public sector is lacking in multiple aspects and may also be limited in its scope. Ismail et al. (2018) further identified the top five factors that are associated with procurement issues in the public sector are; *no job rotation in high risk areas, management override of control, lack of top management support, poor segregation of duties and inadequate continuous monitoring by management* – these factors are components of control activities in the Committee of Sponsoring Organisations (COSO) framework for internal control. It concluded that there is an “insignificant negative relationship between the role of the internal auditor and procurement issues,” possibly indicating that there is a negative perception towards the function of internal auditors in the public sector. This study additionally concluded that there is a significant negative relationship between procurement procedure and procurement issues. On both aspects, both procurement procedures and internal audits leads to a decrease in procurement issues, but the effect is significantly less observable in internal auditing.

[29]. Petraşcu, D., and Tieanu, A. (2014). “The Role of Internal Audit in Fraud Prevention and Detection.” *Procedia Economics and Finance* 16, p. 489-497. doi:10.1016/s2212-5671(14)00829-6.

[30]. El-Nafabi, H. M. (2014). The role of public sector audit and financial control systems in safeguarding public funds in Sudan. *Journal of Administrative and Economics Science*, 2(1), 1-11.

[31]. Hillison, W., Pacini, C., and Sinason D. (1999). “The internal auditor as fraud-buster.” *Managerial Auditing Journal* 14, no. 7, p. 351-363. doi:10.1108/02686909910289849.

[32]. Zakaria, Z., Devi, S., Selvaraj & Zakaria, Z. (2006). “Internal auditors: their role in the institutions of higher education in Malaysia.” *Managerial Auditing Journal* 21, no. 9, p. 892-904. doi:10.1108/02686900610704993.

Ali et al. (2007) found that there were serious shortcomings in the internal audit system:

“These shortcomings are that many internal audit units face staff shortages, and staff lacking in internal audit competence. In addition, a majority of the internal audit units, most of which operate in out-dated audit modes, have failed to get the right level of support and assistance from the Treasury and other parties. Worse, their effectiveness and efficiency are further threatened by the actions of the NAD which transfers its so-called cadre staff seemingly randomly in and out of the internal audit units.”

Shamsuddin et al. (2014) expanded on the research of Ali et al. On the subject of the independence of the internal auditors:

“In the ministries we interviewed, the Secretary General is the superior officer for all internal auditors. Therefore, reports made by the internal auditors will usually favour the Secretary General which disturbs the independency of internal auditors.”

“In a research done on Internal Audit in the Statutory Bodies and Government-linked Companies of Malaysia, the researcher had interviewed several internal auditors in regards to their opinion on the independence of internal auditors in the public sector. The results of the interview were shocking as the independence of internal auditing in public sector has many loopholes. The situation is quite serious where one of the auditors lamented that once during the two decade history of the audit operation, an audit head was demoted due to his or her “aggressive” reporting.”³³

The study additionally found that internal auditors were not provided sufficient training and lacked competency to perform their duties

[33]. Shamsuddin, A., Manijegar, D. B., and Kirupanangtan, K. (2014). “Factors that Determine the Effectiveness of Internal Audit Functions in the Malaysian Public Sectors.” *International Journal of Business, Economics and Law* 5, no. 1 (December 2014), 9-17. ISSN 2289-1552.

despite the high-skill demands of their duties – it cites the failure of the public sector internal audit advisory unit (BNPK) in providing good training ground. Shamsuddin also cites previous research conducted by Zabedah et al. (2011) that revealed the training and development programmes delivered by parties such as the National Institute of Public Administration (INTAN), the National Audit Department (NAD) and the Office of the Accountant General failed to provide much assistance.

Additionally, the study also found that internal auditors were also tasked with ad hoc duties in order to cover for staff constraints in order to ensure the running of organisational operations.

Based on the findings discussed above across multiple studies, it is clear that the internal audit mechanism has a strong potential to serve as an adequate internal monitoring mechanism that will be able to keep track of procurement fraud and such similar corrupt practices. They are, however, held back from doing so due to capacity limitations – it would seem like internal auditors lack requisite skill, support from their organisations, and poor management greatly hinder their ability to conduct their tasks as required. This does not mean that the offices of internal auditor should be ignored, and it is argued here that the government should not seek to reinvent additional monitoring mechanisms but rather focus on improving systems that are already in place.

2.4 RECOMMENDATIONS

2.4.1 FURTHER STUDY ON PUNITIVE MEASURES AS A FORM OF DETERRENT AGAINST PROCUREMENT FRAUD

Based on the discussions above, it would be strongly recommended for the relevant ministries such as the Ministry of Finance as well as the Legal Affairs Division of the Prime Minister's Office to look into the subject of imposing sanctions in greater detail. It is vital that the formation of a policy such as this, with potentially far-reaching effects must be subject to a proper risk assessment beforehand. The commitment to such a policy must first ensure that it indeed likely to fulfil the aims of curbing procurement fraud, and that the possible externalities arising out of this are taken into account, with adequate mitigation measures planned in the event that the risks materialise.

2.4.2 INCREASE THE CAPACITY OF NON-CRIMINAL INTERNAL MONITORING AND SANCTION MECHANISMS

Internal monitoring mechanism such as the internal audit, administration and employee disciplinary sanctions should be prioritised over overly punitive or criminal sanctions in the case of procurement non-compliance. Funding and capacity building for these mechanisms need to be prioritised instead of attempting to legislate new systems that may merely result in a repetition of the same results. This would include budgeting for the maintenance of an Integrity Unit and Internal Auditors within all government agencies, ministries, and departments.

This recommendation would also encompass larger institutional reforms that are geared towards increasing accountability in governance – these potentially include cooperation with the upcoming Ombudsman Office that would be empowered to investigate maladministration, or greater protections for whistleblowers who wish to report suspected corruption, especially against higher-ups in respective government departments and agencies.

CHAPTER THREE

Information accessibility and transparency

3.1 GUIDING PRINCIPLES AND INTERNATIONAL STANDARDS

Multiple international legal instruments and documents have established transparency as a vital component of the public procurement process and have outlined the requirements for fulfilling the criteria of transparency as stated in these instruments. Relevant provisions under these instruments shall be outlined in brief below.

3.1.1 UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)

Malaysia has been a signatory to the UNCAC since 2008. Under Article 9 of the UNCAC, a State Party is obliged to take the necessary steps to establish appropriate systems of procurement, based on transparency, competition, and objective criteria in decision-making, that are effective in preventing corruption. Subparagraph 1(a) to (c) of **Article 9**

outline this in detail:

- (a) *The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;*
- (b) *The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;*
- (c) *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.*

3.1.2 UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT (2011)

The United Nations Commission on International Trade Law (UNCITRAL) proposed a model law on public procurement in 1994 that contains procedures and principles for procurement that seek to achieve the aims of value for money procurement and minimising abuses in this sector – the 1994 model law was subsequently updated to address changing modes of procurement in 2011 but the original intents and purposes remain the same. On the subject of information access, the UNCITRAL Model Law describes procedures at multiple stages of the procurement process as well as the reporting and publishing requirements where applicable. The guiding principle for this can be found in **Article 9** of the Model Law on “Communications in procurement” under paragraph (1):

1. *Any document, notification, decision or other information generated in the course of a procurement and communicated as required by this Law, including in connection with challenge proceedings under chapter VIII or in the course of a meeting, or forming part of the record of procurement proceedings under article 25 of this Law shall be in a form that provides a*

record of the content of the information and that is accessible so as to be usable for subsequent reference.

A more concrete example of this within the Model Law can be found in Article 39 in reference to the “Contents of solicitation documents” that outlines the criteria that need to be fulfilled by procuring entities in publishing solicitation documents for open tendering – the list is lengthy and include criteria such as documentary evidence that need to be presented by prospective contractors, criteria to discern the qualifications of contractors, detailed descriptions of the subject matter of the procurement, the terms and conditions of the procurement contract, etc.

The Model Law also prescribes publishing requirements for post-award of contract under **Article 23** on “Public notice of the award of a procurement contract or framework agreement”:

1. *Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the supplier (or suppliers) or contractor (or contractors) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price.*

3.1.3 NATIONAL ANTI-CORRUPTION PLAN (NACP) 2019-2023

The NACP makes recommendations on the reform and improvement of the public procurement system under the Strategic Objective 3.2: Greater Procurement Transparency, Enabling Better Identification and Mitigation of Corruption Risks, Market Distortion and Anti-Competitive Behaviour. Specifically, increasing transparency and access to procurement information in the following paragraphs:

- 3.2.1:** *To introduce a more transparent mechanism in preventing information leakages in procurement process;*
- 3.2.9:** *To enhance the technology-based procurement system (e-perolehan) in order to reduce human intervention between parties.*

3.2 IMPORTANCE OF TRANSPARENCY IN THE PROCUREMENT PROCESS

Having access to information regarding public procurements is key to maintaining a procurement system that functions to obtain goods and services that serve their purposes adequately with the best possible value for money, and that also maintains a procurement system that is corruption-free.

The procurement-related information that should be published and made accessible for public viewing are numerous and should cover all stages of the procurement process – the Organisation for Economic Co-operation and Development (OECD) has outlined examples of information that should be published in their Checklist for Supporting the Implementation of OECD Recommendation of the Council on Public Procurement: Transparency:

- *Pre-tendering (including planning): procurement plan, prior information notice, public hearing notice, etc.*
- *Tendering (including invitation and award): tender notice, bidding/tender documents, technical specifications, qualification criteria, evaluation criteria, clarifications to bidder's questions, award notice, evaluation reports, decisions on appeals, etc.*
- *Post-award (including contract and implementation): contract notice, information on litigations, progress reports, audits, etc.³⁴*

[34]. The Organisation for Economic Co-operation and Development (OECD). "Transparency - Organisation for Economic Co-operation and Development." OECD Web Archive. Accessed January 31, 2025. <https://webarchive.oecd.org/governance/procurement/toolbox/principletools/transparency>.

Additionally, the OECD also included a list of examples of procurement records and documents related to the different stages of the procurement process and contract management that must be kept and available for public inspection, including but not limited to:

STAGE(S) OF PROCUREMENT	EXAMPLES OF DOCUMENTATION
Pre-tendering	• Needs evaluation report • Unused preliminary reports • Local council deliberations • Public notices of procurement opportunities • Procurement method including justification
Tendering	• Call for tenders • Requirements and justification of changes to technical requirements • All administrative and technical documents supplied to bidders • Bid analysis reports • Evaluation reports including clarification sought and provide during evaluation process • Decisions of the awards commission and all the elements on which the decision was based • Award notices (if applicable) • Selection criteria that have been modified or added during the review of bids
Post-award	Final signed contract documents and amendments

Publicly-available information is important at different stages of the tendering process. Information regarding the qualifications for the submission of tender such as requisite work experience and skill requirements ensures that bidders will be able to ascertain if their bid was rejected in favour of someone who less qualified, or if their bid was not considered fairly. Subsequently, bidders will be able to request further justification as to why their bid was rejected despite meeting the qualifications better, and have a clearer avenue towards seeking a remedy as

they are furnished with sufficient evidence to make that claim.

Members of the public being able to view and review procurement data would add an extra layer of scrutiny over the entire procurement process, especially in cases where they have an interest in the good or service being procured by the government – their personal experiences with flawed procurements or observations that a contract recipient was not actually qualified to carry out the procurement would also be useful in aiding a review and rectification process, and ensuring that the party held responsible can be held accountable.

In terms of anti-corruption, in both instances where prospective contractors and members of the public are allowed access to procurement data, the likelihood of procurement-related corruption taking place would be significantly lower as opportunities to rig bids through cronyism or the giving of bribes would be eliminated. Even if such corrupt practices do take place, its effect on the procurements themselves would not be able to materialise by virtue of the constant monitoring of tender awards by multiple stakeholders.

The increased public scrutiny also means that enforcement agencies such as the Malaysian Anti-Corruption Commission are able to receive reports and complaints at a quicker rate, allowing prompt investigations into public officers or government agencies suspected of engaging in corruption, leading to faster resolutions and a higher level of accountability as well.

3.3 ISSUES AFFECTING THE ACCESSIBILITY OF PROCUREMENT INFORMATION

3.3.1 EVALUATION OF TENDER AND JUSTIFICATIONS FOR AWARD

Tenders bids undergo evaluation by the evaluation committees based on the criteria set in the tender document. Evaluation is normally done by two separate committees i.e. Technical Evaluation Committee and Financial Evaluation Committee. The evaluation of both committees will result in the ranking of tenders received and the tender secretariat will apply the pre-determined weightage for the final evaluation of all tenders. This tender evaluation report will then be submitted to the Procurement Boards of Ministries/Departments (Agency Procurement Boards) for consideration and decision.

The Agency Procurement Boards will consider and select the successful bidder. Selection of tenders will be based on the general procurement principles, pre-determined criteria and final evaluation. All tenders are to be considered by the Agency Procurement Boards. However, in cases where the tender value is above RM100 million for works and RM50 million for supplies and services, the tenders would then be sent with recommendation of the Agency Procurement Boards to the Ministry of Finance for final decision.

Due to the fact that the justifications for the selection of one tenderer over another is never made public, there is no way of adequately identifying with certainty how the evaluation takes place and the weightage given to one evaluation criteria over another, or even if the evaluation criteria were adhered to.

3.3.2 E-PROCUREMENT

A large proportion of procurement bidding is conducted online – there are sufficient benefits to the e-procurement system such as convenience at not having to physically be present at the office of procuring entity; the reduction of costs for the procuring entity for both the procuring entity and the bidder; increased efficiency of the entire procurement process due to the increased rate at which information can be shared between both parties in the procurement process.³⁵

“... Abas Azmi and Abdul Rahman (2015) conducted a study to explore the views of Malaysia's public officials on how e-procurement is used to curb procurement fraud. It was found that e-procurement acts as a tool to minimize public procurement fraud but does not totally solve the procurement fraud activities (Abas Azmi and Abdul Rahman, 2015). The study also found that e-procurement reduced the risk of abuse from political and economic forces and reduced the interference from third parties (Abas Azmi and Abdul Rahman, 2015).”³⁶

The Federal Government publishes notices on public procurement on the portals e-Perolehan and MYPROCUREMENT, but at the same time, different ministries have their own procurement notice boards on their respective websites. For example, the Ministry of Home Affairs publishes tender notices on their website, segregated between development tender³⁷ and procurement tender,³⁸ and also has two separate pages for

[35]. Ngatman, N.H., Alderei, H.S.S., Musa H. (2020). “The Challenges faced by Public Sector Governance in implementing e-Procurement System: A Case Study of Education Department of Malacca.” International Journal of Human Technology and Interaction, Vol. 4, No. 1 (2020), p. 39-43. <https://journal.utem.edu.my/index.php/ijhati/article/view/5207>

[36]. Abul Hassan, S.H., Ismail, S. and Ahmad @ Abdul Mutalib, H. (2021). “Public procurement in Malaysia: objectives and procurement principles.” Journal of Economic and Administrative Sciences, Vol. 37 No. 4, p. 694-710. <https://doi.org/10.1108/JEAS-03-2020-0033>

[37]. Ministry of Home Affairs Malaysia (KDN). “Development Tender” accessed February 10, 2025. <https://www.moha.gov.my/index.php/en/kdn2/tender1/tender-pembangunan>

[38]. Ministry of Home Affairs Malaysia (KDN). “Procurement Tender” accessed February 10, 2025. <https://www.moha.gov.my/index.php/en/kdn2/tender1/tender-perolehan>

publishing the latest tender decisions³⁹ as well as an archive for previous tender award decisions.⁴⁰ Meanwhile, at the state level, the procurement portals are not consistently developed, with some state governments having more developed procurement portals than others, and some state governments not having any procurement portals whatsoever.

The amount of information furnished on these portals also varies – the Selangor state procurement portal furnishes tender notices with tender information, conditions of the tender, the full tender registration document, and even information regarding the government officers overseeing that particular tender. On the other hand, the Perak state procurement portal has limited information – whilst the portal provides the means to access the eligibility criteria of prospective bidders, this is hidden behind the requirement of having to input your company’s registration number as per the Companies Commission Malaysia, hence the criteria are not publicly accessible. A similar condition exists to be able to access the full tender document, with bidders only gaining access to it after having input their registration number and received a serial number which is then input to be able to access the full document.

On both portals referenced i.e., Selangor and Perak, successful tenderers are also published but with very minimal information regarding them – there is no requirement to publish the rationale and reasoning as to why the successful tenderer was chosen.

Research has demonstrated that Malaysia’s e-Procurement system has much room for improvement – a case study conducted on Melaka’s Department of Education revealed many flaws with regards to the implementation of the e-Procurement system:

[39]. Ministry of Home Affairs Malaysia (KDN). “Results of Tender Procurement Board.” Accessed February 10, 2025. <https://www.moha.gov.my/index.php/en/kdn2/tender1/keputusan-tender-perolehan-myprocurement>

[40]. Ministry of Home Affairs Malaysia (KDN). “Archive” accessed February 10, 2025. <https://www.moha.gov.my/index.php/en/kdn2/tender1/arkib-keputusan>

“There were inadequate facilities and training provided by headquarters. The work instructions are received through circulars issued by the Ministry of Finance and subsequently distributed through their respective Ministries. It requires knowledge and skills related to the system in order to operate the system accordingly and mannerly (since the system was newly introduced for usage). The Third party who was responsible for developing e-Perolehan Baharu, was the commercedotcom (CDC), and they also provided one-to-one training services to all government agencies and companies registered with e-Perolehan. However, besides having a shortage of human resources, they were also not familiar with the technical matters.”⁴¹

Hence, based on the discussion above, the issue with regards to e-procurement can be described as two-pronged, with each one correlating to availability of information and the access to information. Both of these aspects need to be fulfilled in order to ensure that the e-procurement process meets an adequate level of transparency.

3.4 RECOMMENDATIONS

3.4.1 PUBLISH PROCUREMENT-RELATED INFORMATION

With regards to availability of information, the government should ensure that across all ministries, agencies, state governments, and other procuring bodies, adequate information regarding procurements should be published and available on public record in real-time – this must also include information previously unavailable to the public such as criteria relied on by the evaluation committees in their decision to award tender, and detailed explanations as to their rationale based on the eligibility criteria as listed in the tender notice and supporting principles like value for money.

[41]. Ngatman, N.H. (no. 35)

3.4.2 ENSURE ACCESS TO INFORMATION

With regards to accessibility of information, the government should endeavour to ensure that the facilities, infrastructure, and platforms used to display this from of information should be easily navigable and also maintained. At present, the presence of two platforms for procurement at the Federal level (e-Perolehan and MYPROCUREMENT), individual Ministry-level procurements, and the scattered multitude of state government procurement platforms. Having multiple platforms each with its own method of presentation of procurement-related information, inconsistency in information access requirements, overlapping notices, and varying degrees of disclosure makes e-procurement difficult and confusing for most people to use.

It is strongly suggested that all procurement information platforms be collapsed down into a single dashboard-like platform that is equipped to allowing viewing of tender notices across multiple Ministries and departments. Companies who have entered bids should be able to have easy access to view all pending decisions and be notified on bid decisions – companies who lose bids should be provided a detailed and justified account as to why they lost the bid selection.

This would also entail resource allocation to ensure that competent and trained staff are dedicated to the task of maintaining, debugging, and improving the platforms that procurement information is displayed on. This is to ensure that the platforms are user-friendly, and are able to display the needed information on demand without interruptions or delays.

3.4.3 LOOK INTO TECHNOLOGICAL SOLUTIONS

In adherence to international recommendations and guidelines, the government must also look into investing into state-of-the-art e-procurement tools that are modular, flexible, scalable and secure in order to assure business continuity, privacy and integrity, provide fair treatment and protect sensitive data, while supplying the core capabilities and functions that allow business innovation. These tools should be simple to use and appropriate to their purpose, and consistent across procurement agencies, to the extent possible; excessively complicated systems could create implementation risks and challenges for new entrants or small and medium enterprises.⁴²

[42]. The Organisation for Economic Co-operation and Development (OECD). "Checklist for Supporting the Implementation of OECD Recommendation of the Council on Public Procurement: E-procurement." OECD Web Archive. Accessed February 10, 2025. <https://web-archive.oecd.org/governance/procurement/toolbox/search/Checklist%2007%20E-procurement.pdf>

CHAPTER FOUR

Grievance and Remedy

Even the most well-crafted administrative systems result in inevitable mistakes and mismanagements. Hence, strong grievance and remedy procedures uphold fairness and meritocracy and faith in the system and provide an avenue for redress.

As previously established, public procurement is an area that is particularly vulnerable to corruption – owing to factors including procurement officers who have been bribed, or have been embroiled in a relationship of patronage with a corrupt and high-ranking politician, the occurrence of tenders being awarded as a means of reciprocation for gratification or patronage cannot be overstated at all. In such a scenario, it would seem unjust and in contravention of good governance if the tender award and subsequent procurement contracts were allowed to be enforced in spite of the corruption and the violation of tender evaluation

criteria. However, it may also be possible that it would not be practicable to nullify or reverse a contract, especially where the procurement works have already been undertaken by the tender awardee either entirely or in part.

This chapter assesses the ways in which a tenderer who loses a tender due to corruption can seek a remedy.

4.1 GUIDING PRINCIPLES

Multiple international organisations have set out principles and model rules to be adhered to in terms of providing an adequate remedy to party aggrieved as a result of a flawed or mishandled corruption.

4.1.1 UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)

Article 9 of the UNCAC regarding Public procurement and management of public finance provides a minimal baseline for establishing a remedy procedure for procurements:

- (d) *An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed.*

4.1.2 UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT (2011)

The UNCITRAL Model Law provides a detailed example of the appeals process for flawed procurements and includes provisions detailing the processes that arise from a claim of non-compliance in the procurements process – this ranges from complaints submission to remedial solutions. **Article 64** on the “Right to challenge and appeal” state briefly and acknowledge the principle basis in stating that tenderers are able to bring claims against the state party:

1. *A supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned.*
2. *Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 66 of this Law, an application for review to the [name of the independent body] under article 67 of this Law or an application or appeal to the [name of the court or courts]].*

Article 67 on “Application for review before an independent body” goes into further detail about the procedures that should be adopted in the submission of complaint to an independent body including the channels to go through the requisite documentation need to be submitted. Paragraph 9 in particular goes into the methods of recourse that can be undertaken by the “independent body”. For example, the independent body can prevent the procuring entity to undertake actions found to be not in compliance with the procurement law, overturn or revise decisions made by the procuring entity, or even mandate payment of compensation or damages.

4.1.3 COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP)

The Trans-Pacific Partnership Agreement (TPPA) was originally signed by 12 nations: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam in 2016 but was not ratified before eventually the United States withdrew from the agreement in 2017 and hence, the Agreement could no longer enter into force. Ministers of the remaining 11 TPP countries reached an agreement on the core elements, the text of the agreement and way forward to implement the TPPA, which was renamed as the Comprehensive

and Progressive Agreement for the Trans-Pacific Partnership (CPTPP).

The CPTPP was signed by all 11 participating countries in 2018 – Malaysia being a signatory to the CPTPP meant that it agreed to ratify the provisions of the agreement in order to bring the provisions of the agreement into force at the local level.

Chapter 15 of the CPTPP on Government Procurement further provides for Domestic Review requirements under **Article 15.19**:

1. *Each Party shall maintain, establish or designate at least one impartial administrative or judicial authority (review authority) that is independent of its procuring entities to review, in a non-discriminatory, timely, transparent and effective manner, a challenge or complaint (complaint) by a supplier that there has been:*
 - (a) *a breach of this Chapter; or*
 - (b) *if the supplier does not have a right to directly challenge a breach of this Chapter under the law of a Party, a failure of a procuring entity to comply with the Party's measures implementing this Chapter, arising in the context of a covered procurement, in which the supplier has, or had, an interest. The procedural rules for all complaints shall be in writing and made generally available.*

However, under the party-specific Annexes to the Chapter, specifically in this case, **Annex 15-A, Schedule of Malaysia**, Malaysia is granted access to the conditional exception to the ratification of specific provisions in the CPTPP. Paragraph 3 under **Section J: Transitional** Matters states:

3. *Notwithstanding Article 15.19 (Domestic Review), Malaysia may delay application of its obligations under Article 15.19 for three years after the date of entry into force of this Agreement for Malaysia. During this transitional period, Malaysia shall use existing internal administrative*

procedures to address complaints, provided that it complies with Article 15.4.1 (General Principles) and Article 15.4.2.

According to the Ministry of Investment, Trade and Industry's website, the CPTPP's official entry into force in Malaysia began on 29 November 2022.⁴³ Malaysia's party specific annex stipulates that the state is not bound to incorporate Article 15.19 into domestic law until 29 November 2026.

4.2 MALAYSIA'S EXISTING PROCUREMENT REMEDY SYSTEM

4.2.1 GUIDELINES ISSUED THROUGH TREASURY CIRCULARS

The current grievance and review mechanism for flawed procurements in Malaysia is listed under the **Treasury Circular PK 2.1** on General Information that was issued on 29 November 2022, the day the CPTPP officially entered into force in Malaysia. Paragraph 11 of PK 2.1 outlines "Management of complaints/objection regarding government procurement" and is subsequently divided into two main components – complaints/objections regarding government procurement that are not governed under Free Trade Agreements (FTA) (11.1) and complaints/objections that are governed under FTA (11.2).

Paragraph 11.1 on complaints regarding government procurement not governed under FTA outlines the guidelines on submitting a complaint. It requires that the complaint be submitted alongside "strong evidence" within a given time period. After receiving a complaint from a supplier, the government agency involved is to set up a committee to consider the complaint. Crucially, if the committee finds that the complaint has substantial basis, the tender must be cancelled and subject to

[43]. Ministry of Investment, Trade and Industry. "Malaysia's Free Trade Agreements." MITI FTA. Accessed January 31, 2025. https://fta.miti.gov.my/index.php/pages/view/tpp_cp TPP.

re-tender according to reassessed specifications.

Paragraph 11.2 on complaints regarding government procurement governed under FTA contain much more detail than the 11.1 provisions, stipulating the preparation of a Domestic Review Procedure (DRP), the establishment of a Review Body at the ministry/agency level, and the recognition of the authority of the Ministry of Finance or any other government-appointed body as the Review Authority to make final decisions to settle disputes regarding procurement contracts.

Interestingly, paragraph 11.2 also contains provisions for “Interim measures” in the event of a procurement dispute – these include a suspension/delay of the procurement process, an extension of the tender advertisement period, a postponement of the Letter of Acceptance (LOA), or other appropriate measures. A postponement of the LOA can only be considered by the Controlling Officer through the Procurement Public Interest Certificate (PPIC), with the decision to be informed to the Approving Authority. The government agency involved must be satisfied that there are sufficient grounds in favour of public interest, supported by strong and hard evidence certified by the Controlling Officer before issuing a PPIC for a particular procurement, such as in cases where it would have a direct effect on the health, safety, or welfare of the public.

While the Ministry of Finance has clearly taken a step in the right direction in terms of preparing these guidelines, certain concerns remain with regards to these provisions. Since these guidelines are only slightly over a year old at time of writing, it is likely they have not yet been fully tested. Firstly, the procuring government departments and agencies still have a lot of power in addressing complaints about procurements – this is truer for procurements that are not governed under FTA (11.1) where the procuring authority has the power to appoint the committee to review the complaint, which could be comprised of individuals from

within the agency itself. Considering earlier discussions of compliance with hierarchy and civil service cartels operating, this lack of independence may interfere with the fairness of the committee's deliberations. Procurements subject to paragraph 11.1 do not seem have an additional oversight mechanism above the level of agency/department, which means that decisions made cannot be challenged or corrected by a secondary authority.

Secondly, questions regarding legal authority and jurisdiction remain, especially after considering additional questions of contractual relationships and time sensitivity. It is unlikely that these guidelines are able to void procurements that have already been the subject of contractual obligation, i.e., after the government has signed a contract with the supplier. Paragraph 11.2 seems to give some leeway in terms of timeliness of complaints, stating that "complaints should be presented within a period of 10 days after the grounds of the complaint have been identified," which may include evidence gained only after the contract has been signed. While the circular states that the decision of the Review Authority (MOF) is final, does this mean that the decision cannot be challenged in a court of law by a contractor who files a suit for breach of contract? The delineation between multiple authorities is unclear but it does not seem to fall in favour of the authority granted by the Treasury Circulars as they are not legally binding or enforceable.

4.2.2 EXTERNAL ENFORCEMENT AGENCIES

The existing avenues for aggrieved tenderers to lodge complaints with have been discussed in Chapter 2 on "Punitive measures", that is the Public Complaints Bureau (PCB) or the Malaysian Anti-Corruption Commission. However, these two avenues are ill-suited to handle complaints by tenderers hoping to challenge a tender award based on the

merit of their application versus another tenderer's, or if the aggrieved tenderer is hoping is additionally seeking damages for opportunity cost. The extent to which the PCB can address such an issue is severely limited, having very no power to compel government institutions such as the Treasury to possibly reverse a tender award decision. On the other hand, the MACC is only tasked with investigating and bringing prosecutions against civil servants found to have been engaging in corrupt practices – MACC's ambit is purely criminal law in nature, and they do not have the power to make assessments on tender awards as well.

The existence of a body or procedure firmly established to hear and decide on cases on flawed procurement becomes a practical impossibility considering our previous discussion in Chapter 3 on the access to information. If procurement evaluation committees are never compelled to publish information regarding their decision to award or reject tender bids, there is no practicable basis for aggrieved tenderers to seek legal action against procurement boards and evaluation committees as they themselves would not possess sufficient grounds to justify that their bid was preferable over the other tenderer's.

4.2.3 JUDICIAL REVIEW

Another possible avenue for seeking a remedy is through the use of judicial review – the following discussion is based on the work of Professor Dr. Rohana Abdul Rahman from Universiti Utara Malaysia. Judicial review is concerned with ensuring that those who exercise public power stay within the limits of that power and those subject to public duties are required to perform those duties and can be sought by persons aggrieved by decisions exceeding the limits of the public power conferred on the decision maker or where there has been a failure to perform public duties. However, this area of law is underdeveloped and is currently still

ill-equipped to serve as the primary method of procurement review.⁴⁴

Order 53 rule 2(4) of the **Rules of Court 2012** state that any person who is adversely affected by the decision of a ‘public authority’ shall be entitled to apply for judicial review. The Malaysian courts have jurisdiction to review governmental decisions that exceed statutory powers or fail to follow mandatory statutory procedures – relying on principle arguments based on established cases, there is indication that the procurement boards and Treasury Department fall under the definition of a ‘public authority’ especially because it can also be said that they perform a public service. Additionally, a tenderer who loses a bid may be considered a ‘person who is adversely affected’, although this remains open for interpretation.

Nonetheless, judicial reviews do not function to review the merits of a decision, only where legal errors have been made. There is the possibility that the court will be able to assess the tender award decision on the basis of ‘procedural fairness’ but more persuasively where a procuring entity has failed to adhere to procedure established in primary or subsidiary legislation such as provisions within the Financial Procedure Act 1957. Professor Rohana additionally argues that treasury circulars used to describe the procurement procedure can be considered ‘quasi-legislation’ that is able to form the basis of a judicial review. Moreover, judicial review is an expensive tool that might not be available to contractors who deal in contracts of smaller value. The issue of inclusivity and accessibility is brought to the forefront.

Finally, on the subject of remedies arising as a result of judicial reviews, Professor Rohana writes:

“As noted above, the High Court can issue orders in the nature of the prerogative

[44]. Rahman, Rohana A., and Haslinda M. Anuar. “Public Law Remedies In Government Procurement: Perspective From Malaysia.” *The European Proceedings of Social and Behavioural Sciences* 52 (December 2018), p. 902-911. doi:10.15405/epsbs.2018.12.03.92.

writs. If judicial review is available in respect of procurement decisions, then the High Court would possess the power to quash a procurement decision relying on the remedy of certiorari and could prevent the continuation of a procurement process with the remedy prohibition. Declaratory relief sought via Order 53 of the Rules of Court 2012 may also be available. Although s 29 of the Government Proceedings Act 1956 provides that no injunctive relief is available against the government in legal proceedings, it appears that this exclusion does not extend to judicial review proceedings (Wan Azlan & Nik Ahmad Kamal, 2006). In the context of procurement, it therefore appears that interim measures in the form of an injunction may be available to an aggrieved supplier that is bringing a public law challenge to a procurement decision.”

4.3 RECOMMENDATIONS

4.3.1 ADOPT PROVISIONS FROM UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

The Procurement Act should follow in the footsteps of the UNCITRAL Model Law on public procurement as far as is practical and codify within the law, in order to confer legal enforceability onto it, the exact procedure for starting a grievance and review process for tender awards by aggrieved tenderers. This procedure should spell out periods and deadlines for submission of appeal by aggrieved tenderers, initial assessment to determine the merits of the case, the suspension of contractual obligations and operations while the grievance process is underway, etc.

It is further argued here that applications for tender award reviews should be first referred back to the internal monitoring and complaints mechanism of the procuring entity first i.e., Ministries, government agencies, state governments, etc. in order to prevent excessive backlog and consequent delay of cases heard by the independent body. This additional barrier is also important in filtering out frivolous cases, cases where the applicant has no locus standi, and vexatious litigations.

4.3.2 SET UP INDEPENDENT REVIEW BODY

There is a clear need for an independent or judicial authority to review tender award decisions, hence, it is suggested here that a Public Procurement Tribunal solely dealing with tender award disputes be established. The Tribunal should be staffed with legal professionals who are trained and equipped with the knowledge and skills to hear cases of this nature, and should receive adequate funding in order for at least one to be established in every state, seeing as state government procurements are self-governed. The Tribunal shall be empowered to make binding decisions on disputes, including in deciding on the form and magnitude of remedy employed to resolve this matter – this would also include the ability to nullify contracts that have been found to be made as a result of non-compliance or clearly based on flawed evaluation of merits. In the interests of transparency, the Tribunal must also furnish all decisions made with justifiable and supported rationale – the records of all cases heard by the Tribunal must also be made available on record for public access.

CHAPTER FIVE

Defence Procurement

5.1 UNDERSTANDING DEFENCE PROCUREMENT

Defence procurement can be defined as the methods in which the field of defence acquires goods or services for its operations – this encompasses the acquisition of food and shelter for individuals who serve in the field of defence, premises and furnishings for their offices, and also equipment that directly relate to the notion of defence itself such as arms, armoured vehicles, missile navigation systems, and so on. These are both correctly termed as “defence procurement” but for the purposes of this chapter, procurement of goods and services that are directly linked to concepts of combat and security form our current scope of discussion.

While public procurement is considered one the government activities most vulnerable to corruption, defence procurement in particular is particularly susceptible to corruption. This is due to the tacit acceptance of decreased transparency and accountability standards within the de-

fence sector, in large part stemming from overused and widely-defined notions of “national security” as justification for high levels of secrecy. Another factor contributing to its vulnerability to corruption is that defence matters usually involved highly specialised knowledge regarding defence technologies and how the needs of end users i.e., the Malaysian Armed Forces, the Royal Malaysian Navy, etc., are met is an issue contingent upon having access to specific industry-related information. Hence, defence procurement proves difficult to scrutinise due to its specificity.

The problems arise when defence procurement goes awry, as it has many times in history. A prime example that remains fresh in our collective memory is the procurement of the littoral combat ships (LCS) – from a budget of RM 9 billion for the delivery of 6 ships, not a single one had been completed by the time the scandal garnered public attention due to the efforts of the Public Accounts Committee (PAC) in August 2022, despite having spent RM 6 billion. In May 2023, it was announced that a supplementary contract had been signed in order to fully realise the LCS project – the budget had now been inflated to RM 11.2 billion, but with the decreased deliverable of only 5 ships.⁴⁵ This is in spite of the Prime Minister Anwar Ibrahim having said the project should be halted and reviewed shortly before he was elected to office.⁴⁶

[45]. C4 Center. “LCS Scandal: Remediating Corruption or Simply Ignoring It?” C4 Center. Last modified June 1, 2023. <https://c4center.org/lcs-scandal-remediating-corruption-or-simply-ignoring-it/>.

[46]. Carvalho, M., Tan, T., and Vethasalam, R. “Anwar Calls for Cancellation of Phase Six of LCS Project.” The Star. Last modified August 4, 2022. <https://www.thestar.com.my/news/nation/2022/08/04/anwar-calls-for-cancellation-of-phase-six-of-lcs-project>.

5.2 DEFENCE PROCUREMENT IN MALAYSIA

Like all other kinds of procurement, defence procurement is primarily headed through by its corresponding ministry, in this case the Ministry of Defence (MoD) handles defence procurement. Similar to what was mentioned in a previous chapter, the MoD website has its own e-procurement portal that publishes tender notices.⁴⁷ On paper, MoD is said to carry out their procurement in adherence to the Treasury circulars that govern procurement across all ministries. According to MoD's latest Management of Procurement by Direct Purchase (Supplies and Services) Guidelines (dated 3 January 2023) found on the MoD website,⁴⁸ procurements carried out through direct purchase are only for purchases of up to RM 50,000. However, this is far from the reality, as Transparency International Defence & Security state:

"The defence procurement cycle as a whole is formalised in the Government Procurement Regime, which outline the tender process, design of specifications and asset disposal processes. Yet in practice, deviations are frequent. The abuse of national security exemptions means that less than a third of procurement is done through open competition, with the rest conducted through single-sourcing."

The rampant use of direct tender in defence procurement could possibly be attributed back to the discussion in Chapter 1 on ministerial power. The Minister of Defence has wide powers in order to decide on procurement matters within their own ministry. To refer back to the LCS scandal, the Minister of Defence at the time the letter of acceptance (LOA) was signed, Zahid Hamidi, was revealed to have unilaterally de-

[47]. Ministry of Defence Malaysia. "Tenders, Procurement Division." Accessed January 31, 2025. <https://tender.mod.gov.my/perolehan.php>.

[48]. Ministry of Defence Malaysia. "Management of Procurement by Direct Purchase (Supplies and Services) Guidelines." Finance Division Directive no. 1/2023, no. 2/2023 (January 3, 2023). https://www.mod.gov.my/images/mindef/upload/sak/ABK%201%20&%202%20TAHUN%202023_CARIS%20PANDUAN%20PENGURUSAN%20PEROLEHAN%20SECARA%20PEMBELIAN%20TERUS%20DAN%20SEBUT%20HARGA.pdf

cided on the ship's model as well as instructed for the project to move forward.

The latest copy of the Management of Procurement by Tender (Supplies and Services) stipulates the procedure for procurements up to RM 500,000 wherein suppliers registered with the Ministry of Finance will be invited to submit a tender via a closed tender procedure.⁴⁹ A very large bulk of defence procurement will exceed RM 500,00 and will have to be made through open tender – the requirements and procedures for open tender notices will vary depending on the type of operation and the tender value.

Nonetheless, Malaysian defence procurement remains alive and thriving – the government under Prime Minister Anwar Ibrahim increased the initial defence budget allocation in February 2023 by 10% as compared to 2022, and included a 26% increase in funding for military maintenance and procurement.⁵⁰ In May 2023, the MoD finalised a total of 43 contracts worth RM10.128 billion at the Langkawi International Maritime and Aerospace Exhibition 2023 (LIMA'23).⁵¹

The government has attempted to improve defence procurement after the repeated revelations of defence procurement's inherent flaws that have led to widespread unflattering coverage of the Malaysian government internationally, most notably the Scorpene scandal that has led to multiple prosecutions and convictions in France but yet not a single prosecution in Malaysia.⁵²

[49]. Ibid.

[50]. Huxley, Tim. "Malaysia's Defence Policy Under the Anwar Government." IISS. Last modified September 8, 2023. <https://www.iiss.org/en/online-analysis/online-analysis/2023/09/malysias-defence-policy-under-the-anwar-government/>.

[51]. Bernama. "LIMA'23: Defence Ministry finalises 43 contracts worth RM10.128b." The Malaysian Reserve. Last modified May 25, 2023. <https://themalaysianreserve.com/2023/05/25/lima23-defence-ministry-finalises-43-contracts-worth-rm10-128b/>

[52]. Loone, Susan. "M'sian Authorities Urged to Act on Scorpene Deal After French Charge." Malaysiakini. Last modified April 28, 2022. <https://www.malaysiakini.com/news/619568>.

The Defence White Paper: “A secure, sovereign and prosperous Malaysia” was released in 2020 and was borne of the efforts of the Pakatan Harapan government shortly before it collapsed. The White Paper was presented as a 10-year plan to overhaul and improve Malaysia’s defence policy, capabilities, and industry and would have run until 2030. In its own words:

“This Defence White Paper (DWP), the first by Malaysia, embodies the Government’s firm commitment to strengthen national defence. It presents the Government’s strategic outlook for the coming decade, sets forth the direction for the defence sector and formulates a long-term strategy for defending national sovereignty and territorial integrity from all forms of external threats and security challenges.”⁵³

The White Paper is expansive and incredibly dense, touching on all aspects of defence policy, and it makes mention of defence procurement at numerous junctures, one of them being in its proposed **Framework for the National Defence Industry Policy (NDIP)**:

“Thrust 3: Industrial Development. Implementing new defence asset procurement policies based on cost-benefit analysis and economic indicators; revitalising specific defence sectoral classification guidelines; reviewing tailored incentives to support local companies to improve industrial competitiveness and developing national strategic projects.”

One of the proposed plans under the NDIP is additionally:

“Establishing a Defence Investment Committee. The Government is committed to empowering the development of defence science, technology and industry by establishing a high level committee chaired by the Prime Minister, with members from related ministries and agencies. This committee will set policies and

[53]. Ministry of Defence Malaysia. (2020). “Defence White Paper: A secure, sovereign, and prosperous Malaysia.” Ministry of Defence (MINDEF). ISBN 978-967-16437-6-1. https://www.mod.gov.my/images/mindef/article/kertas_putih/KPP2.pdf.

make decisions related to procurement of assets, particularly for high value strategic assets that necessitates a collective decision, taking into account the requirements of the MAF and security agencies. Decisions made at this highest level platform will increase assets and equipment commonalities between the MAF and security agencies to achieve economies of scale for the defence industry, as well as return on investment for the country. Commonalities between the MAF and security agencies will indirectly increase the market size and assets maintenance capabilities of local industry players.”

Under the heading of Good Governance, the White Paper commits to other lofty goals:

“The Government supports the active role of the Parliamentary Special Select Committee on Defence and Home Affairs in exercising oversight towards issues related to defence and security. Likewise, a Defence Investment Committee chaired by the Honourable Prime Minister with representatives from relevant government stakeholders will ensure decisions on defence investments are made based on national interests.

The Government will continue institutionalising good governance through the conduct of checks and balances within the Malaysian security and defence sector in line with the principles of accountability and transparency, as well as ensuring that security providers are operating effectively in accordance with legal and policy frameworks. Overall, the continued process as well as regular disclosures on the implementation of the DWP and defence transformations will elevate public awareness of defence matters and garner stronger public support for national defence transformations.”

Whilst no tangible policy positions were made in the way of improving good governance in the defence sector and in defence procurement specifically, the White Paper remains a useful tool for guiding principles on how to structure reform efforts in these areas. The White Paper spe-

cifically names and supports the role of the Parliamentary Special Select Committee on Defence and Home Affairs – Parliamentary oversight over defence will be explored in the Recommendations section of this chapter.

Aside from this, since taking office, Prime Minister Anwar Ibrahim has made sweeping statements about improving governance and curbing corruption in public procurement. He took aim at military procurement stating that it needed to be performed in a more “professional” way and that the presence of competent civil service on these procurement projects would have avoided government wastage.⁵⁴ He also stated that the Malaysian Armed Forces (MAF)’s procurement system should be revamped such that no outside parties can rake in excessive commissions.⁵⁵ Most recently, he once again highlighted the usefulness of “experts” in determining MAF procurements to avoid leakages, adding that most asset procurement will be done through a government-to-government (G2G) approach involving other nations.⁵⁶

[54]. Salleh, Ainin W. “At Least RM3bil Saved if Military Procurements Done Professionally, Says PM.” Free Malaysia Today. Last modified January 17, 2023. <https://www.freemalaysiatoday.com/category/nation/2023/01/17/military-procurements-must-be-done-professionally-to-avoid-excesses-says-anwar/>

[55]. Bernama. “PM Wants Military Procurement System Revamped.” Malaysiakini. Last modified July 31, 2023. <https://www.malaysiakini.com/news/673889>.

[56]. Bernama. “Arms Procurement to Be Determined by Experts, Use G2G Approach to Avoid Leakages, Says PM Anwar.” Malay Mail. Last modified September 11, 2023. <https://www.malaymail.com/news/malaysia/2023/09/11/arms-procurement-to-be-determined-by-experts-use-g2g-approach-to-avoid-leakages-says-pm-anwar/90244>.

5.3 “NATIONAL SECURITY” VERSUS TRANSPARENCY

The notion that “national security” is a factor in how we assess transparency in defence procurement is a hotly debated one and discourses surrounding this subject have treated the idea of national security as a non-negotiable aspect of governance. Aside from the realm of procurement, “national security” has extended into and been used to justify government overreach such as the continued use of the Official Secrets Act 1972 and the Sedition Act 1948, two controversial laws who are more so known for their use in clamping down on Malaysians’ civil liberties than they are used for preserving a vague notion of national security.

That is not to say that national security issues do not exist – China’s increased military activity in the Asia-Pacific region and encroachment in the South China Sea⁵⁷ as well as the terrorist attacks that have taken place in the state Sabah by Moro pirates from Mindanao, Philippines have justifiably increased anxiety over Malaysia’s border security. However, the fact remains that “national security” is a blanket notion that is defined by the Executive branch of government in informing defence policy and defence procurement. Hence, there is a need to counterbalance the risk of national security being used as a shield from scrutiny with define limits as to how they are used in defence procurement contexts.

In spite of the talking points propagated by some parties, increased transparency does not necessarily lead to a decrease in national security standards. It is argued here that increasing transparency leads to better defence procurements and increased oversight over these projects that lead to overall higher-quality and efficient deliverables. The Edge Malaysia detailed some of the massive scandals that have arisen out of

[57]. FMT Reporters. “MP Calls for ‘stronger’ Govt Action over South China Sea Intrusions.” Free Malaysia Today | FMT. Last modified April 29, 2022. <https://www.freemalaysiatoday.com/category/nation/2022/04/29/mp-calls-for-stronger-govt-action-over-south-china-sea-intrusions/>.

flawed defence procurements.⁵⁸ A common theme among them is that companies who were ill-equipped to conduct procurement operations were chosen for defence contracts, leading to the eventual failures of the project anyways, with a lack of military assets to show for it and a huge cost incurred to the government. Consequently, Malaysia's national security is worse off because the military/navy lack the equipment needed to carry out military operations.

[58]. Azhar, Kamarul. "Cover Story: Secrecy and Complexity of Defence Procurements Provide Perfect Cover for Corruption." The Edge Malaysia. Last modified September 8, 2022. <https://theedgemaalaysia.com/article/cover-story-secrecy-and-complexity-defence-procure-ments-provide-perfect-cover-corruption>.

5.4 RECOMMENDATIONS

Defence procurement, being a subject with considerations that would normally fall outside conventional standards of transparency and accountability, presents a challenging scope to legislate around and make recommendations on. Hence, the recommendations presented here aim to offer several potential courses of action that can be implemented individually or collectively, depending on their suitability at the present time.

1. Defence procurement should be placed under Parliamentary oversight. Due to the sensitive nature of defence, it is understandable that the exact details of defence procurements are not shared to the public completely, but it is recommended that the Parliamentary Special Select Committee on Defence and Home Affairs should be empowered to review reports on needs assessment, cost and benefit analysis and market survey as submitted by the Ministry of Defence. In addition to this, it is also suggested that this Special Select Committee be made into a permanent Select Committee, such that subsequent government administrations are unable to dissolve them or remove their functions.
2. A Special Ombudsman Office on Defence Procurement should be established. In view of the complexity and the importance of confidentiality in the procurement of national security and defence system and equipment, which is also the most susceptible to power abuse and corruption, it is recommended that a separate Ombudsman Office on Defence Procurement should be established, as pioneered by South Korea. Members of this Ombudsman office must be individuals with personal integrity and experience in the field. To prevent conflict of interest, a person appointed to the ombudsman's office or the person's family members must not have worked for a

defence company or research institute for the last two years before the appointment as an ombudsman.

3. The Procurement Act must lay out specific provisions to define the limits of “national security” to be used as a justification to avoid scrutiny – no defence procurements can be made fully opaque, and the minimum reporting guidelines to Parliament must also be provided for in the Act itself. Procurements that seek to maintain a certain level of secrecy in the interests of national security must first pass a test of being defined squarely within the statutory definition of “national security.”
4. Alternatively, a broadly drafted concept of general security can be followed but supplemented with ‘strict necessity’ and other related exemptions that would justify the bypassing of established procurement procedures, such as those prescribed by European Union Directive 2014/24/EU.⁵⁹ Corruption is subsequently addressed through the application of strong conflict of interest rules, and instituting exclusion and debarment for contracts that potentially pose a risk of cronyism and nepotism. Other measures that can be taken in line with this is the introduction of proper sanctions that cannot be overridden, the notion of “allowable costs” and baseline profit which ensures that overheads and expenses incurred in performance of public procurement contracts are effective and minimise unnecessary wastage of funds, and mandatory quarterly contract reporting.

[59]. Telles, Pedro. “Extremely urgent public procurement under Directive 2014/24/EU and the COVID-19 pandemic.” *Maastricht Journal of European and Comparative Law* 29, no. 2 (2022), 215-228. doi:10.1177/1023263X221077006.

CHAPTER SIX

Conclusion

Based on the discussions above, it is strongly urged that a Government Procurement Act would take into account all the recommendations as listed above. Public procurement remains an area that is central to governance, and because of this, flaws in the field of public procurement expose vulnerabilities to corruption in all sectors of governance. Hence it bears emphasising that a holistic all-round approach to institutional reform, strong principles of good governance, and a zero-tolerance attitude towards corruption is vital.

The writer would like to take this opportunity to acknowledge the limitations of this policy paper; having endeavoured to cover as many areas adequately, many ancillary issues had to be excluded from the discussions for the sake of time and keeping a focused exploration of the subject matter.

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