

Challenges in the Handling of Procurement Complaints: Ghana's Experience[†]

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Abstract

Before the coming into force of the current legislative and institutional framework, the laws and institutions regulating public procurement in Ghana were fragmented and uncoordinated. The Public Procurement Act has not only tried to harmonize these laws and procedures, it also created the Public Procurement Authority as a central body responsible for policy formulation and regulation of procurement in Ghana. Considering the historical background and the current state of affairs, there is bright hope for the future.. This paper seeks to share with you the experiences of Ghana in the handling of procurement complaints under the Public Procurement Act, 2003 (Act 663). This Act is the primary legislation regulating government contracting in Ghana.

I. Introduction

Mechanisms for handling public procurement complaints contribute to transparency and accountability in public procurement by ensuring that the requirements for procurement are adhered to. Dispute settlement mechanisms in procurement also ensure that all parties who participate in the procurement process are given a fair and equitable opportunity and that unfair advantage is not taken by or given to other participants in the procurement process. Review mechanisms can also promote the elimination of corruption if properly designed and implemented. All of these values serve as checks that can contribute to efficiency in procurement and thereby the attainment of best value for money. Therefore, an efficient legal and institutional framework for reviewing decisions of procurement entities can hardly be over-emphasised. This paper seeks to share with you the experiences of Ghana in the handling

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of procurement complaints under the Public Procurement Act, 2003 (Act 663). This Act is the primary legislation regulating government contracts in Ghana.

II. Right of Tenderers to Seek Review

The Public Procurement Act provides for dispute settlement mechanisms for suppliers, contractors or consultants (“Complainant” in this context) that have any grievance in connection with procurement proceedings. The Act gives the right to any Complainant that claims to have suffered or that may suffer loss or injury due to a breach of a duty imposed on the procurement entity to seek review. There are three requirements under this provision. First, it must be shown that a duty has been imposed on the procurement entity by the Public Procurement Act. Second, it must be shown that the duty so imposed on the procurement entity by the law has been breached. And thirdly, it must be established that the Complainant has a substantive right in terms of having already suffered injury or loss or is likely to suffer an injury or loss. These constitute the basic legal bases for an invocation of the powers of either the procurement entity or the Public Procurement Authority to review a complaint.

There is, however, no right of review in the following cases: selection of a method of procurement; the choice of a selection procedure for evaluation of proposals for consultant services; the limitation of procurement proceedings regarding the use of national competitive tendering; and a decision by the procurement entity to reject tenders, proposals, offers or quotations where the ground for rejection are specified in the tender documents or in the request for proposals or in the request for quotations.

III. Review Procedures

A complaint for review may be submitted to either the procurement entity or the Public Procurement Authority as the case may be.

A. *Review by Procurement Entity*

There are a number of cases where a complaint must be submitted to the procurement entity before a review application may be sent to the Public Procurement Authority for administrative review. In this sense, procurement entities serve as review entities of first instance. Where the procurement contract has not entered into force, a complaint must in the first instance, be submitted to the procurement entity responsible for the procurement process in connection with which a review is being sought. The complaint must be submitted to the head of the procurement entity within twenty-one (21) days after the Complainant becomes aware or should have become aware of the circumstances giving rise to the complaint. The law requires that the head of the procurement entity to resolve a complaint by mutual discussion and agreement with the Complainant. The head of the procurement entity has twenty-one (21) days from the date of submission of a complaint to issue a written decision. The head of the procurement entity must state in his decision the reason for the decision and the corrective measures that are to be taken. Where the head of the procurement entity does not issue a decision within twenty-one (21) days of the submission of a complaint, the Complainant is entitled to seek administrative review before the Public Procurement Authority. Once administrative review is commenced because the head of the procurement entity has failed to issue a decision within the specified time, the competence of the head of the procurement entity to entertain such complaint ceases.

B. *Administrative Review*

Under the Public Procurement Act, the Board of the Public Procurement Authority has the mandate to organise and participate in administrative review proceedings. As part of the Board's efforts to improve public procurement administrative review provided for under the Public Procurement Act, the Board has put in place a nine-member Appeals & Complaints Panel comprising legal and procurement experts from both the public and private sectors to consider and resolve complaints. The Public Procurement Authority (the "Authority") believes that a clearly regulated process to facilitate the exposure of non-compliance or

administrative wrongdoing is important in ensuring transparency and accountability in procurement.

Where the procurement contract has entered into force, a complaint for administrative review may be submitted to the Authority within twenty-one (21) days after the Complainant becomes aware or should have become aware of the circumstances giving rise to the complaint. If the head of the procurement entity issues a decision not to entertain a complaint because the procurement contract has entered into force, a complaint for administrative review must be submitted within twenty-one (21) days of the issuance of the decision not to entertain the complaint. Also, if after the expiry of twenty-one (21) days following the submission of a complaint to the head of the procurement entity the head of the entity does not issue a decision, the Complainant may submit a complaint to the Authority for administrative review.

The current procedure for administrative review is that when the management of the Authority receives a complaint from a tenderer or procurement entity in connection with procurement proceedings, it invites the parties to submit relevant evidence and documentation that substantiate the parties' case. Case briefs are then prepared and submitted together with the relevant supporting documents to the Appeals and Complaints Panel (the "Panel") members ahead of a scheduled meeting. The Panel at a meeting so conveyed considers the cases and makes a decision as it deems fit. Following the decision of the Panel, management of the Authority then prepares case brief reports to be submitted to the Board for its approval. Upon the Board's approval the decision is communicated to the parties concerned. The Board is required by law to, within twenty-one (21) days of starting a review, issue a written decision concerning the complaint and stating the reasons for the decision.

By way of remedies the Authority has the power to grant, among others, the following remedies or reliefs: cancel an illegal act or decision wholly or partially; revise an illegal decision by the procurement entity; order compensation for reasonable costs incurred in connection with the procurement process or; order termination of the procurement proceedings.

IV. The Nature of Complaints

Up to date, complaints have been administratively resolved in respect of the following actions including: alleged manipulation of specifications; declaration of winners at bid opening contrary to procurement rules; clarification of rules on award notification and formation of contract; timely release of tender security; past performance as criteria for prequalification; discrimination in the award of contracts; claims for compensation for costs incurred in connection with procurement proceedings; irregularities in the invitation for tenders, wrongful termination of contracts; and non-availability of tender documents except for a select few tenderers.

V. Enforcement Challenges

A number of Challenges have come up in seeking to enforce the provisions of the Public Procurement Act relating to administrative review. The first challenge has to do with complying with the time limit required to reach a decision on a complaint. As stated, the Authority is required to reach a decision within twenty-one (21) days upon starting to hear a complaint. In practice, this has proved almost impossible to comply with. Usually when a complaint is submitted, it takes a lot of time by way of correspondences to gather the evidence from the parties. This can take up to two weeks or a month depending on the location of the parties to a complaint. Moreover, upon the decision of the Appeals and Complaints Panel, the decision has to be submitted to the Board for its consideration and approval. The time required for a decision can therefore be exhausted during these processes.

A related challenge has to do with the difficulty of effectively enforcing the requirements for suspension of procurement proceedings. Under the Public Procurement Act, suspension of procurement proceedings are allowed up to thirty (30) days if a case is made for such suspension. There is no right of suspension beyond these thirty days. The goal of suspension is to avoid a situation where if the suspension is not granted, the rights of the Complainant might be rendered null and void because of completion of procurement proceedings while the complaint is still pending. In view of the length of time it takes before

the Authority issues a final decision, in some cases before the final decision is issued the suspension period gets expired. The Public Procurement Act is silent on what is to be done after the suspension period has expired and the administrative review proceedings are ongoing.

Furthermore, in some cases the Public Procurement Act itself is simply incapacitated to act. For example, there is provision in the Act that a contravention of any provision of the Act is an offence and where no penalty has been provided for the offence in the Act, the offender is liable on *summary conviction* to a fine not exceeding 1000 penalty units or a term of imprisonment not exceeding five years or to both. The Act does not specifically say that it a court that must summarily convict a person. However, the requirement for summary conviction has been understood in practice to mean that the summary conviction must be given by a court. This understanding has generally denied the Authority jurisdiction in some of the cases.

Finally, there is the issue of whether or not the Public Procurement Authority itself is the appropriate body to handle procurement complaints and appeals. Arguments are being advanced for the establishment of a separate and distinct body from the Authority that will handle procurement disputes. The substantive argument is that since the Authority itself is a regulatory body and gives approvals to some of the procurements, it would be sitting on its own cause if it has to hear and determine matters in respect of which it has given approval.

The above constitute some of the challenges in the handling of procurement complaints under the Public Procurement Authority Act.

VI. The Way Forward

These challenges as outlined above have to do with inadequacies in the legal framework for public procurement in Ghana. In the light of the practical implementation and enforcement challenges examined above,

the way forward is legislative in nature. The relevant provisions would have to be amended to allow for more time for effective procurement dispute settlement. Any times fixed for determining complaints must take into account the practical realities of complying with such a time. There is also the need for further debate about suitability of the Authority itself as a procurement dispute settlement body instead of a separate body.

VII. Conclusion

Assessing the overall nature of the public procurement system of Ghana, it can be said that much progress has been made in the legal and institutional framework for public procurement in Ghana. Before the coming into force of the current legislative and institutional frameworks, the laws and institutions regulating public procurement in Ghana were fragmented and uncoordinated. The Public Procurement Act has not only tried to harmonise these laws and procedures, it also created the Public Procurement Authority as a central body responsible for policy formulation and regulation of procurement in Ghana. Considering the historical background and the current state of affairs, there is bright hope for the future. If subsequent legislative amendments and any ensuing institutional structures are to be done based on experience on the field, there is no doubt that there would be further improvements in the public procurement system of Ghana.

