

**HAWASSA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW**



**The Legal and Institutional Framework of Public Construction
Works Procurement in Ethiopia**

**A Research Submitted to Hawassa University, School of Law in Partial
Fulfillment of the Requirements for the Degree of Master of Laws (LL.M) in
Commercial Laws**

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April, 2019 G.C

Declaration

I hereby declare that this Masters of Law (LLM) Thesis is my original work and has not been presented for a degree in any other university, and all sources of material used for this thesis have been duly acknowledged.

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TABLE OF CONTENTS

Contents	Page
Declaration	i
Acknowledgments	ii
List of Acronyms	Vii
List of tables	Vii
Abstract	Viii
Chapter One: Introduction	1
1.1. Background of the study	1
1.2. Statement of the Problem	4
1.3. Research Questions	7
1.4. Objective of the Study	9
1.5. Research Methodology and Methods	8
1.6. Significance of the Study	10
1.7. Scope of the Study	10
1.8. Limitation of the Study	10
1.9. Organization of the Study	11
Chapter Two	12
Theoretical Frame Work for Legal and Institutional Regulation of Public Construction Works Procurement	12
2.1. Brief Overview of Basic Concepts and theoretical frame work on regulation of Public construction works	16
2.2. Public Construction Works Procurement Policy and Regulation at the International Arena	14
2.3. Public Procurement Regulation and Policy in Construction Sector	18
2.4. Public Construction Works Procurement Planning	19

2.5. Methods and Procedures for Public Construction Works Procurement	20
2.6. Electronic Procurement as a Tool of Reform in Public Construction Procurement	23
2.7. Guiding Principles of Public Procurement.....	24
2.8.. Evaluation of Qualified of Tenderers of Public Construction Works Procurement	28
2.9. Preferential Public Procurement in the Construction Industry.....	30
2.10. Performance-Based Contracting in Public Construction Procurement	31
2.11. Institutional Framework of Public Construction Works Procurement.....	33
Chapter Three	34
3. The Legal and Institutional Framework for Public Construction Works Procurement in Ethiopia	34
3.1. Overview of the Policy and Basic Features of Public Construction Procurement in Ethiopia.....	34
3.1.1. The History of Public Procurement Rules in Ethiopia	34
3.1.2. Policy Environment for Public Procurement in Ethiopia	36
3.1.3. Salient features of Contracting the Public Construction Works Procurement in Ethiopia	38
3.1.4. The Trend of Regulating Government Construction Procurement under Construction Industry Vis-Vis the experience of Ethiopia.....	40
3.2.The Legal Regulation of Public Construction Works Procurement in Ethiopia.....	42
3.2.1. Procurement Planning For Government Construction Works in Ethiopia.....	42
3.2.2. Public Procurement Methods and Procedure and their Application for Government Construction Works Procurements in Ethiopia	43
3.2.3. Evaluation of the Bids: Criteria's For Selection, Assessing of tenders and Awarding of tenders.....	58
3.2.4. Government Construction Works Procurements Consultancy in Ethiopia	64
3.2.5. Preferential Public Procurement Treatments in the Construction Industry	

in Ethiopia	66
3.2.6. Introducing Performance-Based Contracting as a Tool of Reform in Public Construction Procurement in Ethiopia	70
3.3. Institutional Framework for Public Institutions Procuring and Supervising Government Construction Works Procurement in Ethiopia.....	71
3.3.1. Ministry of Finance and Economy’s Public Procurement and Property Administration Agency (PPAA)	73
3.3.2. Functions and Powers of the Public Procurement and Property Administration Agency	74
3.3.3. Ministry of Urban Development and Construction	77
3.3.4. Duties and Responsibilities of Public Institutions Procuring Construction Works in Ethiopia	77
3.3.5. Public Construction Works procurement Information Disclosure System.....	79
3.3.6. Electronic Public Procurement System as a Tool for Institutional Reform in the Construction industry in Ethiopia	81
3.3.7. Regulatory Framework of Anti-Corruption Measures in Public Construction Procurement in Ethiopia	82
3.3.8. Complaint Hearing Mechanisms	83
Chapter Four	
4. Conclusion and Recommendations	84
4.1. Conclusion	84
4.2. Recommendations	87
Bibliography	I

List of Acronyms

BOO	Build-own operate
BOOT	Build-own-operate-transfer
BOT	Build-operate-transfer
BQ	Bill of Quantities
CIDB	Construction Industry Development Board
COMMESA	Common Market for Eastern and Southern African Countries
COST	Construction Sector Transparency Initiative
DBB	Design bid build project delivery sub-system
EPDRF	Ethiopian People Democratic Revolutionary Front
FDRE	Federal Democratic Republic of Ethiopia
FPPAA:	Federal Public Procurement and Property Administration Agency
ITB	Instructions to Bidders
Model Law	UNCITRAL Law
MoFED	Ministry of Finance and Economic Development
MOUCD	Ministry of Construction and Urban Development
OECD	Organization for Economic Co-Operation and Development
PPPAA/PPA	Public Procurement and Property Administration Agency
SOW	Statement of Works
TOR	Terms of Reference
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

List of tables

Table 1: The Objective of Public Procurement Systems

Table 2: The Procurement Thresholds for International Competitive Bidding (ICB)

Abstract

Ethiopia has adopted its own legal and institutional framework of public procurements consisting of modern public procurement rules, principles and regulatory set ups so as to overhaul the weak and corrupt public procurement systems. Although there are changes in the Ethiopian legal and institutional framework following the enactment of the 2009 Public procurement proclamation, it is argued with regard to its application to different type of public procurements. Accordingly, this paper particularly deals the legal and institutional framework of public construction works procurement in Ethiopia.

Crucially, the public procurement regime in a market economy is, inter alia, determined by the quality of the consistency and inclusion of the modern guiding principles for public procurement laws. In this respect, the Public procurement regime has markedly developed considerable guiding principles of public procurement. Accordingly, this work assessed those principles in legal and institutional framework of public construction works procurement in Ethiopia and through discussion; it has found contravening the guiding principles.

Accordingly, based on the legal research qualitative methodology and primary data, cases and looking into the existing literature, the paper basically identified that inadequate emphasis given to the methods and procedures of public construction works procurement and lack of specific regulatory framework that adopt e-procurement methods of procurement and Performance-Based Contracting (PBC) in government construction works procurement, and nonetheless, the failure of regulatory framework to effectively address procurement made between two and more public bodies and the fragmented nature of public construction works procurement regulatory framework are crucially affecting the effectiveness of the public construction works procurement in Ethiopia. In addition, the thesis further argues, absence of comprehensive regulatory framework that allows public bodies to check the reasonable performance, require regulatory reforms in Ethiopia to introduce new approach and tools like Performance Based Contracting (PBC) that enable public bodies to reasonably check 'cost of procurements effectiveness'.

As regards institutional setups for the competitive public construction works in Ethiopia, the study identified the absence of coordination and overlap of mandates among government organs charged to check and balance the activity of procuring organs in public construction works in Ethiopia.

Key words: *Public procurement, principles, regulatory frameworks, Construction works, Model Law, and Ethiopia*

Chapter One

1. Introduction

1.1. Background of the study

‘Procurement’ is defined by the ‘UNCITRAL Model Procurement Law’ (herein after called the Model Law) as means of the acquisition of goods, construction or services by a procuring entity¹. ‘Public procurement involves essential public services such as health, education, and infrastructure that have a significant impact on the development process’². Public procurement refers to procurement by a public body using public fund and it is an activity of all states. It is common including for the purpose of laws on procurement³ to divide procurement into three categories: Goods, Works and Services. From these categories, Construction includes e.g. building of roads, bridges and government buildings)⁴.

The increasing prominence of government in infrastructure construction and development provides a relevant opportunity to scrutinize public procurement laws and policies⁵. Indeed there is no uniform guiding principle for the adoption and application of effective public construction procurement legal regulation applicable to all countries across the world. However, ‘the United Nations Commission on International Trade Law (UNCITRAL) is working to reform the UNCITRAL Model Law on Procurement of Goods, Construction and Services⁶ At the same time, also the World Bank Standard Bidding Documents Procurement of Works and User’s Guide⁷, International Bank for Guidelines Procurement under Reconstruction and Development (IBRD) Loans and IDA Credits⁸, African Development Bank Procurement Policy and COMESA

¹ UNCITRAL Model Law, on Public Procurement with amendments as adopted January 2014 General Assembly resolution 66/95, United Nations Publication Sales No. E.14.V.1 (2014), For instance Art 2(j)

² Caroline Nicholas, ‘Legal background: an introduction to the UNCITRAL Model Law on Public Procurement’ (EBRD-MAE-CONSP Tor Vergata Master Programme in Public Procurement, April 2014) <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2014_Model.html> accessed 4 January 2018

³ Inter alia in the ‘UNCITRAL Law on Procurement of Goods, Construction and Services’ (n 1)

⁴ Sue Arrowsmith, ‘Public Procurement Regulation: An Introduction Chapter 1’ (University of Nottingham 2010) 2

⁵ James Tsabora, ‘Public Procurement In Zimbabwe: Law, Policy And Practice ‘ (2014) 1 APPLJ 1

⁶ .UNCITRAL Model Law on Public Procurement (n 1) Article 2(j)

⁷ The World Bank Standard Bidding Documents Procurement of Works and User’s Guide (April 2015)

⁸ International Bank for Guidelines Procurement under IBRD Loans and IDA Credits, January 1995 Revised January and August 1996, September 1997, and January 1999

Public Procurement Regulation⁹ are important international and regional instruments for harmonizing, and strengthening, procurement systems throughout the developing world. Concerning principles of procurement, it is important to keep in mind that procurement laws are based on the principles of a demand economy.¹⁰ In addition to Principle of Economy, different principles have been development like Principle of Competitiveness; Principle of Effectiveness; Principle of Transparency; Principle of Combating of abuse; Principle of Avoidance of risk; Principle of Accountability; Principle of Fairness and equitability; and Principle of Integrity. Accordingly in this thesis, owing to international nature of public procurement laws, an attempt made to closely look at the legal regime and institutional setup governing public construction procurement in Ethiopia and evaluated by making comparative analysis with guiding principles focusing on the construction industry.

Ethiopia is making a large investment in infrastructure as one of the key contributions to the country's development plan. About 62% of the annual budget is expended on procurement for infrastructure development in transport, energy, water, agriculture, education, health and other sectors.¹¹ The national economy analysis shows that 'construction industry is booming in Ethiopia'¹² and 'the industry has important contributions to the Ethiopian economy, as demonstrated by its share in the GDP'¹³. It plays a major 'contribution of 20 percent of the total Gross Domestic Product (GDP) according to state Ministry of Urban Development and Construction'¹⁴. Due to this importance, it's noted under the 'Policy Directions of Ethiopia' that 'the government and the private sector shall adhere to established appropriate procurement practices so as to ensure quality and cost effectiveness in the delivery process'¹⁵.

⁹African Development Bank Rules and Procedures for Procurement of Goods and Works, Procurement and Fiduciary Services Department May 2008 Edition, Revised July 2012, COMMESA Public Procurement Regulation (2009) Legal Notice No. 3 Official Gazette Vol. 15

¹⁰ S De la Harpe Procurement Law: A comparative analysis PhD Thesis University of South Africa (2009) 364

¹¹ Baynesagn Asfaw Ambaw and Jan Telgen 'The Practice of Performance-Based Contracting In Developing Countries' Public Procurement: The Case of Ethiopia' (2017) 17 Journal of Public Procurement 402, 404 citing Quinot and Arrowsmith (2013)

¹²'Construction Industry Booming in Ethiopia' (Economy, 29 March 2017) <<http://www.ena.gov.et/en/index.php/economy> > accessed on 13 January 2018

¹³ Ministry of Urban Development and Construction of Ethiopia, Construction Industry Policy (First Draft, July 2012) iii

¹⁴ 'Construction sector should contribute 20% of the country's GDP' (Apr 9, 2014) <www.capitalethiopia.com> accessed on January 13, 2018

¹⁵ Ministry of Urban Development and Construction of Ethiopia (n 13) 9

Concerning the legal and regulatory framework of public procurement in Ethiopia, prior to the modernization of the Ethiopian public procurement system in 2005 through the incorporation of the UNCITRAL Model Law on the Procurement of Goods, Construction and Services into the Public Procurement Proclamation No 430/2005, Ethiopia did not have a coherent and consolidated legal document on public procurement. In 1960, with the promulgation of the Civil Code¹⁶, administrative contracts were introduced into the Ethiopian Civil Code.¹⁷ However, the Civil Code was repealed by Public Procurement Proclamation No 430/2005¹⁸ and following Public Procurement and Property Administration Proclamation No.649/2009.¹⁹ However, despite the repealing, to abrogate the old administrative contracts provisions in the Civil Code, the courts in Ethiopia take cognizance thereof and apply them whenever these provisions are invoked by disputing parties.²⁰

In 2011, according to recent Public Procurement Proclamation²¹, the Federal Public Procurement and Property Administration Agency (PAA) issued standard General Conditions of Contract (GCC) for the procurement of works, services, and goods based on which all federal procurements of works, services, and goods obtained²². Standard Bidding Document, prepared based on this procurement law²³, provides an important part of standard bidding documents, known as Schedule of Requirements. Schedule of Requirements encompasses the following four parts: Scope of Works; Technical Specification; Drawings; and Bill of Quantities/Activity Schedule. These documents are the procuring entity's document for public construction works procurement.

¹⁶ Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960

¹⁷ Tecele Hagos Bahta, 'Conflicting Legal Regimes Vying For Application: The Old Administrative Contracts Law Or The Modern Public Procurement Law For Ethiopia' (2017) 4 APPLJ 1, 25

¹⁸ Determining Procedures of Public Procurement and Establishing Supervisory Agency Proclamation No 430/2005 in Federal Negarit Gazeta, Year 11 No 15 (12-01-2005) Article 56

¹⁹ Ethiopian Federal Government Procurement and Property administration proclamation 2009 (Federal Negarit Gazeta , 60 year 15 No.649/2009)

²⁰ Tecele Hagos Bahta, 'Conflicting Legal Regimes Vying For Application: The Old Administrative Contracts Law Or The Modern Public Procurement Law For Ethiopia' (2017) 4 APPLJ 1

²¹ Ethiopian Federal Government Procurement and Property administration proclamation 2009 (Federal Negarit Gazeta , 60 year 15 No.649/2009)

²² Ibid 19

²³ Ethiopian Federal Government Procurement and Property administration proclamation 2009 (Federal Negarit Gazeta , 60 year 15 No.649/2009) Article 15(4) cum 'The Federal Democratic Republic of Ethiopia Standard Bidding Document (SBD) For Procurement of Works For National Competitive Biddings (NCB)' Part 2, Section 6

So far as the institutional setup, the public procurement law of Ethiopia under the fifteen chapter of the public procurement proclamation²⁴ has established an independent public procurement control and oversight organ i.e. the Ethiopian Public Procurement and Property Administration Agency (PPA). For public construction procurement in Ethiopia, Ministry of Urban and Construction and different construction offices within federal institutions together with Ministry of Finance and Economy's Public Procurement and Property Administration Agency (PPA) are identified to as government entities which have mandate to procure and handle disputes arising from construction works procurements.

Therefore, investigating the legal and institutional setup of public construction works procurement system in Ethiopia is of paramount importance particularly at this point because of the policy consideration to make reform within construction industry and to recommend a compressive legal and institutional framework of public construction works procurement in Ethiopia.

1.2. Statement of the Problem

Public procurement provides multiple opportunities for both the public and private sectors to divert public funds for private gains²⁵. Poor governance of public procurement systems can turn public investments into major political and economic liabilities, hinder development goals and outcomes, and result in additional costs and waste public funds²⁶. Despite the steps taken to reform the legal framework for public procurement in Ethiopia, legal and institutional investigation for public construction works procurement remains intact. In Ethiopia, it is noted by the Ministry of Construction and Urban Development (MCUD) that in order to attain the envisaged Vision, Mission and Goal, the Construction Industry in Ethiopia faces major challenges which include: Harmonizing the different laws and regulations (domestic and international) governing the construction industry.²⁷

²⁴ The 2009 Ethiopian public procurement (n 21)

²⁵ Wissenschaftliche Artikel zu, 'OECD, OECD Principles for Integrity in Public Procurement' (Transparency International, 2002) 9

²⁶ Why Reform Public Procurement? (International Bank for Reconstruction and Development/THE WORLD BANK 2012) 7

²⁷ Ministry of Urban Development and Construction of Ethiopia (n 13) 6

Among the recent identified performance constraints of construction industry in Ethiopia, weaknesses, problems and constraints hampering the performance and development of the construction industry include: inefficient and non-transparent procurement systems, corruption and financial mismanagement in public/private sectors²⁸. In this regard, adoption of a Finance Law and a subsequent procurement guideline for service and works is part of ongoing reform.²⁹ To this end, it is believed that having effective public construction procurement regulations and institutional framework is an indispensable thing for the country to make research upon the existing problems arising from the public construction procurement system in the construction sector.

Also the public procurement regulatory framework has a risk of going against the guiding public procurement principles. For instance, inadequate emphasis given in the methods and procedures of public procurement tendering in the proclamation contravene the guiding principles.

The other problem under public procurement regime is that neither the proclamation nor other regulations explicitly demand or empower the public entity to consult the least and exaggerated cost of procurements. These limit authorities to make pre-evaluation for unreasonable financial price offered by the contractor to perform the construction work projects and increase the risk of public construction projects for exposure to non-performance of the contract. Such risk can resonate to the economy of a country and negatively affecting the country's endeavor to bring about cost effective and quality government construction works.

Crucially, in connection to the above problem, tender evaluation still in Ethiopian Public Procurement system has so far been characterized by the traditional procurement approach considering price as a main evaluation criterion³⁰. Using least cost approach as evaluation criteria avoids having to make judgments on qualitative aspects of bids, thus eliminating one opportunity to bias in the selection process. This, however, results in nothing but buying inferior quality products or works, project performance delays and cost overruns in Ethiopia³¹. All of these procurement risks are mostly left to the public. This entails a direct and immediate negative

²⁸ Ibid 4

²⁹ Ibid 6

³⁰ Baynesagn Asfaw Ambaw and Jan Telgen (n 11) 404 citing (World Bank & Ethiopian Government, 2010)

³¹ Ibid citing Quinot & Arrowsmith (2013)

impact on public expenditure; hampers economic development plans and cause to fail to ensure the best value for public money.

Another related problem that arose under public procurement regulatory regime is preferential treatment in public construction works procurement. Regarding to this, there are some preferential treatments between contracting parties involved in public construction procurement as exceptions to the governing principles of procedures of procurement in the proclamation like in case of preference based on nationality of the bidders, preference based on the type of contractors and preferential exclusion of public contracting parties from competition are preference arrangements in Ethiopia.³² However regarding preference regulatory framework, there is no specific standard, procedure and conditions of preference clearly set for public construction procurements under Ethiopian legal framework. Consequently, also excluding public body contracting with public body from public procurement regime³³ raises the question in application of principle of competition, fairness and non-discrimination in public construction works procurement in Ethiopia. Due to failure to regulate such preferential treatment in public construction works procurement, the country might suffer economic loss and fails to get quality construction works in competitive manner.

The other shortcomings of the public proclamation law of the country is that in construction industry in Ethiopia, lack of specific legislation that requires Performance-Based Contracting (PBC) in public construction works procurement crucially affecting the effectiveness of the construction works procurement. Failure to properly introduce PBC approach in Ethiopia construction works procurement may hinder the success of public construction projects and increase risk of exposure to non-performance of the contract.

Apart from the traditional approach, there are now other “fast-tracking” or innovative procurement systems used by the construction industry worldwide³⁴. To this end, the experience of other countries shows that they enact specific legislations for promotion of public construction procurement reform and creating uniformity in procurement procedures. However, in Ethiopia

³² Public Procurement Proclamation (n 21) Article 5(2)

³³ Public Procurement Proclamation (n 21) Article 3(1) and 3(2) b

³⁴ Rosli Abdul Rashid, Ismail Mat Taib , Wan Basiron Wan Ahmad, Md. Asrul Nasid, Wan Nordiana Wan Ali & Zainab Mohd Zainordin, ‘Effect Of Procurement Systems On the Performance Of Construction Projects’ (Padang21-24 June2006, Universiti Teknologi Malaysia) 1

due to lack of special regulation of construction procurement and independent institutional regulatory structure, construction procurement rules enacted by the Public Procurement and Property Administration Agency has exposed for risk to not properly regulate the construction by regulations enacted according to the special needs of the industry.

Also as regards institutional setups for public construction procurement of works procurement in Ethiopia, different construction offices in federal government ministries, agencies, universities and other federal institutions together with Ministry of Finance and Economy's Public Procurement and Property Administration Agency (PPA) involve in different capacity. However among other things, absence of coordination, overlap of mandates, bureaucratic hurdles, and absence of clear institutional regulatory framework are widely seen as pressing problem among these stakeholders involved for procuring public construction works projects.

Thus, this research paper attempted to delve in to the above mentioned problems associated under the existing legal and institutional framework of public construction procurement in Ethiopia.

1.3. Research Questions

The thesis attempted to address the following research questions:

- Do the existing public procurement methods and procedures are adequate and capable of ensuring competitive, efficient and effective public construction works procurement in Federal Democratic Republic of Ethiopia?
- Do the existing legal and institutional framework of public procurement for construction works in Federal Democratic Republic of Ethiopia is consistent with guiding principles of public procurement?
- What are the practical challenges in the legal and institutional framework in procuring public construction works in the Federal Democratic Republic of Ethiopia?
- Do the public construction procurement in construction industry require special procurement legal and institutional regulatory framework than the general public procurement law and Federal Public Procurement and Property Administration Agency (FPPAA) in the Ethiopia?

1.4. Objective of the Study

14.1. General Objective

The general objective of this research aims to investigate the legal and institutional framework public construction works procurement in Federal Democratic Republic of Ethiopia and to propose recommendation.

14.2. Specific Objective

- To examine the procurement methods and procedures of public construction works procurement in Federal Democratic Republic of Ethiopia and propose recommendation to related problems.
- The research aims to identify how the legal and institutional framework of public construction works procurement deal in consistency with principles of public procurement in Federal Democratic Republic of Ethiopia.
- To identify practical problems in the legal and institutional framework of public construction works procurement in Federal Democratic Republic of Ethiopia and propose recommendation to related problems.
- To examine the public construction works procurement in construction industry require special procurement legal and institutional regulatory framework in Federal Democratic Republic of Ethiopia and propose recommendation.

1.5. Research Methodology and Methods

I. Methodology

This research employed qualitative research methodology because qualitative method is deemed to be proper for conceptual analysis used in order to get better understanding of the issues under discussion and provides the researcher with flexibility to interact with participants in discovering their opinion.³⁵ By using qualitative research methods, the researcher made systematic investigation of a public construction works procurement rules and its institutional framework in Ethiopia.

³⁵ Kristina Simion, *Qualitative and Quantitative Approach to Rule of Law Research* (1STedn, International Network to Promote Rule of Law 2016) 16

Both doctrinal and non-doctrinal legal research approach were used in order to undertake this research. It followed doctrinal legal research approach through analysis of statutory provisions and cases. Non-doctrinal legal research approach to highlight the types of major public construction works procurement systems that exist in the world today and to understand it in the social context of Ethiopia.

II. Methods/ Source of Data

This research employed qualitative research method in data gathering. In this regard, the researcher utilized both primary and secondary source data. Primary data are utilized from key informants through (interview and Focused Group Discussion/FGD. Secondary data were collected from books, article, website source periodical/journal, reports, theses, and conference papers.

III. Sampling Techniques

The researcher employed purposive or non- random sampling techniques. Moreover, since the research was based on the principles and accepted methods and procedures of public construction procurement, the researcher has based on identified purpose and made legal analysis as a mode of investigation of good public construction of works procurement system that gained momentum and reached its efficiency in Ethiopia. Since the target population of this study is persons who are working in the public construction procurement in different capacity like Ministry of Finance and Economic Development (MFED) and under the Ministry, the Federal Public Procurement and Property Administration Agency (FPPAA/ PPA) officials and Ministry of Construction and Urban Development (MOCUD) procurement administration officers. Totally 25 key informants were selected purposively.

IV. Data Collection Tools

The primary data is collected mainly through interview. Primary data have been collected from key informants through (interview, and Focused Group Discussion/FGD. Secondary data were collected from books, published and unpublished academic articles, working papers, theses, reports by national and international organizations. Moreover, various internet sources are also

visited. As far as the empirical sources concerned, a case study on administrative decisions of the federal construction works procurement offices and interviews with officials.

1.6. Significance of the Study

The thesis would play an important role in identifying and examining the existing legal, institutional and practical legal problem in public construction procurement of works system in Ethiopia. It is also hoped that the research will benefit the PPA, the construction industry and the country at large when formulating and reforming the legal and institutional framework of public construction works procurement in Ethiopia. As being one of the few studies in the area it will serve as an important source for the academia and a stepping-stone for further studies.

As a point of departure from general construction law, owing to the existing gaps in law of public construction procurement, significance of this thesis paper on public construction procurement regulations under Ethiopian procurement system helps to shed light on the rules governing the public construction procurement law in Ethiopia slightly informed by comparative law. It is opted that this study will play a vital role in forwarding recommendation that are realistic and adequate for Ethiopia to adopt effective methods, procedures and institutional controlling mechanisms of public construction works procurement. In general, this research is expected to bring about immense contributions in accordance with country's strategic plan for the achievement of best value for public money.

1.7. Scope of the Study

The scope of the study is exclusively limited to analytical review of the Ethiopian legal and institutional framework of public construction works procurement at federal government level. The study has not covered the regional public bodies' construction works procurement activities. The study has examined the legal and institutional aspect of public construction works procurement in Ethiopia. This research doesn't deal with procurement of public construction goods and service.

1.8. Limitation of the Study

In the due course of this study, the researcher has come across with limitations which possibly have significant impact on the outcome. Consequently, one limitation is that there is a lack of

legal literature on construction procurement when considering the economic importance of the construction industry.³⁶ Although, ‘all rules and pieces of legislation relevant to public procurement be made freely accessible to interested parties and that a record of proceedings in any committees, boards or any procurement agencies be kept and made available to parties that may need it’,³⁷ the public procurement cases and data are not easily accessible to anyone freely in Ethiopia. In comparative sense, especially researcher who works on construction laws including public construction procurement often faces the limitation to access particular research data on the area. This is the basic limitation of this study which requires construction project case of high political and other hidden agendas.

Additionally, definitional and conceptual controversies arose in construction industry in different times. In relation to regulation of public construction procurements, this might arise and possibly considered as limitation to the study though the researcher focus on the common understandings of this concept. Another limitation is that the time given to the research to complete the research was too short so the research has been influenced by shortage of time. Despite the limitations, the legal and institutional frameworks of public construction works procurement have been examined in this study with utmost effort to minimize such constraints.

1.9. Organization of the Study

This thesis paper contains four chapters. Chapter one is an introductory part that further includes statement of the problem, the research questions, objective of the study, research methods, significance of the study, scope and limitation of the study. Chapter two attempts to outline and review the theoretical frame work on regulation of public construction works. This chapter also briefly describes the general concepts, definitions, objectives and guiding principles for public procurement and also deals with the regulation of public construction works at the international arena. In chapter three, the legal and institutional framework of public construction procurement in Ethiopia has been raised and discussed in considerable detail. Finally, the fourth chapter deals with the summaries of key findings concluding remarks and recommendation part.

³⁶ Allison Megan, *The Legal Regulation of Construction Procurement in South Africa* (Master of Laws Thesis, Stellenbosch University 2013) 32

³⁷Victor Mosoti (n 19) 643 Citing ‘UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction, and Services, UN Doc No A/CN.9/403’ <www.uncitral.org/procurement/Guide-Enactment-Model-Law-Public-Procurement>

Chapter Two

2. Theoretical Framework for Legal and Institutional Regulation of Public Construction Works Procurement

2.1. Brief Overview of Basic Concepts and Theoretical Framework on Regulation of Public Construction Works Procurement

Historical evidence on the earliest procurement shows that it goes back to 2800 B.C and 2400 B.C found in the present day Syria.³⁸ There is also evidence indicating the existence of procurement in the Silk trade between China and a Greek Colony in 800 B.C.³⁹ According to Dobler and Burt, public purchasing possesses a strong historical base in the United States from 1792 when the federal government authorized the Departments of War and Treasury to contract on behalf of the nation. While the intent of Congress was likely to prevent corruption in the letting of government contracts, the authorization also served as an acknowledgement of the profession.⁴⁰

The fact being construction is a complex process, which, ultimately, leads to achieve a result in terms of physical facilities such as building, dam, road, bridge, and so forth. The process, however, is systematically categorized in to different but interrelated phases: planning, design, procurement, construction, and operation and maintenance. To understand and manage this complex process, the construction industry has developed its own system approach to identify relevant construction works tasks. At the heart of identifying such government construction works tasks and distributing same to government procurement system. This is done, in the construction industry, through the use of relevant standard conditions, methods and procedures in legal environment and institutional setup. Thus, accordingly, the possible legal and organizational form to be taken by a construction organs and public procurement agency determine the effectiveness of government construction works.

³⁸Khi V. Thi, 'Public Procurement Re-examined' (Journal of Public Procurement Vol 1, Issue 1, 2001), p 11

³⁹ Ibid

⁴⁰ Yirga Tesfahun , Public Procurement Reforms in Ethiopia: Policy and Institutional Challenges and Prospects (Master of art in public management and public policy thesis, 2011) 12

It is common in legal studies including for the purpose of laws on procurement⁴¹ to divide procurement into three categories, which is useful to set out in order to illustrate the diversity of types of procurement transactions:

- **Goods:** (supplies or products (e.g. simple items such as office furniture or very complex items such as guided missiles)
- **Works:** (construction) (eg. Building of roads, bridges and government buildings)
- **Services:** This includes manual services, bridges and government buildings or cleaning of roads, as well as professional services such as those connected with construction (architectural and engineering services), legal services or consultancy services.⁴²

Concerning the objectives of public procurement system and regulations, the objectives of public procurement can be divided into primary and secondary objectives. The first group has to do with ensuring good public financial management and services, or put differently, with obtaining value for money, and the second group has to do with socio-economic benefits.⁴³ There are a number of objectives of public procurement that can be identified and shared by some, most or many systems of public procurement. Professor Sue Arrowsmith has identified eight key objectives⁴⁴. He summarized in the table below:

Table 1: *The Objective of Public Procurement Systems*

1. Value for money (efficiency) in that acquisition of required goods, works or services
2. Integrity – avoiding corruption and conflict of interest
3. Accountability
4. Equal opportunities and equal treatment for providers
5. Fair treatment of providers

⁴¹ Inter alia in the UNCITRAL Law on Procurement of Goods, Construction and Services

⁴² Sue Arrowsmith, Public Procurement Regulation: An Introduction Chapter 1 (University of Nottingham, 2010) 2

⁴³ Stephanus Petrus Le Roux De La Harpe, Public Procurement Law (Doctor Of Laws, University Of South Africa, 2009) citing Watermeyer Executive Summary www.cuts-international.org/

⁴⁴ Sue Arrowsmith, Public Procurement Regulation: An Introduction (n 42) 4

6. Efficient implementation of industrial, social and environmental objectives (“horizontal policies”)
7. Opening up public markets to international trade
8. Efficiency in the procurement process

Source: Sue Arrowsmith, Public Procurement Regulation: An Introduction

2.2. Public Construction Works Procurement Policy and Regulation at the International Arena

2.2.1. UNCITRAL Model Law on Public Procurement

The United Nations Commission on International Trade Law (UNCITRAL) as a legal body composed of member states to the United Nations focuses on international trade and commercial law reform.⁴⁵ One of the areas that took the attention of reform is public procurement. There is UNCITRAL Model Law on Public Procurement which was enacted in 1994 G.C and amended in 2011 G.C. The Model Law serves as a guide or model for different legal solutions in the national public procurement regimes. The objective of the model law includes maximizing competition, providing fair treatment for suppliers or contractors, enhancing transparency and objectivity in the procurement proceeding.⁴⁶

Among the several objectives of the Model Law there are clear stipulations devoted for the promotion of competition in the procurement process. In addition, the Model Law obliges public entities to publish information regarding planned and future procurement activities internationally.⁴⁷ Furthermore, solicitation document to be detailed to describe the subject matter of the procurement in sufficient manner.⁴⁸ The rationale behind such imposition is to encourage and attract more participants for government contracts.

⁴⁵ UNCITRAL website http://www.uncitral.org/uncitral/en/about_us.html last visited 16/08/2018

⁴⁶ UNCITRAL Model Law on Public Procurement (n 1) Preamble

⁴⁷ Ibid Article 6(1,a and 2) and 33(2)

⁴⁸ Ibid Article 10(1 b)

Moreover, the Model Law indicates the need to give due consideration on the design of technical specifications and descriptions of the goods, works and services required to be made in a way that encourage participation of potential candidates. On this regard Article 10 (2) of the Model Law requires that the technical specifications and descriptions to be clear and objective so as to give sufficient information about the object and conditions of the contract and no description should be designed to restrict bidder's participation. As a default rule, the Model Law prefers open tendering as the main choice for procuring construction.⁴⁹ This implies selection of open tendering as a principal procurement method and procedure in government construction works is to attract unrestricted number of contractors to participate and increase the benefits to the public in terms of value money and competition and it enhances transparency in procurement process.

Public bodies may use other methods of procurement. But crucially while resorting to other methods of procurement they are strictly required to accommodate the conditions provided due to ensure equal treatment of candidates and shall seek to maximize competition to the extent practicable.⁵⁰ Thus, it can inferred from Model law that construction project procuring public bodies are required to give a justification for application of other methods of procurement than open tendering and should ensure equal treatment and competition.

2.2.2. World Bank's Procurement Policy

Like many multilateral agencies, the Bank imposes good-governance and anti-corruption requirements on borrower countries where it provides structural lending or finances for development projects and requires that the procurement process for funded projects is conducted according to Bank mandated procedures.⁵¹ In 2012, the Bank commenced the most holistic reform of its procurement policies, practices and procedures, which were aimed at "the attainment of the larger goal of improving development effectiveness by encouraging the use of country systems and harmonization, building competitive local industries, strengthening public

⁴⁹ Ibid Article 28(2)

⁵⁰ Ibid

⁵¹ Sope Williams-Elegbe (2014) The Changes To The World Bank's Procurement Policy And The Implications For African Borrowers (n 94)22 Citing World Bank, Guidelines: Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans and IDA Credits and Grants by World Bank Borrowers (January 2011), para 1.16

sector management, improving governance and anticorruption, promoting sustainability, accelerating investment in infrastructure, and deepening international trade, among others.”⁵²

The formalization of procurement occurred in the Bank several years after the Bank begun lending. The Bank introduced International Competitive Bidding (ICB) as the normal procurement procedure in 1951.⁵³ The proposed draft procurement policy⁵⁴ is a brief document, which contains the seven principles, which will undergird Bank procurement, once the reform agenda is complete. These principles are value for money, economy, and integrity, fit for purpose, efficiency, transparency and fairness. The principles will inform and drive the Bank’s approach to procurement and it is hoped that the Bank will indeed be able to incorporate these principles in its complex and diverse procurement operations.⁵⁵

2.2.3. African Development Bank Procurement Policy

The African Development Bank’s Rules and Procedures for Procurement of Goods and Works⁵⁶ contain four considerations that generally guide procurement of the goods and works as the Bank’s requirements. The first is that the need for economy and efficiency in the implementation of the project, including the procurement of the goods and works involved; following the Bank’s interest in giving all eligible bidders the same information and equal opportunity to compete in providing goods and works financed by the Bank must be observed. The other considerations required under the African Development Bank’s Rules and Procedures for Procurement of Goods and Works are the Bank’s interest in encouraging the development of domestic and regional contracting, and manufacturing industries in the Borrower’s country; and

⁵² Procurement in World Bank Project Investment Finance: Procurement Policy (Draft), July 8, 2014. Available at http://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/materials/draft_procurement_policy_for_consultation_august_2014.pdf Initiating discussion paper: xi.

⁵³ Sope Williams-Elegbe (n 94) 1 APPLJ 23 citing Operations Policy and Country Services, The World Bank’s Procurement Policies and Procedures: Policy Review Initiating Discussion Paper, (March 29, 2012), pg. 2

⁵⁴ Procurement in World Bank Project Investment Finance: Procurement Policy (Draft), July 8, 2014. Available at http://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/materials/draft_procurement_policy_for_consultation_august_2014.pdf accessed 17 September, 2018

⁵⁵ Sope Williams-Elegbe (2014) The Changes To The World Bank’s Procurement Policy And The Implications For African Borrowers (n 94) 22

⁵⁶ African Development Bank Rules and Procedures for Procurement of Goods and Works, Procurement and Fiduciary Services Department May 2008 Edition, Revised July 2012

the importance of transparency in the procurement process.⁵⁷ It is based on these requirements that the African Development Bank require member countries to undertake public construction works procurement.

2.2.4. COMESA Public Procurement Regulation

The COMESA projects developed a model strategy for public procurement reform in its member states, including a regulatory model.⁵⁸ In 2003, Member states of COMESA at its eighth summit held in Khartoum agreed on the basic elements of reform on national public procurement laws and practices and the development of regional public procurement framework. Accordingly, the COMESA Public Procurement Regulation was enacted in 2009. This regulation acknowledges more transparent, competitive, economic, efficient and accountable procurement system.⁵⁹ It also incorporate provisions dealing with fostering competition and openness in public procurement procedures and proceedings.⁶⁰

What is quite often in contrary with COMESA at issue in this regard in the African context is a tension that subsequently emerges between the uses of procurement for local policy purposes in many African systems.⁶¹ It is thus quite common to find that African systems include selection and award criteria aimed at furthering social policies such as wealth distribution, gender equality, rural development and even social cohesion.⁶² The common use of qualification and award/selection criteria for policy purposes can of course also create tension with other objectives in the procurement process such as value for money and efficient procurement.⁶³ In connection to this, as Stephen Karangizi, who formerly headed the COMESA procurement reform initiative (on which more below), noted, these developments have largely been in the

⁵⁷ Ibid 2

⁵⁸ Geo Quinot , *Symposium: Europe Meets Us And Others: Current Developments In Procurement Law With A Focus On The Selection, Qualification, And Exclusion Of Tenderers, Current Developments In African Procurement Law (2-3 July 2014) Research Center For Public Procurement Law And Administrative Cooperations, Ludwig Maximilian University Of Munich, Munich, Germany. 5 Citing Karangizi (2005) 14 PPLR NA56*

⁵⁹ COMESA Public Procurement Regulation (2009) Legal Notice No. 3 Official Gazette Vol. 15, preamble

⁶⁰ Ibid Article 3 (a) and 4(a)

⁶¹ Geo Quinot (68) 2 Citing La Chimia in Public Procurement Regulation in Africa 237

⁶² Ibid 7 Citing La Chimia in Public Procurement Regulation in Africa 237

⁶³ Ibid 8

form of ‘the recognition of the need to enact specific legislation to provide for clear and unambiguous laws on procurement’.⁶⁴

2.3. Public Procurement Regulation and Policy in Construction Sector

It is not uncommon to see construction projects failing to achieve their mission of creating facilities within the specified cost and time. Hardly few projects get completed on time and within budget since construction projects are exposed to uncertain environments because of such factors as construction complexity; presence of various interest groups such as the project owners, end users, consultants, contractors, financiers; materials, equipment, project funding; climatic environment; the economic and political environment and statutory regulations.⁶⁵

The successful execution of construction projects, keeping them within estimated cost and the prescribed schedules, primarily depends on the existence of an efficient construction sector capable of sustained growth and development in order to cope with the requirements of social and economic development and to utilize the latest technology in planning and executions.⁶⁶

Some argue that developing ideal regulation of construction procurement system helps to manage projects. However, many studies demonstrate that it is basically unrealistic, if not impossible, to develop an ideal procurement system. Just as there is no one best way to organize a firm⁶⁷, so there is no one best way to organize a project. However, crucially many projects suffer from inadequate or inappropriate procurement decisions. The construction industry lacks a sensible and systematic policy for choosing appropriate procurement systems. Indeed, the difficulty faced by clients in getting impartial advice on procurement decisions has been highlighted in two government sponsored reports⁶⁸ Masterman summarizes and reviews a variety of approaches to the procurement decision, and concludes, among other things, that the selection process needs to be carried out in a disciplined and objective manner and within the framework of the project strategy and project brief. The most useful protection that can be offered to a client

⁶⁴ Geo Quinot (68) 2 Citing Karangizi in Reform of the UNCITRAL Model Law on Public Procurement (n 1) 244

⁶⁵ Fetene Nega, Causes And Effects Of Cost Overrun On Public Building Construction Projects In Ethiopia (MSc. Thesis, 2008, Addis Ababa University) 47

⁶⁶ Ibid citing Chalabii, et al (1984)

⁶⁷ John Murdoch and Will Hughes, Construction Contracts Law and Management, (third edition, Spon Press, 2000)

⁶⁸ Citing Woodward 1965

⁶⁸ John Murdoch and Will Hughes, Construction Contracts Law and Management, (third edition, Spon Press, 2000)
89 Citing Building Economic Development Committee 1983, 1988

is a sensible policy for choosing a procurement strategy for each building project.⁶⁹ Thus, we can understand that developing effective procurement legal system and framework for public construction projects plays a vital role for realization of projects and managing public fund.

2.4. Public Construction Works Procurement Planning

Clients are one of the most important parties who invest their money for realization of construction project, and they are the key role players starting from conception through construction up to operation of the project.⁷⁰ According to Chalabii, adequate planning at the early stages of a project is crucial for minimizing delays and cost overruns.⁷¹ Since first stage of the procurement cycle is the identification of procurement needs by the client, planning before construction is the first law of contracting⁷². The preparation of a contract plan is an essential step in the execution of any project no matter how simple.⁷³ In this regard, clients should allow sufficient time to prepare project briefs and other feasibility studies. Allow sufficient time for proper feasibility studies, planning, design, information documentation and tender submission. This helps to avoid errors and omissions that consequentially help in avoiding or minimizing cost overrun.⁷⁴

Further the apportionment of risk as between the client and others will depend upon the procurement system to be used as will the management resources.⁷⁵ Following the decision to procure a construction project a contract plan needs to be prepared for the total project, not just for the letting of the principal contracts, but for every activity which has to be carried out to bring the project to its conclusion, including those which are to be performed by the employer himself. Nor in its totality is it concerned solely with engineering and construction.⁷⁶

⁶⁹ John Murdoch and Will Hughes, *Construction Contracts Law and Management*, (third edition, Spon Press, 2000) 89 (available at www.constructionlibrary.tk)

⁷⁰ John Murdoch and Will Hughes, *Construction Contracts Law and Management*, (third edition, Spon Press, 2000) 108 (available at www.constructionlibrary.tk)

⁷¹ Fetene Nega, *Ibid* citing Chalabii, et al (1984)

⁷² Peter Marsh, *Contracting for Engineering and Construction Projects* (Gower, Fifth Edition 2000) 3

⁷³ *Ibid*

⁷⁴ Fetene Nega, *Causes and Effects of Cost Overrun on Public Building Construction Projects in Ethiopia* (n 75) 109

⁷⁵ *Ibid* 4

⁷⁶ Peter Marsh, *Contracting for Engineering and Construction Projects* (n 72) 7

2.5. Methods and Procedures for Public Construction Works Procurement

Different principal procurement methods and procedures of public procurement have been developed in different times. The following are the common methods and procedures of public procurement.

2.5.1. Open Bidding

This method is used when bidders or tenderers submit their tenders in response to an advertised call for bids. This type of tendering is open to the public and is not limited in terms of the number of parties who may tender for the contract and when the public agencies seek to maximize competition to the extent practicable.⁷⁷ Tenderers submit their tenders based on detailed specifications advertised in the call for tenders found in newspapers or electronic media.⁷⁸ In case of open bidding or tendering, a date, time and venue should be provided for the opening of tenders. This is done in public so as to ensure fairness and transparency so that no tenderer is given the opportunity to adjust his/her tender or have additional time to submit a tender. The contract is awarded to the tenderer who submits a responsive tender and would best achieve value for money.⁷⁹

The other characteristic of Open Bidding (or Competitive Tendering) is that it informs us that it's a standard high value tendering methodology for goods, works & services. Also it is a procurement method with maximum competition which has a formal procedure with detailed invitation to tender documents that would be advertised & open to all tenderers. Often standard tender documents are available for drafting tender documents for certain government construction works projects.

2.5.2. Restricted Tendering

In restricted tendering procurement method, "a request for limited suppliers shall be sent after ascertaining the condition that there are only few or limited suppliers or contractors in the locality and repeated advertisement of invitation for these contractors fails to attract them. These

⁷⁷ Bolton: The Law of Government Procurement in South Africa 134-145

⁷⁸ *Ibid*, See also that 'a procuring entity may use a method of procurement other than open tendering only in accordance with articles 29 to 31 of Model Law, shall select the other method of procurement to accommodate the circumstances of the procurement concerned and shall seek to maximize competition to the extent practicable'

⁷⁹ Allison Megan Anthony (n 36) Cf Arrowsmith, et al Regulating Public Procurement, Stellenbosch University (2013), <http://scholar.sun.ac.za>, 69

limited contractors are expected to compete without exceeding the threshold specified by regulation”.⁸⁰ It is different from open tendering in that only a limited number of tenderers are invited to tender based on their proposals. Those who submit responsive tenders and are most likely to perform the contractual duties are then invited to submit tenders.⁸¹ As clearly stated in the ‘Model Law’, procuring entity may engage in procurement by means of restricted tendering when the subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of contractors or the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.⁸²

Thus, it would be interesting to investigate further the reasons for restricted tendering, i.e. either efficiency or specialization. If one is the case, it may be necessary to adjust the thresholds.⁸³ However, knowledge on the specific markets must first be obtained, in order to accurately judge each situation. It would hence be advisable to request procuring entities or, alternatively, a central procurement institution to conduct a market research on a regular basis.⁸⁴

2.5.3. Direct or Single Source Procurement

Direct procurement for public bodies is allowed to use upon certain conditions. For instance “when there is only one suppliers can supply for technical reasons the goods or other required services; When there is additional unforeseen works and services. Also for similar works or services which were initially awarded based on open and restricted tendering”.⁸⁵ Direct procurement allowed when another annual procurement with previous contractual relationship is needed for repairing or substitution and for emergency cases.⁸⁶ Direct procurement is common in construction industry where additional and unforeseen work needs to be done under an existing contract and cannot be separated from the main contract.⁸⁷ When it is found that there is

⁸⁰ Ibid, Article 49

⁸¹ Bolton, the Law of Government Procurement in South Africa 135

⁸² UNCITRAL Model Law on Public Procurement (n 1) Article 29(1) (a) (b)

⁸³ Annika Engelbert ‘Anti-Corruption Elements In The Ghanaian Public Procurement Law’ (2015) 2 APPLJ 29) 35

⁸⁴ Ibid 34

⁸⁵ UNCITRAL Model Law on Public Procurement (n 1) Article 35(2)

⁸⁶ Ibid

⁸⁷ Bolton The Law of Government Procurement in South Africa 172

special need of public bodies, procurement involves classified information and there are exceptional advantageous conditions direct procurement can be applied.⁸⁸

2.5.4. Request Quotation

Request quotation methods of tendering is widely accepted that for smaller procurement the benefit of tendering are often outweighed by the cost of using a formal tendering procedure, both in terms of use of resource in the procedure and the time taken to complete it, accordingly they use the method of request quotation. It is also referred to as the ‘shopping method’.⁸⁹ It is used to procure goods or works of a low value which are readily available and for which no exact specifications are provided.⁹⁰

2.5.5. Request for Proposals

The procuring entity may use request for proposals and engage for pre-qualification proceedings with a view to identifying, prior to solicitation, suppliers and contractors that are qualified.⁹¹ They may engage in request for proposals proceedings if the subject matter to be procured is available from only a limited;⁹² and when the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured⁹³, and the procurement involves classified information.⁹⁴ Like request for quotation, the ‘Model Law’ requires a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings.⁹⁵ The invitations should be internationally published.⁹⁶

2.5.6. Two Stage Tendering

This method of procurement is generally employed in large and complex contracts where tenders which differ vastly on technical merit or where the procuring entity is unaware of its available

⁸⁸ UNCITRAL Model Law on Public Procurement (n 1) Article 35(2)

⁸⁹ Arrowsmith et al Regulating Public Procurement (n 54) 550

⁹⁰ Bolton, the Law of Government Procurement in South Africa 133

⁹¹ UNCITRAL Model Law on Public Procurement (n 1) Article 18(1), 35(1) (a) and Article 49(3)

⁹² Ibid Article 35(2) (a)

⁹³ Ibid Article 35(2) (b)

⁹⁴ Ibid Article 35(2)(c)

⁹⁵ Ibid Article 35(3)

⁹⁶ Ibid Article 47(3)(a) and Article 35 Para 1

options.⁹⁷ In in the first stage of two-stage-tendering proceedings, suppliers or contractors shall call upon to present their proposals containing without a tender price.⁹⁸ The solicitation documents may solicit proposals relating to the technical, quality or performance characteristics of the subject matter of the procurement, as well as to contractual terms and conditions of supply and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.⁹⁹ In the second stage of two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose initial tenders were not rejected in the first stage to present final tenders with prices in response to a revised set of terms and conditions of the procurement.¹⁰⁰

2.6. Electronic Procurement as a Tool of Reform in Public Construction Procurement

Traditionally the tender process involved the production and printing of multiple copies of the relevant contract documentation. As a result the construction sector, however, “lags behind other business sectors in harnessing the greater potential of ICT”¹⁰¹

Electronic public procurement is the process by which government acquires the goods, construction works or services needed for its operations from outside service providers (the outside service providers generally being the private sector) via electronic means, usually the Internet.¹⁰² The goal of electronic public procurement is primarily to eliminate or minimize the direct human interaction in the procurement cycle between the suppliers bidding on government tender opportunities and the government procurement officials.¹⁰³

While e-procurement can provide benefits such as “cost savings to a firm” others have raised concerns around security of files.¹⁰⁴ It is the interaction between these two parties that usually

⁹⁷ Allison Megan Anthon (n 36) 78

⁹⁸ UNCITRAL Model Law on Public procurement (n 1)Article 48(2)

⁹⁹ Ibid

¹⁰⁰ Ibid Article 48(4)(a)

¹⁰¹ Charles Mitchell, Procurement in Property and Construction – A review of practices under taken by a medium size contractor in Ireland (Dublin Institute of Technology, charles.mitchell@dit.ie 2015) 5 Citing Thomas and Hore (2003), Gunnigan, Orr and Hore (2004) & Hore and West (2005)

¹⁰² Ibid Citing Schoenherr & Rao Tummala (2007) 8; Oliveira & Amorim (2001) 43 43; De la Harpe (2015) 1572

¹⁰³ United Nations Office on Drugs and Crime, 2013:27; Kühn & Sherman (2014) 19

¹⁰⁴ Charles Mitchell, Procurement in Property and Construction – A review of practices under taken by a medium size contractor in Ireland (Dublin Institute of Technology, charles.mitchell@dit.ie 2015) 6 citing (Wisner, 2003, cited Vaidyanathan & D’Arcy (2012) 437

results in corruption in public procurement.¹⁰⁵ Besides reducing the chances for corrupt behavior within the public procurement system, various other benefits can be realized by modernizing the procurement process through the introduction of an electronic public procurement system. The benefits include better quality service delivery through a more efficient procurement system; economic growth due to the development of infrastructure; and for suppliers, the cost of doing business with the state substantially decreases,¹⁰⁶ resulting in the achievement of substantial potential savings through electronic public procurement.¹⁰⁷

In construction procurement, e-procurement has a vital role in transparency since it reduces procurement cost. The ‘Model law’ give an emphasis to countries to encourage the use as e-procurement process since it has a vital role in ‘Pro-business’ potential by creating transparency, lower cost, monitoring and removing human interaction, improving processes and standardization of public procurements.¹⁰⁸

2.7. Guiding Principles of Public Procurement

The UNCITRAL Model Law on the Public Procurement contains different principles which are required to be adopted by member states. The nine principles applicable to public procurement as contained in the Model Law which form the essence of the procurement regimes are the following; Principle of Economy; Principle of Competitiveness; Principle of Effectiveness; Principle of Transparency; Principle of Combating of abuse; Principle of Avoidance of risk; Principle of Accountability; Principle of Fairness and equitability; and Principle of Integrity. “It is important to keep in mind that these laws are based on the principles of a demand economy”.¹⁰⁹ Here is brief explanation of these principles.

I. Principle of Economy

The principle of economy is the first principle that requires economic object of public procurement is to obtain the best product at the best price.¹¹⁰ It is generally accepted that to

¹⁰⁵ United Nations Office on Drugs and Crime, 2013:27

¹⁰⁶ Geoné Kramer, Electronic Public Procurement As A Tool Of Reform In South African Public Procurement (2016) 3:1 APPLJ 2 Citing National Treasury South Africa (2015)

¹⁰⁷ Schoenherr & Rao Tummala 2007:9

¹⁰⁸ An introduction to the UNCITRAL Model Law on Public Procurement, (n 2) 25

¹⁰⁹ Stephanus Petrus Le Roux De La Harpe, Public Procurement Law (n 10) 364

¹¹⁰ Ibid 371

ensure that the lowest price is obtained the widest possible competition by potential suppliers is necessary, and the principle of competition will therefore have a direct influence on the principle of economy.¹¹¹ Economy can also relate to the question of the cost effectiveness of both the process and the subject matter of the procurement.¹¹²

II. Principle of Competitiveness

It is a core principle of the procurement process, in particular with regard to the methods of procurement. “It is believed that competition, as an economic principle, will ensure that suppliers will offer the best product at the best price. Many legal scholars claim this principle overlaps with the principle of economy. However, it is generally accepted that effective competition will enhance the process”.¹¹³ The principle of competition is central to the methods of procurement provided in the ‘Model Law’. In the preamble of the ‘Model Law’¹¹⁴, it is stated that competition between bidders should be promoted in procedures qualifications of suppliers and contractors. “To ensure effective competition open tender procedures are deemed to be the most effective”.¹¹⁵ Choice of procurement method maximizes competition.¹¹⁶ Unless another method is justified, open tendering is a rule for competition.¹¹⁷ Default rule is open and international solicitation.¹¹⁸

III. Principle of Effectiveness

Effectiveness can be defined as productiveness with relation to the costs of the procurement process.¹¹⁹ Crucially, the final goal of any procurement system is to insure that the procurement process itself is carried out efficiently.¹²⁰ Thus, effectiveness at every stage of the procurement process must be realized and the procurement process must carry out without unnecessary or

¹¹¹ Trepte Regulating Procurement 64-70; Arrowsmith Public and Utilities Procurement

¹¹² Ibid Citing Stephanus Petrus Le Roux De La Harpe, Public Procurement Law (n 10) 372

¹¹³ Ibid 389

¹¹⁴ UNCITRAL Model Law on Public Procurement (n 1)Preamble (c)

¹¹⁵ Stephanus Petrus Le Roux De La Harpe, Public Procurement Law (n 10) 390

¹¹⁶ UNCITRAL Model Law on Public Procurement (n 1) Article 27

¹¹⁷ Ibid Chapter II, part I, Article 28(1)

¹¹⁸ Ibid Article 8 Chapter II, part II

¹¹⁹ Arrowsmith, Regulating Public Procurement para 5.3.2(f) and Arrowsmith, Linarelli and Wallace Regulating Public Procurement 31

¹²⁰ The EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 19

disproportionate delay or waste of resources for the purchasing entity, and also without unreasonable cost for bidders.¹²¹

IV. Principle of Transparency

Transparency is a key principle to implement system objectives of public procurements.¹²² Transparency in public procurement requires publication of all the ‘rules of the game’ in advance including administrative rulings and procedures and directives relating to public procurement.¹²³ Transparency requires public tender opening. All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to participate in the opening of tenders.¹²⁴ As mode of procurement to avoid undue influence, one thing which must be stringently followed by public bodies is that after opening of bids, the process of examination and evaluation must not be disclosed to bidders or other persons not officially concerned with the process of examination and evaluation before the announcement of award of the contract.¹²⁵

V. Principle of Combating of Abuse

The principle of the combating of abuse entails that conflicts of interest, fraud and corruption must be avoided.¹²⁶ This principle is supported by, and overlaps with, most of the principles referred to above, and is to an extent a function of the above principles. In particular, the principles of accountability, transparency and integrity assist in ensuring that abuse is combated.¹²⁷ Because of the vast amounts of money involved in public procurement, the scope of public procurement, the many opportunities for abuse and the prevalence of abuse, the principle of the combating of abuse in public procurement needs to be included in the process and legal framework of public procurements.

VI. Principle of Avoidance of risk

Risks relating to public construction procurement can be addressed in a procurement regime by providing for at least the following: The ‘ascertainment by the procuring entity the information

¹²¹ Ibid 20

¹²² An introduction to the UNCITRAL Model Law on Public Procurement (n 2) 23

¹²³ Ibid 24

¹²⁴ UNCITRAL Model Law on Public Procurement (n 1) Article 42(2)

¹²⁵ Public Procurement Proclamation (n 21) Article 40

¹²⁶ Stephanus Petrus Le Roux De La Harpe, Public Procurement Law (n 10) 438

¹²⁷ Ibid

relating to tenderers’, ‘professional and technical qualifications’, ‘competence, financial resources, equipment and other physical facilities, managerial capability, experience and reputation’ and if the tenderer has the personnel to perform the contract, its ‘legal capacity and its financial means’¹²⁸. This principle requires the tenderers to must fulfill their obligations to the state regarding taxes, security and similar contributions; and to have a clean criminal record.¹²⁹ In addition, in order to reduce risk of corruption in tendering process, further attention should be paid to newly established areas like e-procurement with the required detail for application in construction works procurement.¹³⁰

VII. Principle of Accountability

Accountability entails that both the government officials and parties participating in public procurement to be held accountable for their actions in the process of procurement.¹³¹ The principle of accountability includes the requirement of the provision of effective remedies which offer appropriate redress in the case of unlawful actions. The general public and the tenderers clearly also have an interest in holding the procuring entity and government officials accountable for the proper implementation and functioning of the public procurement system.¹³² The essence of ‘Model Law’ shows that measures permitting discretion shouldn’t be centralized systems in public procurements.¹³³ The modern approach allows ex post facto assessment (audit) to achieve accountability and internal records to allow decisions to be assessed.¹³⁴ The principle of accountability requires public institution to have a code of conduct and institutional measures. A code of conduct for officers or employees of procuring entities shall be enacted.¹³⁵ The code of conduct so enacted should be promptly made accessible to the public and systematically maintained.¹³⁶ Also institutional measures in Public Procuring agency with the ability to impose sanctions; debarment (Guide) should be established.¹³⁷

128 UNCITRAL Model Law on Public Procurement (n 1) Article 6

¹²⁹ Ibid Article 9 (2) f

¹³⁰ Organisation For Economic Co-Operation And Development (OECD) 2007 (n 117) 22

¹³¹ Stephanus Petrus Le Roux De La Harpe (n 10) 457

¹³² Ibid

¹³³ An introduction to the UNCITRAL Model Law on Public Procurement (n 2) 31

¹³⁴ Ibid

¹³⁵ UNCITRAL Model Law on Public Procurement (n 1) Article 26

¹³⁶ Ibid

¹³⁷ An introduction to the UNCITRAL Model Law on Public Procurement (n 2) 31

VIII. Principle of Integrity

Integrity is referred to as an objective of public procurement in the ‘Model Law. In public procurement, the “principle of integrity includes the incorporation of all of the principles referred to above as well as the proper implementation of these principles”.¹³⁸ Integrity in public procurement entails consistency and objectivity in the implementation of all of the applicable provisions to ensure their ability to achieve their objectives. As a holistic concept, it judges the quality of a system in terms of its ability to achieve its own goals.¹³⁹ Furthermore, requirement for record ensure integrity in procurement process.¹⁴⁰

IX. Principle of Fairness and Equitability

Fairness in the public procurement context is said to generally refer to procedural fairness¹⁴¹. Procedural fairness has two requirements namely audi alteram partem¹⁴² and nemo iudex in sua causa.¹⁴³ It relates to the relationship between the organ of state and tenderers and the relationship between the organ of state and the tenderers in relation to each other.¹⁴⁴ The first relationship requires that sufficient access to the procurement process is provided by the organ of state, that tender opportunities should be publicly available; tenderers should be familiar with all the rules applicable to the process and should be allowed sufficient participation.¹⁴⁵ With regard to the second relationship, organs of state should treat tenderers fairly in relation to each other, meaning that no tenderer should have an advantage above another.¹⁴⁶

2.8. Evaluation of Qualified of Tenderers in Public Construction Works Procurement

As a general rule, contractors are required to meet all qualification criteria stated in the tender documents in order to tender for a contract. In the case of construction contracts, the conditions

¹³⁸ Stephanus Petrus Le Roux De La Harpe, Public Procurement Law (n 10) 487

¹³⁹ MWOD (2009) Integrity, see on <www.merriam-webster.com>

¹⁴⁰ Ibid Article 21

¹⁴¹ Allison Megan Anthony (n 36) Citing Bolton The Law of Government Procurement in South Africa (n 23) 56

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Ibid citing Bolton, The Law of Government Procurement in South Africa (n 23) 47

¹⁴⁵ Ibid citing Bolton, The Law of Government Procurement in South Africa (n 23) 48

¹⁴⁶ Ibid citing Bolton, The Law of Government Procurement in South Africa (n 23) 48

of tender indicate the specifications of the tender and the evaluation criteria.¹⁴⁷ The importance of procurement comes from the main criteria which affect success of the project: cost, quality, time, safety and how the project meets its envisaged purpose.¹⁴⁸ For this reason, it is crucial to allow bidding for the contract to only such contractors who are sufficiently qualified for the proper performance of specific contract. From this perspective, authors like Banaitiene¹⁴⁹ and Plebankiewicz¹⁵⁰ consider selection of an appropriate contractor as one of the most critical factors of project success.¹⁵¹ It should be emphasized, that each qualification criterion has to be used appropriately in order to preserve the competition in the tender.¹⁵²

Furthermore, a full disclosure to tenderers of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender that must be made. These criteria may be price alone, or a combination of price and some other technical, economic or other criteria. Such criteria must as far as practical be objective and quantifiable and be given a relative weight or be expressed in monetary terms. The principle of whole-life costs is included, save that the costs of disposal are not referred to. The enacting state can add to the list of technical, economic or other criteria.¹⁵³ In the evaluation the price must be evaluated separately after completion of the technical evaluation.¹⁵⁴ The absence of economic and financial qualification criteria, however, brings the risk that the incompetent applicants could participate in the tender procedure, because it is sufficient to prove the competency by a simple statement.¹⁵⁵ In this context, replacing the fulfillment of economic and financial qualification criteria simply by affidavit of financial and economic capacity to fulfill a contract seems to be an unnecessarily radical measure against the

¹⁴⁷ Allison Megan Anthony (n 36) 139

¹⁴⁸ Jana Korytářová, Tomáš Hanák, Renata Kozik, Elżbieta Radziszewska Zielina (eds), Creative Construction Conference (2015) Exploring the contractors' qualification process in public works contracts 1
Citing Fong, C. K., Avetisyan, H. G. Cui. Q. (2014) Understanding the sustainable outcome of project delivery methods in the built environment 1141-1155

¹⁴⁹ Banaitiene, N., Banaitis, A. (2006). Analysis of criteria for contractors' qualification evaluation, *Technological and Economic Development of Economy*, 12:4 276-282

¹⁵⁰ Plebankiewicz, E. (2012). A fuzzy set based contractor prequalification procedure. *Automation in Construction* 433-443

¹⁵¹ Jana Korytářová, Tomáš Hanák, Renata Kozik *, Elżbieta Radziszewska – Zielina, Creative Construction Conference 2015 Exploring the contractors' qualification process in public works contracts 232

¹⁵² Ibid 238

¹⁵³ Stephanus Petrus Le Roux De La Harpe, *Public Procurement Law* (n 10) 126

¹⁵⁴ Ibid 129

¹⁵⁵ Jana Korytářová, Tomáš Hanák, Renata Kozik *, Elżbieta Radziszewska – Zielina, Creative Construction Conference 2015 Exploring the contractors' qualification process in public works contracts 236

abuse of this institute.¹⁵⁶ Applying the economic and financial qualification criteria to be justified, but it is desirable to create methodological guidelines for their practical application in order to minimize the risk of misuse.¹⁵⁷

Crucially in connection to evaluation of bids, as noted by Arrowsmith and Linarelli that in the event in a procurement process during which the procuring entity determines the actual cost and the relative merits of offers, to determine which offer is to be accepted for contract award.¹⁵⁸ This implies that evaluators in construction procurement to make pre-engineering estimations of the actual cost of the construction projects. To this end, those found to have complied with all the qualification criteria and are responsive, are then evaluated for the purposes of awarding the contract to the tenderer with the best offer.¹⁵⁹

2.9. Preferential Public Procurement in the Construction Industry

Preferential procurement in the construction industry is generally referred to as “targeted procurement”¹⁶⁰ Targeted procurement involves the provision of employment and business opportunities for marginalized or disadvantaged individuals and communities and that these individuals and communities are referred to as the target groups. Watermeyer further notes that targeted procurement provides opportunities for participation of targeted enterprises through various techniques which is done in a manner which does not guarantee contracts to such enterprises. In the case of small contracts, direct preference is awarded to developing enterprises to “tip the scales in their favour”.¹⁶¹

Where preference is an important component of a particular procurement, competition will be limited as not all tenderers will be able to comply with the preference requirements. These

¹⁵⁶ Ibid 236 Citing Weinhold, D. Professional forum: impact of a future amendment to the Act on Public Contract the quality of public procurement (2011) Available from: <http://www.kavz.cz/2011/08/vliv-budouci-novely-zvz-na-kvalitu-verejnych-zakazek/>

¹⁵⁷ Jana Korytářová, Tomáš Hanák, Renata Kozik *, Elżbieta Radziszewska – Zielina, Creative Construction Conference 2015 Exploring the contractors’ qualification process in public works contracts 237

¹⁵⁸ S Arrowsmith, J Linarelli & D Wallace Regulating Public Procurement: National and International Perspectives (2000) 673

¹⁵⁹ Allison Megan Anthony (n36) 138

¹⁶⁰ Ibid 166 Citing ‘R Watermeyer “Potential procurement strategies for construction industry development in the SADC region” Proceedings of the Second International Conference on Construction Industry Development, Botswana National Construction Industry Council in association with the Faculty of Engineering Technology, University of Botswana under the auspices of CIB, Gaborone, Botswana 2000 <<http://www.ssinc.co.za/Files/Doc/RWBPapers/T4-5.pdf>> (accessed 13-08-2011)

¹⁶¹ Ibid

tenderers will, however, not be denied an opportunity to tender, they simply will not be awarded points for preference at the evaluation stage of the process. In targeting larger, more developed contractors, fewer developing contractors will be able to participate as prime contractors.¹⁶²

Preference in the construction industry is implemented in terms of the schemes used in general public procurement such as set-asides, qualification criteria, offering back, providing for preference at the short listing stage, product or service specification and award criteria.¹⁶³ However, it appears that preference is primarily implemented by means of contract participation goals.¹⁶⁴ Scholars in the area of regulation of public procurement like Arrowsmith, Linarelli & Wallace note that participation goals can be defined as “the net value of goods, services and works for the supply of which the firm contracts to engage targeted small, medium and micro enterprises in the performance of the contract, expressed as a percentage of the tender value of the contract”.¹⁶⁵ For instance, the maximum domestic and regional preference margin eligible for preferential treatment in construction works is stated with different margin under African Development Bank Rules and Procedures for Procurement of Goods and Works. Accordingly the margin applies to domestic preference, the maximum domestic preference margin, which the Borrower may grant to bidders, eligible for such a preference, is for construction works is up to 10%.¹⁶⁶ Whereas for regional preference, the maximum regional preference margin that the Borrower may grant to bidders eligible for such preference to construction works is 7.5%.¹⁶⁷

2.10. Performance-Based Contracting in Public Construction Procurement

Performance-Based Contracting (PBC) is widely accepted as a useful tool of procurement particularly so far as procurement of works is concerned. It is believed that the use of PBC can assist the efficient utilization of the public resources.¹⁶⁸ Applying a PBC system is believed to be a better option for achieving their expected objectives. However, very few of them do so, believing it to be a riskier contract with low levels of predictability of the contract results, while

¹⁶² Ibid 211

¹⁶³ Allison Megan Anthony (n 36) 25 Citing P Lehohla ‘Construction industry 2007’ (University of South Africa 2007) 257

¹⁶⁴ Ibid

¹⁶⁵ Ibid 25 Citing P Lehohla ‘Construction industry 2007’ (University of South Africa 2007) 257 see footnote 169

¹⁶⁶ African Development Bank Rules and Procedures for Procurement of Goods and Works, Procurement and Fiduciary Services Department May 2008 Edition, Revised July 2012, pg. 36, article 9

¹⁶⁷ Ibid 37, article 13 (B)

¹⁶⁸ Baynesagn Asfaw Ambaw and Jan Telgen (n 11) 402

leaving more responsibility to the contractor. However, in recent years, PBC has become a common practice in many government organizations.¹⁶⁹

However, much of the public procurement in developing countries specifically is still contracted out based on input or process specifications (i.e. the traditional approach) and employs inefficient procurement practices. In addition, many major public projects in developing countries face cost and schedule overruns and require a huge amount of extra budget to complete.¹⁷⁰ For example, as identified by World Bank, such problems are common practice in Ethiopia in most public projects.¹⁷¹

Using the PBC system also enhances a continuous dialogue among all involved parties in the construction process and helps to solve any problem in a timely manner. This improves the contract administration process as compared to the traditional contracting approach. In spite of all this, the contracts that practiced the PBC system are works contracts (design-build-transfer type of contracts in road construction projects), whereas PBC has not yet been fully practiced in other types of procurement, even in the same procuring entity.¹⁷²

Different international and regional instruments set different procurement guidelines promoting PBC. In the World Bank (WB) Procurement Guidelines dated January 2011, Article 2.19 for procurement of goods, works and non-consultancy services states that ‘the standards and the technical specifications stated in the bidding document shall promote the broadest competition possible, while assuring the critical performance or other requirements for the goods and/or works under procurement.’¹⁷³ Also the African Development Bank Rules and Procedures for Procurement of Goods and Works promote PBC. According to Articles 3.14 and 3.15 of Procurement and Fiduciary Services Department, Revised July 2012, The African Development Bank Rules and Procedures for Procurement of Goods and Works¹⁷⁴, Performance Based Procurement or Output-Based Procurement, refers to competitive procurement processes (ICB or

¹⁶⁹ Ibid 403 Citing Hypko, Tilebein, & Gleich (2010); Kim, Cohen, & Netessine (2007) ; Becker (2008); Hannah, Ray, Wandersman, & Chien (2010); Hypko et al. (2010)

¹⁷⁰ ibid Citing (Becker, 2008; Kleemann & Essig, 2013), (Doer, Lewis, & Eaton, 2005)

¹⁷¹ ibid 404 Citing (Quinot & Arrowsmith, 2013; World Bank & Ethiopian Government, 2010)

¹⁷² ibid 423

¹⁷³ Ibid 414

¹⁷⁴ African Development Bank Rules and Procedures for Procurement of Goods and Works, Procurement and Fiduciary Services Department May 2008 Edition, Revised July 2012

NCB) resulting in a contractual relationship where payments are made for measured outputs instead of the traditional way where inputs are measured.¹⁷⁵

Performance Based Procurement (or Output Based Procurement) can involve: (a) the provision of services to be paid on the basis of outputs; (b) design, supply, construction (or rehabilitation) and commissioning of a facility to be operated by the Borrower; or (c) design, supply, construction (or rehabilitation) of a facility and provision of services for its operation and maintenance for a defined period of years after its commissioning. For the cases where design, supply and/or construction are required, prequalification is normally required and the use of Two-Stage Bidding shall apply.¹⁷⁶ Examples of such type of procurement is for the case of procurement of a facility: Design, Procurement, Construction, and Commissioning of a thermal power plant to be operated by the Borrower; (iii) for the case of procurement of a facility and services: Design, Procurement, Construction (or Rehabilitation) of a road and operation and maintenance of the road for 5 years after construction.¹⁷⁷ Therefore, different international and regional instruments recommend and promote the application of PBC in public construction works procurement. Thus, as a matter of fact of benefits of PBC in construction works procurement, different countries would introduce it under their legal and institutional framework of public construction procurement.

2.11. Institutional Framework of Public Construction Works Procurement

Institutional setup defined by Benon as structures for conducting procurement that minimize subjective decisions and politicization (including approval mechanisms, authorities, and composition of bid and evaluation committees).¹⁷⁸ An essential element of the role of the public procurement department in a government entity is the placement of procurement authority.¹⁷⁹ Since contracting for specialized professional services (e.g., architectural and engineering, legal, medical services) arranged directly by the using departments.¹⁸⁰ At this juncture at institutional

¹⁷⁵ Ibid article 3:14

¹⁷⁶ Ibid article 3: 15 Cum as indicated in paragraph 2.6 of the African Development Bank Rules and Procedures for Procurement of Goods and Works

¹⁷⁷ ibid 29

¹⁷⁸ Benon Basheka, Public Procurements in Africa a Tool for Effective Governance of the Public Sector and Poverty Alleviation (2009) 23

¹⁷⁹ Yirga Tesfahun , Public Procurement Reforms in Ethiopia: Policy and Institutional Challenges and Prospects (Master of art in public management and public policy thesis, 2011) 14

¹⁸⁰ Ibid

level, governmental entities need to have a comprehensive training program, a comprehensive strategic workforce plan to profile the current staff, and projects staffing needs for the future, to hire, develop, and retain talent.¹⁸¹

The other issue is related with institutional set up of public construction works procurement, the government bodies who want to undertake certain construction project are expected to minimize unnecessary and excessive bureaucratic procedures in the clients' organization.¹⁸² Thus, an efficient public procurement therefore requires sound institutional engagement at all levels of the procurement process.¹⁸³ The other important issue related to institutional framework is that establishing collaborative procurement system for public construction works is highly important. In this regard, studies have shown that "traditional procurement processes reinforce socio-cognitive barriers that hinder team efficiency"¹⁸⁴ A collaborative approach to procurement within the firm is a significant impact as it requires the production of guidelines for each function which defines the areas where co-operation is required for effective procurement. E-procurement could simplify some of these functions from conception through construction and onto completion of projects. These approaches could save time in relation duplication of functions and as a result provide a more cost efficient model for procurement.¹⁸⁵ At tender stage the collaborative function between the estimating and purchasing departments works well. Estimating takes the lead and manages the process regarding the flow and return of information.¹⁸⁶

Finally, the importance of public construction works procurement comes from both the legal and institutional framework. Also many literatures did not deny the importance of institutional framework of public procurement would affects success of the construction project and public money in different way. Thus, investigating the laws and institution framework of public construction works procurement and proposing an efficient and effective regulatory framework is required.

¹⁸¹ Ibid 16

¹⁸² John Murdoch and Will Hughes, *Construction Contracts Law and Management*, (third edition, Spon Press, 2000) 109

¹⁸³ Yirga Tesfahun , „Public Procurement Reforms in Ethiopia: Policy and Institutional Challenges and Prospects“ (Master of art in public management and public policy thesis, 2011) 33

¹⁸⁴ Charles Mitchell (n 165) 8 Citing Forgues & Koskela (2009)

¹⁸⁵ Charles Mitchell (n 165) 13

¹⁸⁶ Ibid 8

Chapter Three

3. The legal and Institutional Framework for Public Construction Works Procurement in Ethiopia

3.1. Overview of the Policy and Basic Features of Public Construction Procurement in Ethiopia

This chapter is designed to address the question whether there is a suitable legal and institutional arrangement for government construction works procurement in Ethiopia. Accordingly, the chapter analyzes the laws of the country which directly or indirectly affect the government construction works procurement in Ethiopia. Following this, the chapter examines the organizational structure, responsibilities and functions of concerned government organs according to their mandates in procuring government construction works projects.

3.1.1. Public Procurement Rules in Ethiopia

In Ethiopia, public procurement was started in 1940 E.C.¹⁸⁷ Following the Ethiopian Civil Code of 1960 contained provisions dealing with administrative contracts. In early 1990s, as part of its modernization efforts, Ethiopia enacted new laws consisting of modern public procurement law principles in order to overhaul the then existing weak and corrupt public financial management and administration, and the public procurement systems. However, despite what it seems to be a clear and deliberate move by the legislature, as discussed in this work, to abrogate the old administrative contracts provisions in the Civil Code, the courts in Ethiopia take cognizance thereof and apply them whenever these provisions are invoked by disputing parties.¹⁸⁸

After the coming of Ethiopian People Democratic Revolutionary Front (EPDRF), the first Federal Financial Administration Proclamation No 57/1996¹⁸⁹ advanced the point that it was “essential to a well-functioning government” to have in place a “modern and efficient financial administration” and that the setting out of the basic concepts, principles and elements which

¹⁸⁷ Public Procurement and Property Disposal Service Magazine, (Vol 1, No 6, 2009)²⁸

¹⁸⁸ Tecele Hagos Bahta (n 17) 1

¹⁸⁹ Federal Government of Ethiopia Financial Administration Proclamation No 57/1996, Fed. Neg. Gazeta, Year 3, No 14, 19 December 1996

govern the management of [the Federal Government's] financial resources was necessary.¹⁹⁰ Then the promulgation of the Public Procurement Proclamation No. 430/2005¹⁹¹ expressly and sweepingly repealed Proclamation No 57/96 and Regulation No. 17/97.

In 2009, the Federal Procurement and Property Administration Proclamation No 649/2009¹⁹² was enacted and this Proclamation is currently contains governing rules of public procurement including government construction works procurement. By virtue of this new Proclamation, the old Proclamation No 430/2005 was repealed. Consequently, in 2011, the Federal Public Procurement and Property Administration Agency (FPPAA) issued standard bidding document that contains standard general conditions of contract (GCC) for the procurement of works, based on which all federal procurements of construction works should be obtained.¹⁹³

3.1.2. Policy Environment for Public Procurement in Ethiopia

Government procurement and its legal regulations have been used for the promotion of socio-economic objectives. Such use of government procurement as a policy tool in Ethiopian construction industry is noted under the 'Policy Directions of Ethiopia' that 'the government and the private sector shall adhere to established appropriate procurement practices so as to ensure quality and cost effectiveness in the delivery process'¹⁹⁴. In this regard, efficient and value for money procurement continue to be a major factor in the achievement of the second Growth and Transformation Plan (GTP II); which is expected to be realized in the coming five years 2015-2020.¹⁹⁵ Also the preamble of the Federal Public Procurement and Property Administration proclamation¹⁹⁶ has a policy rationale to achieve better transparency, efficiency, fairness and impartiality in public procurement. The same proclamation stated that ensuring greater economy and efficiency by addressing problems encountered in the course of implementation of the proclamation determining the procedures of public procurement of the Ethiopian Federal Government and establishing the Supervisory Agency.

¹⁹⁰ Tecele Hagos Bahta (n 17) 16

¹⁹¹ Public Procurement Proclamation No 430/2005, Fed. Neg. Gaz., Year 11, No 15, 12 January 2005

¹⁹² Public Procurement Proclamation No 649/2009 (n 21)

¹⁹³ The Federal Democratic Republic of Ethiopia Standard Bidding Document (SBD) For Procurement of Works For National Competitive Biddings (NCB) 2011

¹⁹⁴ Ministry of Urban Development and Construction of Ethiopia (n 13) 9

¹⁹⁵ Federal Public Procurement and Property Administration Agency, January/2016 newsletter volume 6 Issue No.9

¹⁹⁶ Federal Public Procurement and Property Administration Proclamation (n 21)

Particularly in construction sector in Ethiopia, the huge economic actors found investing in construction, real estate, transport and communication, hotels and the like highly profitable. Growth has taken place in the construction and also in the service sectors. Infrastructure in the form of roads and power stations are being developed. School enrolment and health coverage has increased. Many schools, universities and health clinics have been opened.¹⁹⁷ However, albeit the positive changes in the construction and service sectors of Ethiopia economy, it is rare to find clear policy specifically dealing the how the government construction works to be procured and its legal and institutional setup to look like. However, the fact being this, one can refer the general country's policies and have some clue about the policy direction of government construction works procurement. Accordingly as stated under the GTP, the country's vision is to reach the level of middle income- economy as of 2020-2030.¹⁹⁸ To this end, the government was working to implement various policies and strategies.

Above all, the Ethiopian government is convinced that the developmental state approach is the only way forward for Ethiopia to bring about economic growth in a short period of time. The policies and strategies of the country are, accordingly, molded by this line of thinking.¹⁹⁹ As the matter of fact, different public sectors including construction sector may most likely be influenced by developmental state approach of the country that the construction sector in Ethiopia aimed to ensure quality and cost effectiveness in the delivery process to establish in public procurement practices.²⁰⁰ However crucially, beside the above general reference based policy analysis, it is possible to conclude that concerning the specific policy for public construction works procurement, so far, Ethiopia doesn't have a distinct and comprehensive public construction works procurement policy. Thus, without a clear policy that shapes its legal and institutional system in construction sector, the government construction project procurement delivery system and implementation might fail and following economic crises might take place. Thus, Ethiopia should clearly stipulate the construction industry policy for public construction procurement and by doing so; the country can create uniformity in construction procurement, promoting uniform standardized application of construction policies in the construction industry.

¹⁹⁷Amha Dagnew Tessema, *The Impact of State Policies And Strategies in Ethiopia's Development Challenge* (Master Of Arts Thesis, University Of South Africa (UNISA) 2012) 141-142

¹⁹⁸ *The Growth and Transformation Plan (2010/11- 2014/15)* (2010) 21

¹⁹⁹ Yohannes Hailu, *Legal and Institutional Framework for Transfer of Technology in Ethiopia* (LLM thesis, Addis Ababa university, 2015) 67

²⁰⁰ Ministry of Urban Development and Construction of Ethiopia (n 13) 9

3.1.3. Salient Features of Contracting the Public Construction Works Procurement in Ethiopia

In Ethiopia, concerning procurement of public construction works all the proclamations and directives and Federal Standard Bidding Document for the Procurement of Works have defined the works in the same manner as follows:

«Works» mean all work associated with the construction, reconstruction, up grading, demolition, repair or renovation of a building road, or structure, as well as services incidental to works, if the value of those services does not exceed that of the works themselves and includes build-own-operate, build- own-operate-transfer and build-operate-transfer contracts;²⁰¹

There are some features and concept indication under the legal framework of Ethiopia that turnkey contract is required for construction works. The relevant part of Article 20(2) of the directive reads that procurements requiring prequalification bids should satisfy at least one of the following criteria:-

- a) Where the procurement pertains to a work of design, manufacturing or installation of a very high value or complex nature, or*
- b) Where the procurement pertains to a turnkey contract of works, or the acquisition of machinery or Information technology*

Furthermore concerning features of construction works contracts, a reading of Art.2616 of the Civil Code makes it clear that Works on Goods contracts are distinguished from a contract of employment in that the provision states that the contractor remains not only independent of the employer or client but also free to “carry out the task as he wishes” and is bound to comply only with the rules of the profession in addition to those orders from the client he specifically committed himself to respect at the time of contracting. In other words, the law has the presumption that the contractor is the ‘master of his Art’. Corollary to it, therefore, the contractor

²⁰¹ Public Procurement Proclamation No 649/2009 (n 21) Article 2(3), The Ministry Of Finance & Economic Development Issued Federal Public Procurement Directives (2010), and Federal Standard Bidding Document for the Procurement of Works (2011)

should draw the attention of the client to any matter which he considers night may create a problem.²⁰²

The public procurement proclamation²⁰³ recognizes build-own operate (BOO); build-own-operate-transfer (BOOT) and build-operate-transfer (BOT)²⁰⁴ project delivery sub-systems as a default sub-system currently in use in the country's construction industry. Based on this, the PPA Standard Bidding Document, prepared based on public procurement law²⁰⁵, provides an important part of standard bidding documents, known as "Schedule of Requirements". Schedule of Requirements encompasses the following four parts: Scope of Works; Technical Specification; Drawings; and Bill of Quantities/Activity Schedule. This document is the procuring entity's (the future employer's) document. The procurement law also provides, the possibility, as far as possible, for the technical specifications to be prepared by the project owner (employer) to be in terms of performance specification rather than design or descriptive characteristics²⁰⁶. For procurement of works (construction works) in the public proclamation, works have been defined in the same manner as all work associated with the construction, reconstruction, upgrading, demolition, repair or renovation of a building, road, or structures²⁰⁷. It does not include the possibility of design task. Thus, in construction industry in Ethiopia, procurement law starts with dichotomizing the two project tasks: design and construction. The method of procurement including its detail process shows the adoption of a design bid build (DBB) project delivery sub system. The bidding document (for works) includes a technical specification of the desired object (project) of procurement²⁰⁸. However, the DBB project delivery sub-systems so mentioned have been identified for contracting public construction works in Ethiopia has no detail legal regulation yet.

²⁰² Tecele Hagos and Mahelet Shewangzaw 30

²⁰³ Public Procurement Proclamation No 649/2009 (n 21)

²⁰⁴ Ibid Article 2(3)

²⁰⁵ Ethiopian Federal Government Procurement and Property administration proclamation No 649/2009 (n 21) Article 15(4) cum 'The Federal Democratic Republic of Ethiopia Standard Bidding Document (SBD) For Procurement of Works For National Competitive Biddings (NCB)' Part 2, Section 6

²⁰⁶ Public Procurement Proclamation No 649/2009 (n 21)

Article 29(3)(a)

²⁰⁷ Ibid Article 2(3).

²⁰⁸ Ibid Article 2(12) cum Article 29 cum Article 37(f))

3.1.4. The Trend of Regulating Government Construction Procurement under Construction Industry Vis-Vis the Experience of Ethiopia

In Ethiopia, there is no specific proclamation or regulation specifically enacted for regulation of public construction works procurement. Public construction works procurement is regulated by general public procurement legal regime. The Ethiopian Federal Government Procurement and Property administration proclamation No 649/2009, Procurement and Property administration Directive (2010), and the Federal Democratic Republic of Ethiopia Standard Bidding Document (SBD) For Procurement of Works For National Competitive Biddings (NCB, 2011). Whereas when we compare the experience of Ethiopian construction industry in regulating construction procurement with other country like South Africa, we can understand that the Ethiopian construction industry failure to adopt specific procurement rules applying to government construction works. In South Africa, the rules for construction procurement are found in the Construction Industry Development Board (CIDB) Act and the Regulations to the Act.²⁰⁹ So this specific regulation of ‘Construction Industry Development Board’ (CIDB) Act and its Regulations regulate government construction works procurement and are empowered to regulate construction procurement in terms of the Act and to publish best practice guidelines for further regulation and development of construction procurement. They have specifically been enacted for the regulation of construction procurement in construction industry. The Act establishes the Construction Industry Development Board which is responsible for inter alia the promotion of procurement reform and creating uniformity in procurement procedures.²¹⁰ Coming to Ethiopia unlike the South Africa, the construction industry lacks to regulate the construction by regulations enacted according to the special needs of the industry. Still government construction works are regulated by the general public procurement regulations enacted by the Ethiopian Federal Government Procurement and Property administration Agency.

Furthermore, the lack of comprehensive special procurement law that regulates construction procurement and the fact of existence of construction procurement rules in scattered legislations in Ethiopia cause difficulty of understanding the specific nature of construction works procurement. Beside this, adopting special regulatory framework for construction procurement in

²⁰⁹ Allison Megan Anthony (n 36) 3

²¹⁰ Ibid

Ethiopia helps to create uniformity in construction works procurement, promoting standardized procurement method and procedures applicable for construction works in accordance with the construction industry policies. In addition, special regulatory regime to construction procurement helps to adopt best practice in the industry. In this regard, the special public construction regulatory framework of CIDB in South Africa has published a ‘Standard for Uniformity’ in construction procurement in which these best practice guidelines are included. The Standard for Uniformity is aimed at standard and uniform construction procurement practice. The objects of the CIDB are inter alia to improve public sector delivery management, promote best practice and performance of public sector clients and promote uniform application of policies in the construction industry throughout all spheres of the government. The CIDB thus performs a public function in terms of legislation²¹¹. Accordingly, the experience of South Africa is relevant for Ethiopia’s legal and institutional framework to enact specific regulation like CIDB in manner that considers the context of Ethiopia.

According to this thesis aim to answer the question as to whether the legal regulation of construction procurement in construction industry require special procurement legal and institutional regulatory framework than the general public procurement law and Federal Public Procurement and Property Administration Agency (FPPAA) in Ethiopia. In this regard, the experience of other countries and the existing practical situation in a country requires also support the same need of adopting special regulation for construction procurement. For instance interview with the Higher Officer of Contract Administration of Federal Institution²¹² shows that laws which regulate construction procurements found in scattered legislations that even officers in the area claim that it is difficult for them to get the required legislations dealing construction procurement since there is no comprehensive special law that regulates construction procurement in Ethiopia. Therefore, due to lack of special regulation of construction works procurement and independent institutional regulatory structure, the Public Procurement and Property Administration Agency has to enact public construction works procurement. At this juncture, it is important to note that adoption of special regulatory framework would create a conducive environment to achieve transparency, accountability, efficiency, uniform application and towards

²¹¹ Ibid 66

²¹² Interview with Engineer Ato Abraham Gizawu who serves as Higher Officer of Contract Administration of Hawassa University, interview held in 23 March, 2019

nation-wide harmonization of public construction procurement in Ethiopia and make research upon the existing problems arising from the public construction procurement system in the construction sector.

3.2. The Legal Framework for Public Construction Works Procurement in Ethiopia

Under the previous section, it has been noted that the policy of the FDRE government acknowledge the importance of public procurement in fostering and sustaining the country's economic growth and infrastructure development. In particular, public construction works procurement cover the large portion of the country's economy. In order to achieve the country's desired economic and infrastructure development goal, there must be favorable legal environment for public construction works procurement. Such legal regulation normally begins from procurement planning up to construction projects contract awarding and institutional administration process.

3.2.1. Procurement Planning For Government Construction Works in Ethiopia

According to the Procurement Directive of the FDRE (Part III, Article 9), a public organization must consider the following when identifying its procurement needs for the fiscal year: The construction materials inputs available should be first identified and used at all. Identification of the available resources and its need can be met by a product or service available in the market, i.e. it must be possible to get every identified need from the market. If the planned items to be used in the construction work projects can likely cause the public body to incur unnecessary cost, public procuring authorities are required to undertake construction works which its inputs can easily be accessed from local market and reduce unnecessary cost.

Crucially, in connection to government construction procurement planning in construction industry, the contemporary issue that should be regulated so far as the procurement need concerned, it should identify the planned construction work is environment friendly or not. For instance, when the design engineers makes specification of a given construction works, whether such construction project is environmentally friendly or not should be checked during procurement planning process.

Nonetheless, the Procurement Directive also requires additional or complementary objectives to be considered while preparing procurement plan. From Art 8(2) of the directive readings, the procurement plan should be prepared in such a way as to enable the attainment of the following objectives in the public procurement proclamation²¹³ and directive²¹⁴ that are primarily to ensure economy, efficiency and competitiveness in compliance with principles of public procurement.

3.2.2. Public Procurement Methods and Procedures and their Application for Government Construction Works Procurements in Ethiopia

There are six methods of public procurements in the proclamation: Open bidding, request for proposals, restricted tendering, ‘direct procurement, request for quotation and two stages tendering.’²¹⁵ Here as follow, the paper discusses the application these method for public construction works in Ethiopia.

3.2.2.1. Open Bidding

Apart from specifying the above circumstances, the proclamation provides as a general rule for public bodies in Ethiopia, are in principle required to use ‘open bidding’ as first of choice of means of procurement. Article 33 (2) of the Public Procurement Proclamation²¹⁶ stipulates as follows: “Except as otherwise provided in the Proclamation, public bodies shall use open bidding as the preferred procedure of procurement. If they prefer otherwise, they are required to give justifications for the ground of using other procurement means and procedure.”²¹⁷ The very justification for the application of open bidding procedures and methods of public procurement is laid up on the principle of public interest. Whenever the time for bidding is reasonable, the bidders can get a chance to participate in the bidding. This enables the public to get as many as possible candidates of bid. According to the ‘Model Law’, the proclamation requires to ‘include in the record required the statement of the reasons and circumstances upon which it relied to justify the use of other method than open bidding.’²¹⁸ Thus, the public procurement directive under requires a public body using other method of procurement other than open bidding,

²¹³ Public Procurement Proclamation No 649/2009 (n 21)

²¹⁴ Public Procurement Directive (n 201)

²¹⁵ Public Procurement Proclamation No 649/2009 (n 21) Article 33(1)

²¹⁶ Ibid

²¹⁷ Ibid Article 23(1) (f) cumulative to 33(2)), *See also* UNCITRAL Model Law, on Public Procurement (n 1) Article 28(1)

²¹⁸ UNCITRAL Model Law, on Public Procurement (n 1) Article 28 (3) cum 25 1 (e)

pursuant to the Public Procurement Proclamation shall record a statement of the grounds and circumstances on which it relied to justify the use of that method²¹⁹.

As mentioned above, in Ethiopia, open bidding is a default method for public procurement including both for international and national competitive bidding of government construction work procurement. Here are the two type of open bidding and their procedures are as follows:

3.2.2.1.1. International Competitive Bidding (ICB)

Chapter ten of the proclamation and article 17 of the FDRE Public Procurement Directive allows the application this bidding type considering the characteristics of international competitive bidding (ICB) for high value or complex procurement and for the nature of procurement unlikely to attract enough competition locally.²²⁰ The Procurement threshold stated in Article 17.2 of the FDRE Procurement Directive for ICB is as follows:

Table 2: The Procurement Thresholds for International Competitive Bidding (ICB)

Thresholds for ICB

For Works	Above Birr 50,000,000
For Goods	Above Birr 10,000,000
For Consultancy Services	Above Birr 2,500,000
For Services	Above Birr 7,000,000

However, the recent amendment on the public procurement directive²²¹ has made modification on publication requirement. Concerning the threshold for ICB, if it is a construction work, only

²¹⁹ Public Procurement Directive (201) Article 15.4 Cum Public Procurement Proclamation No 649/2009 (n 21) Article 33(3)

²²⁰ Public Procurement Proclamation No 649/2009 (n 21) Article 59(1)

²²¹ Federal Government Procurement Execution Directive (Amendment) on 2010 FEDERAL PUBLIC PROCUREMENT DIRECTIVE OF Ethiopia (Annex VI to Procur/GT) December 21, 2016 Article 2(4)

when the total value of the government construction works project is above 150,000,000 Birr, International Competitive Bidding (ICB) is required to be applied that other bidding type. Some professionals in construction areas and legal scholars argues that for sake technology transfer, beside setting the threshold of 150 Million Birr for International Competitive Bidding (ICB), if the legal framework alternatively introduce joint venture procuring method for certain complex construction projects, it would bring technology transfer and for the government to have quality construction works. Thus, by reducing the amount of price less than 150 million birr, Ethiopia can design the legal framework which open itself for international competition in the area and transfer technology to local construction contractors.

In practice, so far as international competitive bidding for construction works in Ethiopia is concerned, there is a challenge which arises from the structure of authorities and the nature of procurement that contractors are registered abroad; it is difficult for the PPAA Agency to monitor the record, legal, professional requirement and recent financial status of foreign contractors invited in ICB. Almost there are no structural or partnership arrangement between the Agency and contractors invited by international competitive biddings. For sake of examining the institutional setup and practice, the researcher has visited the PPAA experience of international competitive bidding but returned empty handed due to lack of response from the Agency. Also there are no court cases on the international open biding of construction works in the archives of the Federal Courts. This implies that Ethiopia should develop structural or partnership arrangements network with host countries of contractors within the PPAA Agency or Ministry of Construction and Urban Development organization structure. By doing so, a country can create good legal and institutional framework for international competitive biddings of construction works procurement.

3.2.2.1.1.1. Procurement Procedure for International Competitive Bidding (ICB)

For procurements made by means of International Competitive bidding are required to comply with certain procedure. For instance, the bid advertisement and the bidding documents should be prepared in English.²²² Also the bid advertisement should be published in a newspaper that has wide circulation and accessible to foreign bidders in addition to posting the bid advertisement on the Agency's website if the value of the procurement is above the threshold stated above. In

²²² Public Procurement Directive (n 201) Article 17(4) a

order to attract a large number of bidders, the bid advertisement may also be posted on embassies of various countries may be notified of the bid.²²³ Concerning the applicable law, unless the contract provides otherwise, disputes arising from the performance of the contract would be adjudicated in accordance with Ethiopian Law.²²⁴

The directive stated that ICB bidders to be given adequate time to prepare bid documents and the schedule of requirements to be prepared are required to comply with national standard and be internationally acceptable.²²⁵ Accordingly bid prices offered by foreign bidders should be quoted and bid securities required of such bidders should be furnished in a freely convertible currency used for payment in international commercial transactions.²²⁶ Also where a foreign bidder uses local inputs to satisfy the required object of procurement under the contract, the portion of the total contract price representing such local expenditure should be expressed in birr in the price schedule of the bidder.²²⁷ Concerning the standard and conditions, any contracts concluded for procurements by means of ICB may incorporate standard terms and conditions applicable in international commercial transactions to the extent that such terms and conditions are not in conflict with the Proclamation, this Directive and other documents governing public procurement.²²⁸

So far as the application of ICB for government construction works concerned, the construction sector should provide adequate incentives under the legal regime to foreign contractor whose participations might bring transfer technology, open the public market to international trade and also helps to reduce foreign currency problems for complex construction works projects that importing materials is required due to non-availability of in local market in public construction works procurement process in Ethiopia.

3.2.2.1.1.2. Other International Procurement Procedures

Concerning other international bidding, International Competitive bidding (ICB) is a default rule. However, crucially where the participation of foreign companies is believed to be necessary to

²²³ Ibid Article 17.4. b

²²⁴ Ibid Article 17.4. h

²²⁵ Ibid Article 17.4. c & d

²²⁶ Ibid Article 17.4. e

²²⁷ Ibid Article 17.4. f

²²⁸ Ibid Article 17.4. g

carry out adequately competitive and effective procurement, public bodies may, without prejudice to certain aspects of National & International Competitive bidding procedures set forth in the Proclamation and Directive which are appropriate to the particular method of procurement in question, may execute international procurement by means of two stage bidding, request for proposals, restricted bidding, request for quotation or direct procurement pursuant to article 59(4) of the Proclamation.²²⁹

In construction industry, due to specialized nature, nation security concern and complexity of the construction works, public bodies may execute international procurement for government construction works by setting other international procurement procedure. However, crucially the directive requires the public bodies to make justification as to the application of other international procurement procedure ‘necessity to carry out adequately competitive and effective procurement’²³⁰. To this end, there should be clear guidelines as to application of other international procurement procedure. Unless the lack of such guidelines opens a door for grand corruption during carrying out public construction works procurement in Ethiopia.

3.2.2.1.2. National Competitive Bidding (NCB)

In principle national open bidding is a default rule. As stated above the open international bidding might be used whenever in national open bidding an effective competition cannot be obtained unless foreign firms are invited to bid or for procurements above a threshold level for national bidding determined by a directive.²³¹

3.2.2.1.2.1. Procurement Procedure for National Open Bidding

Concerning the procurement procedure for open bidding, the Public Procurement Directive under article 16 states that when the procedure for procurement for open bidding is used, the procuring organ of state should publicly advertise a call for tenders. Detailed specifications of the construction works to be met by tenderers are contained in the call for tenders. The

²²⁹ Public Procurement Directive (n 201) Article 18.1

²³⁰ Ibid

²³¹ Public Procurement Proclamation (n 21) Article 59(1) Cum Public Procurement Directive (n 193)

advertisement should be published in for example newspapers, trade journals and electronic media if possible.²³²

In Public Procurement Proclamation, there are five steps or procedures that are required for case open bidding procurements. The first step that is expected from public bodies to make procurement is the '*preparing annual plan*'. Every authority is required to prepare annual procurement plan and communicate to concerned head and agency.²³³ In relation to the annual budget, someone can ask the question a public bodies what they do if the annual budget is not enough to meet the execution of the procurement. Any public body required to prepare annual procurement plan until 'Hamle 30' (end of July) of the Ethiopia calendar, and communicate the fact to the concerned authority. The procuring authority has a duty to make sure that there are available funds to support the procurement activities before signing the contract. The second procedure is that '*preparation of bid*'. The bid should be prepared by the agency. Preparing a standard bill document shall help the agency to make invitation of bid.

The third procedure of open tendering is that '*invitation of bid*'. The bid is expected to contain the following major contents like identity of the authority with detail specifications.²³⁴ It is a compulsory requirement for the bidding documents to contain sufficient information that enable bidders to compete with each other.²³⁵ To consider bid documents contains sufficient information, it needs to be checked whether the documents made on the basis on the complete, neutral or impartial and objective terms like for instance criteria's for evaluation should be understood by any laypersons.

The fourth procedural condition for open tendering is '*advertisement or publication (notification to the public)*'. Advertisement allows a great number of bidders to competitively participate in invited bid. "Advertisement of bid must at least be advertised by national wide circulation newspaper. Additional to advertising in national wide circulation newspaper, the public agency if

²³² S De la Harpe Procurement Law (10) 116 para 3.3.2 notes that wide publication of an invitation to tender enhances competition and efficiency 284 In the construction industry specifically, all procurement documents must be available on the day the call for tenders is published. See also CIDB Best Practice Guideline A3 "Applying the procurement prescripts of the CIDB in the Public Sector"(2004) 25

²³³ Public Procurement Proclamation (n 21) Article 12

²³⁴ Ibid Article 36

²³⁵ Ibid Article 37

it finds necessary can advertise in national television or radio”.²³⁶ The law clearly laid down the duty of publication for the public procurement contracts, for that majority of public bodies use ‘Addis Zemen’ Newspaper for the advertisement. The reasons they use Addis Zemen newspaper are; it is government newspaper, it has less price and it is accessible though out the country as a result it is preferable than any other newspaper. These also help to attain one of the purposes of open tendering that is to have less price and high quality by comparing the competitive bidders. But, it is to be noted that a recent media development to resort to other alternative approach of publication and the proclamation has to introduce the different model methods of advertisements albeit imposing a requirement of publication for the public procurements. To this end, adopting e-procurement methods of publication helps to increase competition of competent participants.

Concerning the procurement language for the advertisement is Amharic in default. However, for limited cases where the bid is internationally competitive, the public bodies can use English language in the preparation and advertising the bid²³⁷. However in Ethiopia, it is pretty obvious that due to the procurement proclamation is a federal law, Amharic language which is official federal language used as default language. Some people criticize the law for not allowing alternatively using major international language like at least English languages together with Amharic in preparation and advertising bid. However, in contrary, the practice in Ethiopia shows that many construction works bids specifications have been prepared only in English language. This may be justified by its specification technical nature of construction materials required for construction projects. But, this does not totally limit not to prepare construction works procurement specifications both in English and Amaharic languages. In doing so, it is possible to facilitate the procurement process to be undertaken in transparent manner that fills gaps and challenges arising from barrier of language related communication problems.

The fifth procedural step of public procurement is ‘*submission and acceptance or receipts of bids*’. The bids shall be submitted in writing, signed and in a sealed envelope to the place contained in the bid documents. The authority will accept the document giving receipt dated, signed and stamped.²³⁸ The sixth or last procedural step of open tendering public procurement is ‘*opening of bids, examination and evaluation of bids*’. Concerning the opening of bids,

²³⁶ Public Procurement Proclamation (n 21) Article 35

²³⁷ Ibid Article 27 (1) and (2)

²³⁸ Ibid, Article 41

administrative contracts laws require opening of the box of bidders in public. So public opening of the bidding document is a compulsory rule. Opening of bids expected to follow immediately after the deadline of for submission.²³⁹

However, procedures for open bidding contravene the principle of economy, which considers cost effectiveness of both the process and obtaining the best product at reasonable time. Procedures for open bidding often consumes too time, starting from advertisement to examination and evaluation. This may sometimes became against with the principle of economy. In Ethiopia, the five procurement procedures that are required for case open bidding procurements for construction works often consumes too time and criticized as if they goes against with the principle of economy. This procedure should be condensed and regulated according to principle of economy which considers cost effectiveness of both the process and obtaining the best construction works at reasonable time. To this end, by reducing manual contact of authorities, digital applications like e-procurement reduces the cost and time wasted in each processes.

3.2.2.2. Restricted Tendering

In restricted tendering procurement method, only communication to limited suppliers or contractors. What differs restricted tendering from open tendering is that there is no advertisement at all²⁴⁰ or where a repeated advertisement of the invitation to bid fails to attract bidders in respect of procurement.²⁴¹ Another difference which can be observed from the Public Proclamation is that ‘tender’s’ box can be opened before the end date if all contractors submit their tender. There is no reason to wait other contractors since all submit’.²⁴² The total contract value of Procurement made by restricted bidding, in accordance with the Proclamation²⁴³ shall not exceed the following:²⁴⁴

1. For procurement of works Birr 2,000,000.00;
2. For procurement of goods Birr 500,000.00;

²³⁹ Ibid, Article 42(1)

²⁴⁰ Public Procurement Proclamation (n 21) Article 49(1)(2)

²⁴¹ Public Procurement Proclamation (n 21) Article 49(3)

²⁴² Public Procurement Proclamation (n 21) Article 50(3)

²⁴³ Ibid Article 49(2)

²⁴⁴ Public Procurement Directive (n 201) Article 49(2) and see Public Procurement and Property Administration Agency report (2011) 43

3. For procurement of consultancy services Birr 300,000.00;
4. For procurement of services Birr 400,000.00

However, the recent amendment on the public procurement directive²⁴⁵ has made modification on restricted tendering requirement. Concerning the application of restricted tendering, if it is construction works procurement and when the total value of the government construction works project is above 6,000,000.00 Birr, public bodies are prohibited to apply restricted tendering method. The reason of the modification on the threshold under the amendment is not clear for many stakeholders in the construction industry. Among the contractors, some claim that since there are many registered and capable construction contractors²⁴⁶ in Ethiopia, only inviting few contractors for up to six million Birr construction project contravene the principle of competition and fairness enshrined under the law. They suggest that government should invite all and applies restricted tendering after ascertaining the condition that there are only few or limited contractors in the locality and repeated advertisement of invitation for these suppliers fails to attract them.

In contrary to the above claim, construction contract administration officers²⁴⁷ argues differently with the contractors that by reason of some highly complex or specialized nature of design, good performance of the construction can be achieved by communicating best experienced contractors is justifiable restricted tendering applied only from a limited number of contractors and for stronger reason the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the construction works procurement. Furthermore, the writer of this paper is of the opinion that it is wise that the modification on the threshold would be sounder when the construction works types considered and restricted tendering application differs from one type of construction works to another. For instance, the bridge, building and road are construction works but the specialized nature and complexity of the works differ one from the other. As result, the application of restricted tendering for such construction project should be set by considering their difference. In this regard, the application of restricted tendering for total cost of twenty million Birr road construction project might be justifiable. But the law has made the restriction to apply restricted tendering for all government construction

²⁴⁵ Federal Government Procurement Execution Directive (Amendment) on 2010 Federal Public Procurement Directive Of Ethiopia (Annex VI to Procur/GT) December 21, 2016 Article 2(7)

²⁴⁶ Focused Group Discussion with Construction Contractors, April 5, 2019

²⁴⁷ Focused Group Discussion with construction contract administration officers, March 23, 2019

works project whose total value of the project is above six million Birr. The practice from focused group discussion results also supports the same assertion and considered amendment on the threshold for application of restricted tendering as one weakness of the regulation for its failure to differentiate areas of construction works.

Concerning procurement procedure for restricted tendering, “the procurement procedures are almost the same with the procedure of open tendering”.²⁴⁸ The basic procedural difference of restricted tendering’s basically two, the first is that unlike open tendering, there is no advertisement and the public bodies only communicate with suppliers. “The number of contractors expected as possible as more than five competitors”.²⁴⁹ The second difference from open tendering is that the box of tenderers can be opened before the end date of allowed for the bidders.²⁵⁰ This difference of restricted tendering procedure from open biddings makes sense since there is no reason to wait if all contractors invited to the bid have submitted their bids before closing date.

3.2.2.3. Direct or Single Source Procurement

With regard to regulation of direct procurement for works in Ethiopia, Public Procurement Directive pursuant to Public Procurement Proclamation allows public bodies may procure from the same supplier or contractor, additional requirements of goods, works, consultancy or other services of the same kind as those they have procured from that supplier under a previous contract in accordance with the following stipulations, if there is any advantage to be gained from procuring such additional requirements from that same supplier.²⁵¹

- The volume of the additional requirements of works assignment may not exceed 25% of the volume of such goods, works or consultancy assignment under the initial contract;
- Job order for the additional requirements must be issued before the expiration of the initial contract or within six months after the expiration of the initial contract;
- No adjustment shall be allowed to the unit price of items included in the additional procurement.

²⁴⁸ Public Procurement Proclamation (n 21) Article 50

²⁴⁹ Ibid Article 50(2)

²⁵⁰ Ibid Article 50(3)

²⁵¹ Public Procurement Directive (n 201) Article 25.2 Cum Public Procurement Proclamation (n 21) Article 51 (d) and (e)

- Notwithstanding the provision of the Public Procurement Directive, if the additional requirements include inputs for which the initial contract allows price adjustment, adjustment may be made in respect of such inputs by applying the method used in calculating such adjustments in the performance of the initial contract.

Concerning the conditions to ascertain that the additional works, public bodies may, subject to the following conditions, enter into a new contract or vary the initial contract for the execution of works which have not been foreseen or not included in the initial contract.²⁵² The first condition is that the Public Body has to ascertain that the additional works should have been included in the initial contract, and the separation of the additional works from the initial contract would be difficult for technical or economic reasons. The other important condition is that the value of the additional work shall not exceed 30% of the total value of the initial contract.²⁵³

Concerning the direct procurement price of additional construction works, if the unit price of the additional works can be determined by reference to the initial contract, the unit price of the initial contract should be applied to calculate the price of additional works to be procured through direct procurement. However, if the unit price of the additional works cannot be determined by reference to the initial contract, the price to be agreed through negotiation between the Public Body and the contractor expected to conform to the prevailing market price.²⁵⁴ So far as the negotiation for additional construction works between the public body and contractor, a clear standard and guidelines should be adopted by construction or PPA Agency in Ethiopia. Since often construction contractors in Ethiopia used to pre calculate unfair benefit arising from additional construction works that they will be invited in direct procurement process; it requires high attention in regulating it.

In Ethiopia, another precondition is that public bodies should ensure two requirements in the public procurement proclamation. The first is that the contract price does not exceed the limited cost stated in the public procurement directive and the second is that this method is preferred with no intention to avoid possible competitions or aimed to discriminate other candidates.²⁵⁵ There is no unique procedural requirement for direct procurement to be advertised, nor is there a

²⁵² Public Procurement Directive (n 201) Article 25.3 cum Public Procurement Proclamation (n 21) article 51.1.c,

²⁵³ Public Procurement Directive (n 201) Article 25.3

²⁵⁴ Ibid

²⁵⁵ Public Procurement Proclamation (n 21) Article 51(3&4)

need for competing bids since public body ask single bidder directly and negotiate with sole construction works bidder.

3.2.2.4. Request Quotation

In Ethiopia, request quotation methods of tendering is widely applied for smaller construction works procurements or non- complex procurements for construction works like maintenance of buildings, paintings, temporary housing, fence works partition of offices.²⁵⁶

In Ethiopia, the proclamation, to use request quotation methods for purchase of goods, works or services that their value can easily be estimated from market. A public body may undertake procurement by means of a 'Request for quotations' for low value simple works or physical services, provided the estimated value of the contract does not exceed the amount set by directive. Accordingly, request for quotation method can applied for works up to 250,000 Birr.²⁵⁷

However, coming to construction industry, the recent amendment of the public procurement directive has made modification on application for request for quotation method of procurement of construction works. If it is a construction work when the total value of the government construction works project is above 500,000.00 Birr, public bodies are prohibited to apply request for quotation method.²⁵⁸ The writer of this paper is of the opinion that it is wise to amend the previous maximum amount to apply request for quotation for government construction works and the modification of the amendment to the directive is justifiable due to the increase of construction materials in the market. The good example is the price of steel which its price has increased three fold within the date the directive is enacted and the day the amendment is made.

3.2.2.4.1. Conditions for Application of Request Quotation Method

In Ethiopia, Public Procurement Directive Article 24.1 has clearly stated that public body organ may apply request for quotation to procure goods, works or services the need of which cannot be

²⁵⁶ Public Procurement Directive Annex 3(1.1) b

²⁵⁷ Public Procurement Directive (n 200) Article 24.2. See also The Federal Democratic Republic of Ethiopia Public Procurement and Property Administration Agency Report (2011) 73

²⁵⁸ Federal Government Procurement Execution Directive (Amendment) on 2010 Federal Public Procurement Directive Of Ethiopia (Annex VI to Procur/GT) December 21, 2016

foreseen, or which cannot be included in the Public Body's bulk purchase of needed items, or which are needed for immediate use and the estimated value of which is within the threshold.

Another similar condition in the proclamation and Model Law is that the "public bodies shall request at least from three supplies."²⁵⁹ Limiting the minimum numbers of contractors in request for quotation can let the organ to know the price of good, works or service and manageable. Accordingly, in Ethiopia, the public body shall request quotations from as many bidders as practicable and shall obtain and compare at least three quotations or candidates to establish the competitiveness of the quoted prices".²⁶⁰ In some construction authorities practice, comparison of two quotations is justified only when there is satisfactory evidence that there are only two sources of supply or contractors.²⁶¹ However, neither the proclamation nor the 'Model Law' allows less than three suppliers or contractors as practicable. Another requirement in 'Model Law' is that no negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation presented by the supplier or contractor.²⁶² Also each supplier or contractor shall be permitted to give only one price quotation and is not permitted to change its quotation.²⁶³

Concerning the information given to supplier or contractor, the public procurement proclamation require the request shall contain a clear statement of the requirements of the public body as to quality, quantity, terms and time of delivery of the goods, works, consultancy or other services as well as other special requirements.²⁶⁴ However, the 'Model Law' except disclosure of charges like such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price to be informed to each suppliers and contractors.²⁶⁵ It broadly puts that each supplier or contractor from which a quotation is requested shall be informed whether any elements other than the charges for the subject matter of the procurement

²⁵⁹ Public Procurement Proclamation (n 21) Article 56 and also see a UNCITRAL Model Law on public procurement (n 1) Article 34 (2)

²⁶⁰ Yonas Dubale, Evaluation of procurement process the case of Addis Ababa Water and Sewerage Authority (2014) 27

²⁶¹ Ibid

²⁶² UNCITRAL Model Law on Public Procurement (n 1) Article 46(2)

²⁶³ Ibid

²⁶⁴ Public Procurement Proclamation (n 15) Article 56(3)

²⁶⁵ UNCITRAL Model Law on Public Procurement (n 1), Article 46(1)

itself.²⁶⁶ Thus, clear guideline is required for application of request quotation since the number of bidders is only three; information access determines the likelihood of contractor to win the bid. So clear information disclosure guidelines should be developed in order to apply request quotation and regulate disclosing information to contractors equally and without any discrimination.

3.2.2.5. Request for Proposals

The public procurement proclamation demands the public bodies may choice request for proposals for consultancy services or any contracts for which the competent consultancy service constitute more than 50% of the contract.²⁶⁷ The method is therefore more often used in the procurement of services. “At least three and not more than seven consultants should be addressed in case of request for proposals”.²⁶⁸ Thus, public procuring entities cannot use request for proposal for government construction works procurement in Ethiopia. However, in request for proposals method, the potential tenderers determine what the specifications of the tender will be. It would appear that quality is more important than price where this method is used due to the vast differences between proposals. It may also be used as a formal procedure when used as part of a tendering process.²⁶⁹ However, crucially in construction industry in Ethiopia, the adoption of request for proposals method might help authorities to save the time and cost wasted in examining and evaluating large number of tenders which would be uneconomic to the value of the construction work to be procured.

3.2.2.6. Two Stage Tendering

In Ethiopia, public procuring entities can use two stage tendering for certain conditions arising from difficulty of making specifications for goods, works and services by themselves due to the nature of the demand and the need to conduct research, experiment, study or development.²⁷⁰ This shows that two stage tendering method is useful where the public construction project procuring organs are unable to set exact specifications of construction work required and also let authorities to require information from potential construction work contractors.

²⁶⁶ Ibid

²⁶⁷ Public Procurement Proclamation (n 21) Article 56 Article 53

²⁶⁸ Ibid Article 54(2)

²⁶⁹ Bolton, The Law of Government Procurement in South Africa (n 92)133

²⁷⁰ Public Procurement Proclamation (n 21) Article 5

In Ethiopia, for most complex construction works, two stage tendering method of procurement often applied by public bodies. For instance, construction projects which requires ‘Public Private Partnership’ as a mean investment through private sector participation by a contractual arrangement between a public body and a private sector enterprise, as the concessionaire, in which the concessionaire.²⁷¹ Often complex and multi-millions government construction projects adopt this type of procurement method. For instance huge government construction projects like industry park development projects, huge stadium and dam projects requires pre-proposals relating to the technical, quality or performance characteristics of the construction works project with public bodies. In this regard, the public bodies in the second stage of tendering would make response after setting the terms and conditions for construction work procurement. In addition, the ongoing issue in relation to this method of procurement is that public authorities can require application of joint venture agreements with foreign construction contractors. In this case, in the second stage of two stage tendering, public bodies are required to identify whether the required construction project can be undertaken by domestic construction contractors or else well experienced foreign contractors in the area should be alone invited or together with domestic contractors. To this end, the Minister of Finance and Economic development in Ethiopia is entrusted to issue directive prescribing the rules governing the formation of Public Private Partnership and the modes of implementation of such partnership.²⁷² However, there is no such directive which is issued to deal the public private partners in Ethiopia. This is one lacuna in the public procurement law for government construction works and considered as challenges as far as applying two stage tendering method of procurements for government construction works.

In addition, concerning methods of procurements, unlike Ethiopian Public Procurement Proclamation, the Model law provides that the procuring entity may also conduct procurement by means of: ‘Request for proposals with dialogue’, ‘without negotiation or with consecutive negotiations’, ‘competitive negotiations’ and ‘with dialogue Electronic reverse auction’.²⁷³ by comparing the methods of procurement that the proclamation and Model Law, it is recommended to adopt new methods of procurement found in Model like request for proposals with dialogue;

²⁷¹ Public Procurement Proclamation (n 21) Article 2(27)

²⁷² Ibid Art 34

²⁷³ UNCITRAL Model Law on Public Procurement (n 1), Article 27 (1)

Request for proposals with consecutive negotiations; Competitive negotiations; Electronic reverse auction which are new to Ethiopian public procurement legal framework.

3.2.3. Evaluation of the Bids: Criteria's for Selection, Assessing of tenders and Awarding of tenders

In Ethiopia, crucially, tender evaluation still in Ethiopian public construction procurement system has so far been characterized by the traditional procurement approach considering price as a main evaluation criterion²⁷⁴. Using least cost approach as evaluation criteria avoids having to make judgments on qualitative aspects of bids, thus eliminating one opportunity to bias in the selection process. This, however, results in nothing but buying inferior quality construction works, project performance delays and cost overruns in Ethiopia²⁷⁵. All of these procurement risks are mostly left to the public body. Of course, contractors for construction works have paid for the activities but not for the results achieved²⁷⁶. Establishing effective evaluation criteria helps in minimizing the public body's risk as far as public construction procurements concerned.

3.2.3.1. Setting of Criteria for the Bid Evaluation in Construction Industry in Ethiopia

From the very beginning before commencing the tendering process, the directive requires the instruction to bidders to include a statement indicating the methodology of evaluating bids, the criteria for the evaluation and the weight each criterion shall have as well as the conditions for submitting further proposals to select the successful bidder and the criteria for evaluating such proposals where two or more bidders get equal evaluation results.²⁷⁷

The Public Body has to indicate clearly the bid evaluation criteria to be used in the evaluation and qualification section of the standard bidding document.²⁷⁸ Although the bid evaluation criteria vary from one type of procurement to another, the following two methods can be used for public construction works procurement: The first is setting minimum technical requirement and selecting the bidder with the lowest evaluated bid from among the bidders meeting such

²⁷⁴ Baynesagn Asfaw Ambaw and Jan Telgen (n 13) 404 citing Quinot & Arrowsmith (2013) Cf. World Bank & Ethiopian Government (2010)

²⁷⁵ Ibid citing Quinot & Arrowsmith (2013)

²⁷⁶ Ibid 404 citing Patil & Molenaar (2011)

²⁷⁷ Public Procurement Directive (n 200) Article 16.4.2 (i)

²⁷⁸ Ibid Article 16.8.1

minimum technical requirements²⁷⁹ or Secondly, the public body should indicate clearly in the bidding document the criteria to be applied to determine the functional or economic value of the procurement and the relative weight to be ascribed to each criterion and selecting the bidder with the highest cumulative result by conducting evaluation based on these criteria.²⁸⁰

Concerning the requirement of qualification of candidates to participate in public procurement, they should meet the necessary professional, technical qualification and competence to perform the contract. The eligibility criteria's provided under the proclamation among others include, financial and personnel resources, physical facilities, managerial capability, experience in the object of procurement and reputation and personnel to perform the contract. However, the problem arises when identifying the criteria to check experience and reputation of bidders. The law only requires documentary evidence that shows the required qualification. Furthermore, public bodies are allowed to use additional criteria's as they think fit.²⁸¹ This shows the proclamation fails to direct public bodies to adopt different criteria's for different type public procurement proceeding like for instance the criteria's used in construction work procurement might be differ goods procurement. Also there are no parameters provided both in the proclamation and directive that regulate the decision of public bodies while resorting to other criteria's to determine eligibility of bidders. The excessive discretion power given to public bodies in setting eligibility criteria's opens the room for public bodies to abuse the discretion power and use subjective standards that negatively affect the principle of competition in the bidding process.

3.2.3.2. Establishing the Bid Evaluation Committee

The Bid evaluation is usually done by a committee consisting of between three and five including the Head of Procurement. Ad hoc evaluation committee for procurements which are complex and require detailed technical evaluation may be established by head of a public body and the committee members may consists no less than 3 persons which serves for a maximum

²⁷⁹ Public Procurement Directive (n 200) Article 16.8.2.a

²⁸⁰ Ibid Article 16.8.2.b

²⁸¹ Ibid Article 28(1)

period of 3 years with one additional term if appropriate.²⁸² To select the members, a head of the public body is required to use the following criteria:

- Officials, who are in high position of responsibility in the Public Body,
- Need to have a better knowledge and experience and as far as possible should comprise from various professions.

However, neither the proclamation nor the directive clearly shows that whether the selection criteria of having “high position of responsibility” in office and “better knowledge and experience” are cumulative or alternative requirement. Concerning the detail measurement set by the specific public construction offices. However, there is still a gap in selecting the members based on established rules and standard. The practice confirms the same²⁸³.

3.2.3.3. Pre-requisites of Briefing to Evaluation of Tender

Before the evaluation starts, it is usual for the head of procurement unit to brief the members of the committee about their role during the evaluation process, for example, members of the evaluation team are expected to indicate immediately if they are in a potential conflict of interest situation with one of the bidders and ask to be replaced.²⁸⁴ Another thing that members of the evaluation team expected to be briefed is that any decision given by the committee on evaluation report submitted to it should be reasonable.²⁸⁵ Accordingly he/she has to study the requirement definition, the evaluation criteria and method.²⁸⁶ In this regard, every procurement unit has to make sure that copies of bid documents are delivered to members of bid evaluation committee and that the original bid documents are kept securely for reference.²⁸⁷ In addition he/she has to understand that the deliberations of the evaluation committee are strictly confidential and that they cannot discuss the content of the evaluation with colleagues and/or outsiders.²⁸⁸

²⁸² Public Procurement Directive (n 200) Article 5(4) cum Article 5(5)

²⁸³ Interview with Contract Administration Officer whose name is anonymous due to privacy issue

²⁸⁴ Ibid Article 34.2

²⁸⁵ Ibid Article 7(5)

²⁸⁶ Ibid Article 16.8

²⁸⁷ Public Procurement Directive (n 201) Article 6 (12)

²⁸⁸ Ibid Article 34.6

Further, the members of the evaluation team must include technical persons but persons from the user departments may also be invited to attend the evaluation as observers.²⁸⁹ In this regard, observers like representative of mass-media or any other interested observer may attend the bid opening ceremony.²⁹⁰

3.2.3.4. Evaluation of Technical and Financial Aspects

In practice weights are given to the Technical proposal (TP) and financial proposal (FP) in the final determination of the lowest evaluated Bid or the most advantageous Bid. The weights given to the scores of the Technical and Financial Proposals are usually:

Concerning the technical evaluation, the construction work bidders must score at least 70 % of the technical requirement. This means if the bidders bring less than 70 %, the financial proposal of bidder would not be opened. It is only the bidders who have scored more than 70 % that their financial proposals be evaluated together with their technical proposal result and winner will be identified. Then more than 70 % of the technical proposals would be converted to 40 % of the total evaluation (TE).

TP = [70-100% will be Converted to 40 % of the Total Evaluation]

FP = [60% of the Total Evaluation]

TE = TP + FP

As practical case review, the researcher has visited Hawassa University Construction Project Office and made observation that how the construction works procurement evaluation criteria document prepared. The bid evaluation document referred titled as ‘Standard Bidding Document (SBD) For Procurement of Construction of Fence of Hawassa University Edo Gojola Research Center at Ziway (Batu) For National Competitive Biddings, 2018.’²⁹¹ The Procurement evaluation criteria are prepared by Hawassa Universtiy Construction Project Office according to Evaluation and Qualification Section of the Standard Bidding Document. Accordingly bidders who score

²⁸⁹ Ibid Article 16.18.1 b

²⁹⁰ Ibid

²⁹¹ ‘Standard Bidding Document (SBD) For Procurement of Construction of Fence of Hawassa University Edo Gojola Research Center at Ziway (Batu) For National Competitive Biddings, 2018

70% for technical proposal evaluation are qualified for financial bid opening and the technical proposal converted to 40% and financial proposal evaluated out of 60%.

In relation to bid evaluation, problems arose due to lack of clear guidelines to evaluate candidate's eligibility of candidate's financial, managerial and personnel capacity in Ethiopia. Although the public proclamation and directive requires the professional, technical and financial criteria's to be clear and objective, practical investigation shows that there are challenges in terms of setting the evaluation criteria's in construction works procurement. However, price is still considered as the only and the most important evaluation criterion in Ethiopia in many of the public construction works procurement projects. This shows public procurement regulation in Ethiopia has not given emphasis to qualities and performance results of construction projects. To this end, by adopting use of PBC concepts in public construction works procurement, the legal regulation and institutional framework in Ethiopia could create balance between total cost and quality performance of construction works during evaluation of bids. Nonetheless, the absence of PBC rules in public construction works procurements causing difficulty for the public organizations and evaluation committee in clearly understanding and using PBC approaches in the construction works procurement evaluation process.

3.2.3.5. Price Adjustments

The head of public bodies ascertain that price adjustments made in the process of procurement is in keeping with the procedure and the requirements of price adjustment set forth in article 16(14) of the Directive.²⁹² In this regard, any price adjustment made in connection with construction works contract shall be calculated using the formula provided in the standard bidding document in accordance with the following procedure.

- I) Identifying the major inputs necessary for the works in question and the set of items to be classified under each major input.
- II) Calculating the share of each major input from the total input of the works in question under which set of items is classified and select the ones for which price adjustment may be allowed.

²⁹² Ibid Article 5(14)

- III) The price index or price indicator operating before the bid closing date should be used as basis for price adjustment.²⁹³

At this juncture, one may ask whether it is reasonable to totally do away from the rigid price indicator requirement that bid closing date as point of reference. To make price adjustment, such point of reference has to be changed by considering the point of reference from existing market price than list of contractor's price index or indicator. Crucially in construction industry, Interview with a Civil Engineer for Government Construction Works of the Design and Contract Administration department of Construction Authority in Ethiopia states that construction contractors may intentionally or unintentionally commit errors while filling the price of input many times ignoring the fluctuation of the price of certain item of the bid. The reason why the contractors intentionally commits error is often to get unfair advantage from the price fluctuation of the item in the market or to win the tender with lower price and then to claim price adjustment.²⁹⁴ According to the above Civil Engineer and focused group discussion with officers of Hawassa University, Construction Office Contract Administration office also shared the same idea. They assert that the present legal framework is not adequate to regulate price adjustment and during evaluation of bids, tenderers used to commit errors for expected price adjustments to be claimed in the future. The practice also shows that many government construction works fails to be performed by the construction for lacking effective and clear price adjustment rule and implementation in Ethiopia.²⁹⁵ In this regard, it a time for Ethiopia to wisely adopt the effective and clear regulation for price adjustment for construction works.

3.2.4. Government Construction Works Procurements Consultancy in Ethiopia

In Ethiopia the notion has been applied of the most meritorious tender, taking into account all of the criteria, it also found the absence of formal consultation scheme provided for public organs to check the reasonableness of the price offered by contractors to compete in construction projects, causing in practice to government construction projects to run over their time and estimated

²⁹³ Ibid Article 14.16.3

²⁹⁴ Interview with Ato Butuna Burika, who is a Construction Procurement officer of the Design and Contract Administration department of Construction Authority (February 2, 2018)

²⁹⁵ Focused group discussion with officers of Hawassa University, Construction Office Contract Administration office

budget. Thus, the government construction works procurements have to develop formal consultancy structure to pre-check and confirm the reasonable cost of public construction works in Ethiopia. Crucially, in construction industry, the Ethiopian public procurement regulatory structure should create a regulated structure for public entity to freely consult either before or after undertaking procurements through default rule is open tendering for many construction works projects. As it is witnessed for open tendering public construction procurements, the number of tenderers is high than other methods of procurement. Due to its openness to all and high need to won the tender, tenders used to unreasonably breakdown the price they submit. Sometimes after winning the tender, they most likely would fail to provide what they have promised in the construction procurement contract with public agencies. Furthermore, their failure can resonate to the economy of a country by wasting time and resources of a state.

However, crucially investigation of the present legal regime to government procurements shows that the 2009 Ethiopia public procurement proclamation does not made a mandatory stipulation for public entities to consult the reasonable ‘cost of procurements effectiveness’ of the construction works procurement. However, neither the proclamation nor other regulations explicitly demand or empower the public entity to consult the reasonableness of the least and exaggerated price offered by the bidders of public construction procurements. They simply award the contract for the least bidders. But it’s evident for construction consultants and professional to identify the likelihood not performance of the contract just by making pre engineering estimation of procurement price offered by least bidders to finish the construction project. But if the legal and institutional framework requires such consultations as a mandatory requirement before awarding the contract, it will avoid the wastage of time, cost and failure of construction project in Ethiopia. To this end, if there is legal framework adopt engineers estimation price controlling mechanism that empower the public bodies to adopt 20 up to 30 percent price difference range that the total estimated price of a given government construction works set by consultants and engineers in the area basing the existing market price, public bodies can check the reasonableness of the price offered by the contractor for a given government construction work. For instance, if a public body invites the call for construction contractors to compete according to open bidding procurement method and procedure. If the estimated total price of a given construction work is 10 million birr in market price and the contractor X offers 4

million birr for whole construction project. If there is legal framework to apply price difference range that allow a public bodies to check the reasonableness of the total cost of the construction project, they the price offered by contractor X is enough for the public bodies to dismiss or reject such unreasonable price offer which has 60 percent difference for estimated total price set by public bodies.

Also on the other hand, from the perspective of the practice though authorities who evaluate bids of construction works worry the submission of low price offer by contractors and know their reasonable possibility to fail to perform the construction project, they are forced to enter in to agreement with the contractors who submit such least price provided that the offered price is unreasonable to perform the construction project in the eyes of professionals. To avoid this problem, it's suggested by these professionals that if there is legislative framework that set formal range of difference to exclude unreasonable offer of contractors by making pre-evaluation or estimation of the reasonableness of the price offered basing the market price of the reasonable cost of the provision of construction works. Thus, the practice is essentially requires such regulation that would reduce the risk of non-performance, unreasonable breakdown the price offer of construction contractors and regulate the behavior of bidders according to principle of economy.²⁹⁶

Thus, it is never doubted in construction industry the need for public agencies in Ethiopia to have or develop system of consultation of experts and professionals to make pre-evaluation of the reasonable construction cost of the construction work procured and the financial price offered by bidders before engaging to formal procurement evaluation process. In doing so, public bodies can develop regulatory framework and regime in consistence with the principle of economy which considers cost effectiveness and reasonableness of the procurement unless they can't get what they have procured with needed quality with fair and reasonable price.

²⁹⁶ Interview with senior government construction works procurement evaluating committee chief (whose anonymity is respected), June 29, 2017

3.2.5. Preferential Public Procurement Treatments in the Construction Industry in Ethiopia

In Ethiopia, there are some preferential treatments between contracting parties involved in public construction procurement as exceptions to the governing principles of procedures of procurement in the proclamation like preference based on the type of contractors and also in case of nationality of the bidders, domestic bidders are preferable,²⁹⁷ and too often countries adjust such exceptions depending on their existing specific socio-economic and political condition. Also with limited grounds, small micro construction enterprises might be encouraged in different procurements but specific standard and conditions should be clearly set for preferential construction procurements under Ethiopian legal framework.

3.2.5.1. Preferential Exclusion of Public Construction Works Company from Procurement Competition Rules in Ethiopia

The public procurement proclamation promotes competition through public procurement process. In principle, the procurement proclamation directs public bodies to achieve the aim at creating fair and open competition and devoid of any statement having the effect of restricting competition.²⁹⁸ On the contrary, the proclamation of Ethiopia is highly criticized for not advancing competition with regard to procurement between two or public bodies engaged in the procurement process. The proclamation has made it clear, public bodies are an exception to competition. This proclamation reads:

*“This Proclamation does not apply to contracts a public body enters into with another public body for the provision of goods, works, consultancy or other services at cost”.*²⁹⁹

So, public construction enterprises are not subject to procurement procedures if they intend to participate in the provision of construction works, consultancy or other services at cost. They will simply get awarded of a contract without competing with the private sector. This will, in turn, subject the exclusion to critics which are forwarded against to proclamation. In effect, they will get preferential treatment. This then destroy the principle of competitiveness. What is worse,

²⁹⁷ Public Procurement Proclamation (n 21) Article 5(2)

²⁹⁸ Ibid (n 21) Article 29(1 and 3(c))

²⁹⁹ Ibid Article 3(2)

no alternative procedure which ensures competitiveness together with transparency and accountability is devised for contract of public works, goods and services if it is between two public bodies though the ‘Model law’ guide countries to treat private and public entities in the procurement as competitive suppliers provided they are eligible unless they disqualified.³⁰⁰ As a result, the procurement proclamation which professes to be rooted in the basic principles of fairness and non-discrimination, almost destroys itself by including such ‘suicidal provision’³⁰¹ which give a public body to get a preferential treatment, it surely will not be competitive. This makes achieving the basic objectives of the procurement proclamation unattainable.³⁰² It shall be noted this problematic approach in the proclamation that lacks specific procedures between public bodies engaged in procurement process might have adverse effect in construction industry that different public enterprise engage in provision construction works. For instance, the Ethiopian Construction Works Corporation is a newly established public enterprise with the aim of becoming a leading, preferred and competitive construction contractor. The corporation was a result of the amalgamation of two formerly independent public enterprises, namely the Ethiopian Water Works Construction Enterprise and the Ethiopian Road Construction Corporation.³⁰³ However, the wider preferential exclusion from competition rule might impede such public enterprises to achieve the aim of becoming a leading, preferred and competitive construction contractor.

Furthermore in Ethiopia, it arguable that if the country does not set a competition rule and procedures to such kind of public construction contractors, the country might suffer economic loss and fails to get quality construction works in competitive manner. In this regard, the practice also shows that there are pressing practical problems with regard to advancing competition among public construction work contractors in public construction procurement process in Ethiopia.³⁰⁴ The procurement proclamation beside its policy behind encouraging those enterprises, with respect to the regulating it, the law should clearly state the grounds of preferential treatment given to public construction works enterprises and shouldn’t compromise

³⁰⁰ Ibid Article 9 and Article 18

³⁰¹ See the online newsletter by Abrham Yohannes, Ethiopian Public Procurement Law applicable only to the private sector in February 16, 2012, and Accessed on June 1, 2017.

³⁰² Ibid

³⁰³ <file:///F:/EthiopianConstructionWorksCorporation.html> accessed in April 25, 2019

³⁰⁴ Interview with senior South Nation Nationalities Regional State government construction procurement evaluating high expert whose anonymity is respected for privacy, Interviewed on June 29, 2018

principle of competition at all. As a result, even in the presence of justifications for application of preferential treatment for public enterprises in Ethiopia in regulations, at least the country is recommended to devise specific grounds and procedure to be considered during the procurement process between public bodies. In doing so, the industry can ensure competitiveness together with transparency and accountability.

3.2.5.2. The Preference Given to Small and Micro Enterprises in Construction Industry in Ethiopia

There are some preferences provided to small and micro construction work association in Ethiopia. They are entitled to preference given by a margin of 3% when such enterprises compete with local suppliers in national competitive bidding.³⁰⁵ When small and micro enterprises participate in international competitive bidding, only the preference granted to local companies as per the public procurement directive, the margin of preference to be so granted and applied when comparing prices during evaluation of bids shall be for construction is 7.5. %.³⁰⁶ Also in lieu of bid security, performance security or advance payment guarantee, a letter of guarantee written by a competent body organizing and overseeing small and micro enterprises shall be accepted. Furthermore, they are entitled to obtain bidding documents free of charge by producing their certificate of registration.³⁰⁷ In connection to the preferential treatment given to small and micro enterprises, the practice shows that there are gaps and challenges in utilizing the preference. In this respect, according to interview result, the construction projects procurement and contract administer has asserted that many construction projects failed due to open preference given to small construction contractors associations to participate in construction work procurement. Crucially since these construction contractors associations are free of giving bid security, performance security or advance payment guarantee; they often fail to perform or delayed in performing their obligations. Also during non-performance of these associations, public entities suffer different challenges in enforcing contract and effectively managing the frequent non-performance of construction projects due to the associations who won the procurement by taking the advantage of preference in unfairly manner. So he calls the revision of preferential packages given to small and micro construction associations. As per his suggestion,

³⁰⁵ Pubic Proclamation Directive (n) Article 16.20.5

³⁰⁶ Ibid, article 16.20.2 (c)

³⁰⁷ Pubic Proclamation Directive (n) Article 16.20.5 (C)

preference should be provided according to the performance of these associations.³⁰⁸ These shows, preference for construction works carried out by small and micro associations should differently regulated according the record of performance and requires special category of preference arrangement. Performance Based Contracting (PBC) in preference procurement arrangement to small and micro construction enterprises or associations should be introduced

Further, the preference scheme in Ethiopia has to introduce recent development in preferential treatment like ‘Green Building’ development of CIDB Best Practice Green Building Scheme in South Africa. In Green Building Approach of Preferential treatment, Contractors are encouraged or may be required to be certified to build, renovate, design and construct in accordance with a Four Star Green Star SA standard, where such a standard exists for the particular classes of construction works being procured. Contractors are further encouraged to take their rating into account as part of their qualification criteria in the case of the lease of an office space.³⁰⁹ Accordingly, the legal and institutional framework should include the best practice of ‘Green Building’ under public construction work procurement process.

Moreover, specific information regarding the type of preference scheme to be used or the specific participation goal to be achieved must be published in tender documents to ensure that all tenderers are aware of the criteria to be applied and to ensure in turn that procuring entities apply the advertised criteria.³¹⁰ Thus, clearly unregulated preference might reduce competition. Competition will further be affected in future green building requirements which will exclude a large number of contractors who have not yet incorporated environmentally friendly practices.³¹¹ However, still the Public Procurement Proclamation requires ‘the preference margin to be determined by a directive to be issued by the Minister for goods produced in Ethiopia, for works carried out by Ethiopian nationals’.³¹² Yet, there is gap in the law in addressing different kind of preferences provided during government construction works procurement. There should be clear and consistent conditions to set preference margin for different kind of procurements in Ethiopia

³⁰⁸ Interview with Engineer Ato Abraham Gizawu who serves as Higher Officer of Procurement and Contract Administration of Hawassa University, Interview conducted in March 2, 2019

³⁰⁹ Allison Megan Anthony (n 6) 175 Citing CIDB Best Practice Project Assessment Scheme; Green Building Certification 1

³¹⁰ Ibid 25 Citing P Lehohla ‘Construction industry 2007’ (University of South Africa 2007) 211

³¹¹ Ibid

³¹² Public Procurement Proclamation (n 21) Art 25(1)

and for a country to create conducive environment for international trade and technology transfer.

3.2.6. Introducing Performance-Based Contracting as a Tool of Reform in Public Construction Procurement in Ethiopia

Performance-Based Contracting (PBC) is widely accepted as a useful tool of procurement. It is believed that the use of PBC in construction procurement would bring economic benefit to a state. More importantly, the main objectives of the PBC approach are to lower the overall cost of acquisition and achieve the objectives of the procurement by focusing on performance results. However, price is still considered as the only and the most important evaluation criterion in Ethiopia in many of the public procurement projects. Public procurement in Ethiopia is still dominated by the principles of competition and fairness, but not qualities and performance results.³¹³

Ethiopia enacted public procurement rules that contain few concept of PBC in 2009. Article 29 of Proclamation number 649/2009 clearly states that ‘the specifications to be used by public bodies, as far as possible, have to be expressed in terms of performance, instead of describing the characteristics. Otherwise, they have to be expressed based on the national standards, where such exists, or the internationally recognized standards or building codes.’ This impliedly allows the procuring entities to use PBC in their procurement activities. However, in 2010 MoFED issued a directive that was expected by many to introduce further the application of PBC. But the directive neither contains elements of PBC nor prohibits them from using PBC. Furthermore, it does not show how PBC could be applied or for what type of contract it could be used. This results in difficulty for the public organizations in clearly understanding and using PBC for their procurement process. In addition, the regulatory authority can also face difficulties in enforcing the procuring entities’ use of PBC in their procurement process. The absence of clear guidelines on how to use PBC has resulted in a lack of a uniform understanding of the application procedures, and different organizations apply PBC differently based on their level of understanding.³¹⁴

³¹³ Baynesagn Asfaw Ambaw and Jan Telgen (n 13) 425

³¹⁴ Ibid 414

To aggravate the problem, the country's public procurement doesn't expressively address PBC approach which is the important tool for the construction industry to adopt it to achieve the objectives of the public construction procurement by focusing on performance results. This legal lacuna results in difficulty for the public organizations in clearly understanding and using PBC approaches in the construction works procurement process and have the effect of hindering the adaption, implementation and further development of PBC approach in construction industry. In this regard, it better in Ethiopia, the PBC for construction works Procurement has to be introduced by the concerned construction industry sector and PPAA Agency. To this end, the Ethiopian Legal framework can introduce PBC approach according to World Bank (WB) Procurement Guidelines and the African Development Bank Rules and Procedures for Procurement of Goods and Works.

3.3. Institutional Framework for Public Institutions Procuring and Supervising Government Construction Works Procurement in Ethiopia

Having these policies and laws are meaningless unless efficient institutional framework for the implementation of the policies and the laws put in place. Concerning the institutional history of public procurement control and oversight organ in Ethiopia, since 1940 E.C the authority to handle public procurement was at the hands of the then Ministry of Finance. The Ministry was especially established to purchase military equipment and supplies for the army. In 1942 E.C, the same Ministry further authorized to purchase stationeries and vehicles for public entities that operate by regular government budget. However the Ministry was not free from criticisms and oppositions while undertaking the tasks of procuring good, works and service according to the law. The critics and the oppositions were attributable to the lack of skilled and qualified personals in the ministry who could effectively discharge their duties and responsibilities and the raising distress to other public entities that lost the power of purchasing. As a result, it was dissolved³¹⁵.

In 1950 E.C, the power of purchasing was given for the Ministry of Public Property Organization and Distribution under Proclamation No 19/1950. Accordingly, the Ministry is empowered to purchase military supplies, vehicles, and capital equipment, crucial materials for development

³¹⁵ Public Procurement and Property Disposal Service Magazine, (Vol 1, No 6, 2009)

and industrialization and transportation spare parts. The Ministry did not last long and dissolved after six years from its formation. Then after, the task of procurement is decentralized to individual institutions and the Auditor General supervises purchases greater than 10,000 Ethiopian Birr. The trend has continued until the Provisional Military Government (Derg) reigned and issues a financial regulation in 1981 G.C. The government of Derg regime enacted a financial regulation which consists eleven chapters only the last two chapters were devoted to discuss government procurement. The task of purchasing was left to the then Ministry of Finance.³¹⁶

In 2009, the new public procurement proclamation has established an independent public procurement control and oversight organ that is the Public Procurement and Property Administration Agency.³¹⁷ As regards recent institutional setups for public construction procurement of works in Ethiopia, Ministry of Urban and Construction and different construction offices in federal government ministries, agencies, universities and other institutions together with Ministry of Finance and Economy's Public Procurement and Property Administration Agency (PPA) deals public construction works procurements in Ethiopia.

In order to determine the responsibilities of different federal government institutions in Ethiopia, looking the existing structure of different federal public body's establishment and to whom and how they handle government construction works project procurement helps a lot researchers to conduct related studies. Accordingly in this paper, the research question that whether do the public construction procurement in construction industry require special procurement legal and institutional regulatory framework than the general public procurement law and Federal Public Procurement and Property Administration Agency (FPPAA) in Ethiopia could be addressed. To this end, the following public institutions related to public construction procurement in Ethiopia discussed.

³¹⁶ Ibid

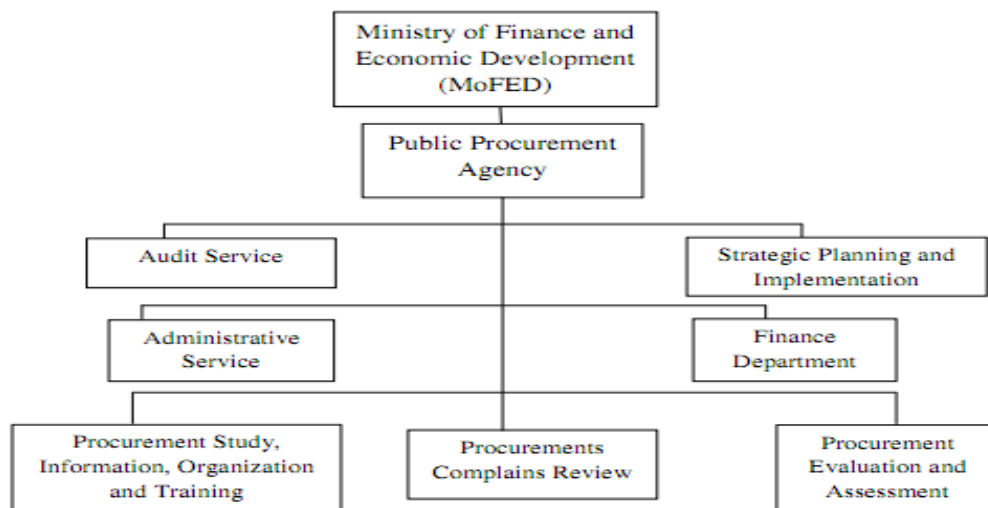
³¹⁷ Federal Public Procurement and Property Administration Proclamation (n 21), Chapter 15

3.3.1. Ministry of Finance and Economy’s Public Procurement and Property Administration Agency (PPAA)

The Ministry of Finance and Economy of Ethiopia contains the Public Procurement and Property Administration Agency³¹⁸ that the agency established as an autonomous Federal Government organ having its own juridical personality. The Agency is accountable to the Ministry of Finance and Economic Development.³¹⁹ The agency has the following objectives³²⁰ to:

- ensure the application of fair, competitive, transparent, non-discriminatory and value for money procurement and modern public property administration;
- follow up compliance of public bodies with the provisions of procurement proclamation in conducting procurement and administrator property at their disposal;
- build the capacity of procurement and property administration with in the Federal Government;
- work for the prevalence of uniform and consistent system of public procurement and property administration at national level;
- endeavor to harmonize the system of public procurement and property administration with the internationally recognized standards

Figure: Public Procurement Agency’s Institutional Framework chart



Source: Ministry of Finance and Economic Development, 2018

³¹⁸ Public Procurement Proclamation (n 21) Article 14

³¹⁹ Ibid Article 12

³²⁰ Ibid Article 14

3.3.2. Functions and Powers of the Public Procurement and Property Administration Agency

Concerning the functions of the Public Procurement and Property Administration Agency,³²¹ the proclamation vested the Agency with wide ranges of powers and duties to actively handle government procurement including construction works procurement. Among, the functions, the Agency advise government and giving technical assistance to o the regional governments and city administrations like preparing standard bidding documents, procedural forms and any other attendant documents pertaining to procurement and property administration. In addition, the Agency also gives training and professional development together with undertaking public procurement execution and property administration research and surveys and establishes cooperation. Also since the Agency is accountable to Ministry of Finance and Economy, it monitors and reports to the Minister the performance of the Federal public procurement and property administration systems in Ethiopia. Crucially, the agency review and decide on complaints submitted by public bodies and accordingly publicizing bidders who have been debarred from participating in public procurement by the Agency.³²² Also the agency is also required to establish and maintain institutional linkages with related entities.³²³

In practice, however, there are problems in PPAA Agency in dealing government construction works procurement which are the causes for not properly discharging the above duty. For instance, criticisms forwarded that the Agency has not developed efficient and independent inventory system for construction works procurement of the country.³²⁴ The Agency may develop independent inventory system for construction works procurement in its online website. By doing so, the Agency can fulfill its duty to set up, develop, maintain and update a data base that covers the entire spectrum of public procurement and property administration³²⁵ including public construction works procurement. Also the Agency is not adequately staffed with specific professional with required field background for handling government construction works

³²¹ Public Procurement Proclamation (n 15) Article 15

³²² Ibid

³²³ Ibid

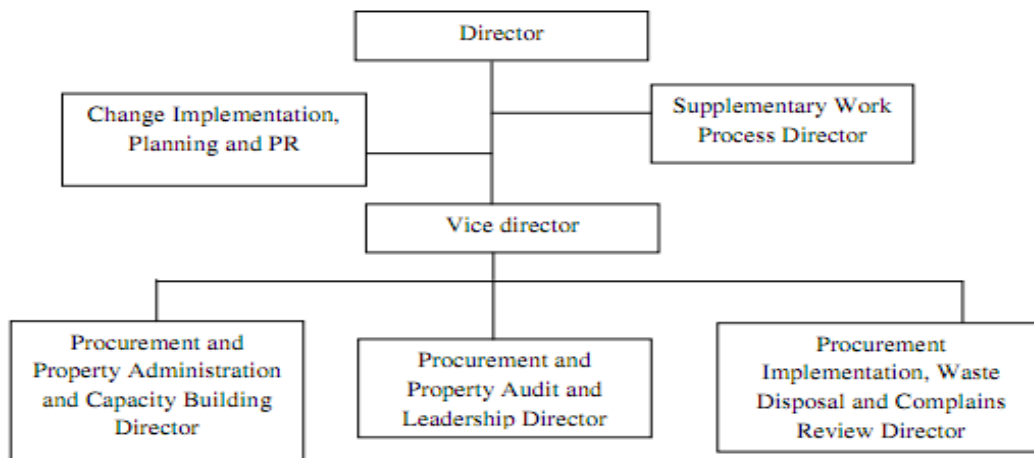
³²⁴ Interview with other researcher who had visited the Agency and personal observation of the writer of this thesis too

³²⁵ Public Procurement Proclamation (n 21) Article 15

procurement.³²⁶ To this end, at least engineers' staffs who know the technical aspect of construction works and legal professional who know the construction and procurement law of the country are required in the public construction works procurement process.

In the exercise of its functions, the Agency have the power to require any information, documents, records and reports in respect of any aspect of the public procurement process. Also it give summon and examine witnesses and concerned parties, give warning to or suspend for a definite or indefinite period of time from participating in public procurement candidates, suppliers or persons involved in the disposal of public property where it proves that they have offered a price higher than the market or committed an act contravening the provisions of this Proclamation and the directives to be issued by the Minister. Also they agency conducts audit on its programs. Crucially, upon the request of public bodies, exceptionally and when justified on sound grounds, may permit the use of a procedure which is not consistent with the procedures laid down by this Proclamation or the procurement directive.³²⁷ However, according to report of PPA, concerning construction works procurement, the agency failed to publish in them in its websites and has problems of inventory system³²⁸.

Figure 3: Public Procurement and Property Administration Agency's Administration Power Chart



Source: Ministry of Finance and Economic Development, 2018

³²⁶ Interview Mr. Shunka Adugna and Mr. Solomon Fantahun who are the offices in PPPAA Agency

³²⁷ Public Procurement Proclamation (n 21) Article 16

³²⁸ PPA OFAG Audit Report 2018 available at www.ppa.gov/

The other point worth a discussion in relation to the power of PPA Agency in regulating anti-competitive actions of bidders in Ethiopia, the proclamation prohibits collusion and bid-rigging in the public procurement process. In this regard, it incorporates rule of conduct that must be observed by bidders and prohibited anti-competitive behaviors and empowers the PPAA Agency to take the necessary measures for their observance. For instance, the proclamation prohibits candidates to plot with others in an act of false competition and authorizes the Agency to give warning or suspend candidates for definite or indefinite period of time that collide with others to affect the outcome of the procurement.³²⁹ In addition to this the Agency can reject bids, quotations and proposals where there is a concerted practice between bidders.³³⁰ With regard to the possible criminal liability resulting from collusive tendering, procurement proclamation provides rigorous imprisonment not less than 5 years and not more than 25 years and penalty with fine not less than 25,000 Birr and not more than 50,000 Birr.³³¹

Concerning the Agency's independence, PPA does not appear to be fully independent (to decide) as they are funded and subordinated to MoFED.³³² Thus, as far as exercising the powers independently, the Agency often has been criticized by different persons when forwarding the drawbacks of the Agency in terms of exercising the entrusted power to it.³³³ In this regard, for the Agency to exercise its power independently, the Agency should be entrusted to be accountable to the House of People's Representatives of Ethiopia. In doing so, the country can develop a strong independent institution which deals with public procurement including construction procurements which cover large amount of public money in the economy of the country.

3.3.3. Ministry of Urban Development and Construction

The role Ministry of Urban and Construction is crucial in public construction procurement process in terms of supervising, implementing and directing the construction work procurement in alignment to the national construction policy. The trend shows that different federal institutions like Agencies, Universities, and offices in different Ministries have their own

³²⁹ Public Procurement Proclamation (n 21) Article 32 and Article 16(3)

³³⁰ Ibid Article 30

³³¹ Ibid Article 77(3(b))

³³² Yirga Tesfahun , Public Procurement Reforms in Ethiopia: Policy and Institutional Challenges and Prospects" (Master of art in public management and public policy thesis, 2011) 55

³³³ Interview with PPAA complaint hearing officer

construction offices. These offices have close connection with Ministry of Finance and Economy's Public Procurement and Property Administration Agency (PPAA) but have insignificant connection and coordination with the Ministry of Urban and Construction and its commissions. In connection to this, other weakness of the regulations is that their failure to establish a separate entity under Ministry of Urban and Construction that monitor and follow up the PPAA Agency especially in relation to public construction procurement in Ethiopia.

3.3.4. Duties and Responsibilities of Public Institutions Procuring Construction Works in Ethiopia

The proclamation and directive of public procurement purport to illustrate the major and additional duties of different public bodies.³³⁴ Coming to the tasks of the construction procuring authorities, it is, among other things, the following are the responsibility of the public bodies:

I) Duties and Responsibilities of Heads of Public bodies

The head of the public body procuring government construction works in Ethiopia have the following major duty to examine and approve the procurement plan.³³⁵ The head also has a duty in delegating authority of approval for small value construction procurement. In this regard, pursuant to article 24(2) and article 5(13) of the public procurement directive concerning procurements of small value which do not need the approval of the Procurement Endorsing Committee,³³⁶ the head of public bodies can delegate authority. In this regard, in Ethiopia a public body may undertake procurement by means of a 'Request for quotations' for low value simple works or physical services, provided the estimated value of the contract does not exceed the amount of works up to 250,000 Birr.³³⁷ In construction industry, the heads of public bodies can only delegate approval power of construction works procurement to other organ provided the value of works does not exceed 250,000 Birr.

³³⁴ Public Procurement Directive (n 201) Part II Article 5 cum Public Procurement Proclamation (n 15) Article 8

³³⁵ Public Procurement Directive (n 201) Article 5(11)

³³⁶ Ibid Article 5(13)

³³⁷ The Federal Democratic Republic of Ethiopia Public Procurement and Property Administration Agency Report (2011) 73

In an organization level, the head of public body has a duty to establish an adequately staffed unit for procurement and property administration.³³⁸ Furthermore, the head of public bodies ensure that the procurement staff and head of the procurement unit of the public body have the required educational qualification and experience in the fields relevant to public procurement.³³⁹ The head of a Public Body have the duties and responsibilities to establish procurement endorsing committee, providing facility necessary for Endorsing Committee and authorizing the work program and giving enough time for Committee, and overseeing the Committee work.³⁴⁰ Also the head of a public body make arrangements necessary for procurement audit or inspection to be conducted by the Agency in respect of the execution of procurements by the Public Body.³⁴¹ The head of public body sign a contract or delegate authority to sign a contract where necessary, and monitor the execution of any procurement as per the contract.³⁴² Also the head of the public body would give decisions on complaints lodged and against rejection by the procurement unit of request for information concerning the conduct of a particular procurement in the Public Body.³⁴³

II) Duties and Responsibilities of Procurement Units

Besides the head of public procurement, the role of each procurement units are highly crucial so far government construction works procurement is concerned. In different construction offices in federal government ministries, agencies, universities and other institutions in Ethiopia, there are different procurement units within the institutions to handle the institution's construction works procurement. For instance in Hawassa University, there is Construction Project Office that has its own procurement unit that handle Hawassa university construction works procurement. The following are the duties of such procurement units have a duty to identify the procurement need and prepare the procurement plan³⁴⁴, prepare and submit to the Procurement Endorsing

³³⁸ Proclamation 8(a)

³³⁹ Public Procurement Directive (n 201) Article 5(1)

³⁴⁰ Public Procurement Proclamation (n 21) Article 8 (b-d) cum Public Procurement Directive (n 201) Article 5 (6-10)

³⁴¹ Public Procurement Directive Article 5(20)

³⁴² Public Procurement Directive (n 201) Article 5(16)

³⁴³ Ibid Article 5(15)

³⁴⁴ Public Procurement Directive (n 201) Article 6(1) Cum Article 8/1

Committee, bidding documents and correction if necessary in collaboration with the procurement initiator and to execute work ethically and skillfully³⁴⁵.

3.3.5. Public Construction Works procurement Information Disclosure System

Concerning the information disclosure for government construction works, the procurement unit must also disclose to the public by posting it on the Agency's website for certain construction works in addition to general duty of making publication of its bid advertisement in a newspaper. Such government construction works procurements are which the value of which corresponds to or is greater than that stated in the laws, including procurements to be made by means of International Competitive Bidding. For construction works, only when the total value of the government construction works project is above 10,000,000.00 Birr that posting it on the Agency's website by procurement unit is required at the same time of making publication of its bid advertisement in a newspaper.³⁴⁶ However the recent amendment on the public procurement directive³⁴⁷ has made clearly that if it is a construction work, only when the total value of the government construction works project is above 20,000,000 that publication of its bid advertisement in a newspaper and posting it on the Agency's website become a mandatory requirement including procurements to be made by means of International Competitive Bidding. Here what is criticized is that construction projects should be categorized by different levels like small, medium and large level. The publication requirement should be separately regulated.

Furthermore, the Agency would disclose the information to the public by filling it in the form provided for this purpose and posting it on the Agency's website within 5 days of signing the contract after award.³⁴⁸ Invitation to bid shall be advertised in at least one times in a national newspaper of general circulation which is published in the language the bidding document is prepared. Where the public body finds it necessary, it may, in addition to the medium mentioned above, can advertise the bid on a national radio and television.³⁴⁹

³⁴⁵ Public Procurement Directive Article 6(3)(4) cum Public Procurement Proclamation (n 21) Article 9(a)

³⁴⁶ Public Procurement Directive (n 201) Article 6(5) and Public Procurement Proclamation (n 15) Article 35

³⁴⁷ Federal Government Procurement Execution Directive (Amendment) on 2010 Federal Public Procurement Directive Of Ethiopia (Annex VI to Procur/GT) December 21, 2016 Article 2(1)

³⁴⁸ Public Procurement Directive (n 201) Article 6(6)

³⁴⁹ Public Procurement Proclamation (n 21) Article 35

However, except when ordered to do so by a competent court or other body authorized by law and subject to the conditions of such an order, the public body shall not disclose information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interest of the parties or would inhibit fair competition.³⁵⁰ Another exception to non-disclosure of information is when information relating to the examination and evaluation of bids, proposals or quotations and the actual content of bids, proposals or quotations, other than in the summary record form referred in the evaluation criteria stipulated and applied and a summary of the evaluation and comparison of bids, proposals and quotations received.³⁵¹

But, critics have been forwarded with regard to exception to non-disclosure of information relating to the examination and evaluation of bids. The researcher has personally denied these documents showing such grounds of non-disclosure of information related to public construction works procurement. In order to ensure transparency of procurement process, public bodies should disclose the examination and evaluation criteria's to bidders. In contrary to such exception, the Standard Bid Document for Works procurement requires public body to contain in bid document all the factors, methods and criteria that the Public Body shall use to evaluate a bid.³⁵² Thus, the PPA has to clearly state grounds of non-disclosure of information to interested parties or post it in Agency's websites.

In addition, the adoption of e-procurement method and procedure based regulatory system may alive the problem of information asymmetry in construction sector in general and also in application of technology for public construction procurements in particular.

3.3.6. Electronic Public Procurement System as a Tool for Institutional Reform in the Construction industry in Ethiopia

Electronic public procurement is the process by which government acquires the goods, construction works or services needed for its operations from outside service providers (the outside service providers generally being the private sector) via electronic means, usually the

³⁵⁰ Ibid Article 23 (2) a

³⁵¹ Ibid Article 23 (2) b

³⁵² SBD (n 17) Part 1, Section 3:Evaluation Methodology and Criteria

Internet.³⁵³ The goal of electronic public procurement is primarily to eliminate or minimize the direct human interaction in the procurement cycle between the suppliers or contractors bidding on government tender opportunities and the government procurement officials.³⁵⁴

It is the interaction between government procurement officials and contractors that usually results in corruption in public procurement.³⁵⁵ Besides reducing the chances for corrupt behavior within the public procurement system, various other benefits can be realized by modernizing the procurement process through the introduction of an electronic public procurement system. The benefits include better quality service delivery through a more efficient procurement system; economic growth due to the development of infrastructure; and for suppliers, the cost of doing business with the state substantially decreases,³⁵⁶ resulting in the achievement of substantial potential savings through electronic public procurement.³⁵⁷

In government construction procurements, electronic procurement has a vital role in transparency since it reduces its cost.³⁵⁸ In Ethiopia, the proclamation has introduced for the first time ‘electronic procurement’³⁵⁹ without a detail direction or regulation to apply for variety of public procurement. The procurement laws keeps silent as to the application of e-procurements for government construction works procurements in Ethiopia. This necessitate Ethiopia to adopt news regulation of electronic public procurement which the ‘Model law’ give an emphasis to countries to encourage the use as e-procurement process since it has a vital role in ‘Pro-business’ potential by creating transparency, lower cost, monitoring and removing human interaction, improving processes and standardization of public procurements.

3.3.7. Regulatory Framework of Anti-Corruption Measures in Public Construction Procurement in Ethiopia

In Ethiopia, the Public Procurement and Property Administration Agency (PPA) requires contracting authorities, as well as bidders to observe the highest standards of ethics during the

³⁵³ Schoenherr and Rao Tummala (2007) 8 citing Oliveira & Amorim (2001) 43 43 and De la Harpe (2015) 1572

³⁵⁴ United Nations Office on Drugs and Crime (2013) 27 cited by Kühn & Sherman (2014) 19

³⁵⁵ United Nations Office on Drugs and Crime (2013) 27

³⁵⁶ Geoné Kramer, Electronic Public Procurement As A Tool Of Reform In South African Public Procurement (2016) 3:1 APPLJ 2 Citing National Treasury South Africa 2015

³⁵⁷ Schoenherr & Rao Tummala (2007) 9

³⁵⁸ An introduction to the UNCITRAL Model Law on Public Procurement (n 2) 25

³⁵⁹ Public Procurement Proclamation (n 21) Article 31

procurement and the execution of contracts.³⁶⁰ When bidder found in corruption crime, they will debar from participation in public procurement for a specified period of time if it at any time determines the bidder has engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for, or in executing, a contract. The list of debarred bidders is available on the Agency's website.³⁶¹ Also in pursuit of the policy defined, the public body may terminate a contract for works if it at any time determines that corrupt or fraudulent practices were engaged in by representatives of the Public Body or of a Bidder during the procurement or the execution of that contract.³⁶² Since corruption in public construction procurement is widespread, it demands detail legal and institutional study of corruption in government construction works projects in Ethiopia.

Furthermore in public construction works procurements, the transparency in public sector procurement in Ethiopia can be improved by procurement audits and devising adequate anti-corruption measures with effective sanctions. This can be done through seminars on transparency and the dissemination / use of the recently drafted Code of Ethics.³⁶³ Crucially, developing a strong institutional setup with the stakeholders in construction industry in Ethiopia would help to provide solution to common problems related to corruption during government construction procurement process. Then after making co-operation between procurement agency and construction industry stakeholders is needed for working together and integration of best practice in detecting and deterring anti-competitive behaviors of contractors in the government construction procurement process.

3.3.8. Complaint Reviewing Mechanism

A candidate or a bidder aggrieved or is likely to be aggrieved on account of a public body inviting a bid not complying with the provisions of the proclamation or the directive in conducting a bid proceeding may present complaint to the head of the Public Body or to the secretariat to have the bid proceeding reviewed or investigated and then the head of a public body review such complaint.³⁶⁴ Accordingly, the head of the public body would give decisions

³⁶⁰ Ibid, Article 32

³⁶¹ Ibid Article 3.1.b citing the website: <http://www.ppa.gov.et>.

³⁶² Ibid Article 3.2

³⁶³ Ethiopia Country Procurement Assessment Report, June 28 (2012) 4

³⁶⁴ Public Procurement Proclamation (n 15) Article 43

on complaints lodged and against rejection by the procurement unit of request for information concerning the conduct of a particular procurement in the Public Body.³⁶⁵ Any complaint must be submitted in writing to the head of the public body, within five working days from the date the bidder knew, or should have known, of the circumstances giving rise to the complaint. If the head of the public body does not issue a decision within ten working days, he/she may bring complaint to organ's compliant hearing body.³⁶⁶ Before presenting complaint to another body, in different administrative organs, there are internal complaint hearing organs under public bodies. However, after submission of complaint, or the candidate or the bidder is not satisfied with the decision, it may submit a complaint to the Complaint Review Board which established an independent board from the PPA. Such complaint should be submitted within five working days from the date on which the decision has been or should have been communicated to the candidate or the bidder by the public body. The Board's decision is binding for both parties.³⁶⁷ The board keeps good track of the cases received and the number of complaints has increased over the years since the Board was established.³⁶⁸

Concerning the composition of the board, currently it consist six members (MoFED State Minister is a chairman of the board and Chamber of Commerce and a government owned entries, public body representative and one from PPA and the board office are members)³⁶⁹ Crucially, in order for a board to function more and receive many complaints, there should be awareness creation and promotion of the board to be equipped with specialized staffs. i.e the board should contain at least private construction professional staffs or professionals on the area from civil society for public construction procurement related complaints submitted to the board.

³⁶⁵ Ibid Article 5(15) Cum Public Procurement Directive Article 3.5

³⁶⁶ Ibid Article 3.5

³⁶⁷ Public Procurement Proclamation (n 15) Article 70-72 Cum Public Procurement Directive Article 3.5

³⁶⁸ Yirga Tesfahun (n 13) 67

³⁶⁹ The PPA Annual Report of Decisions on Complaint lodged to the Agency (2016), Available at www.ppa.gov.et/index

Chapter Four

4. Conclusions and Recommendations

This chapter provides the concluding remarks and recommendations on key findings of the legal regulation and institutional framework of public construction works procurement in Ethiopia.

4.1. Conclusion

From the discussion of this paper, we can see positive sides of Ethiopian public procurement law by referring the efforts of integration of basic principles of public procurement. But, the finding of this paper suggests that inadequate emphasis given to the methods and procedures of public construction works procurement in the public procurement proclamation and directive contravene the guiding principles.

In Ethiopia, the stubborn adherence to apply open bidding tendering as default method and the five public procurement procedures that are required for open bidding procurements for construction works often consumes too time and criticized for being against with the principle of economy. The procedures are not well regulated according to principle of economy which requires cost effectiveness of both the process and obtaining the best construction works at reasonable time.

Concerning Electronic method of procurement, the Ethiopian Public Procurement law failed to effectively address electronic procurement method with required detail. Neither the directive nor amendment describes the electronic method to be applied for government construction works procurement. By adopting e-procurement methods of procurement for government construction works, it is possible to have the legal and institutional framework that increase competition of competent contractors for public construction works procurement and further create transparency, lower cost, monitoring and removing human interaction, improving processes and standardization of public construction works procurements.

From the research it is clear that concerning the application of procurement tendering methods, the general thresholds set for a construction works are not consistent with the practical needs and a thorough analysis should be conducted in regulating threshold.

The other important issue under public procurement legal regime is that for construction works procurement made between two and more public bodies, as embodied under the public procurement proclamation, contracting public bodies are an exception to competition and not governed by PPA. This then destroy the principle of competitiveness and increase risk to corruption. Furthermore, lacks specific procedures between public bodies engaged in procurement process demands devising specific procedure to ensure competitiveness together with transparency and accountability. Accordingly, the paper found the same demand in the public body's procurement with public construction enterprises that the endeavor of Ethiopia to establish new legal regimes that adopt new methods, procedure and standards between public bodies engaged in public construction works procurement process.

Concerning preferential treatment under public construction works, the proclamation albeit having its own policy behind encouraging small construction association and enterprises in the construction industry, it doesn't set limited boundary. As a result it compromised principle of competition at all. In relation to institutional regulatory framework, neither PPAA agency nor Ministry of Urban Development and Construction (MoUDC) have developed mechanisms to follow up such preferential treatment. The practice also supports the need to further regulate preferential treatment in public construction works procurement to be carried out taking into account the record of performance and requires special category of preference arrangement.

In construction industry in Ethiopia lack of specific legislation that requires Performance-Based Contracting (PBC) in public construction works procurement crucially affecting the effectiveness of the government construction works procurement. Thus, the absence of adequate legal and institutional setup for application of PBC public construction works requires the existing construction industry to develop its own special legal regime and institutional set up for government construction works to adopt PBC approach in the procurement process.

Furthermore, it is identified under this paper that the absence of comprehensive regulatory framework that allows public bodies to check the reasonable performance price offered by contractor for a given construction work project led contractors to resort to reduce their financial competing price in unreasonable manner. This because using least cost approach as evaluation criteria for construction works projects limits authorities to make pre-evaluation based on qualitative aspects of bids. This, however, results in nothing but buying inferior quality

construction works, project performance delays and cost overruns in Ethiopia. This requires regulatory reform to introduce new approaches that adopt tools that enable public bodies to reasonably check 'cost of procurements effectiveness' and make engineering price pre-estimation for government construction works. Thus it is never doubted in the construction industry the need for public agencies in Ethiopia to have or develop a legal and institutional framework that allows pre-evaluation of reasonable performance of the construction work with the price offered by contractors in consultation with experts and professionals.

Further, the experience of other countries and the existing practical situation in Ethiopia requires adopting special regulation for construction procurement to help create uniformity in construction procurement, promoting uniform standardized application of construction policies in the construction industry and to adopt best practice in the industry. Nonetheless, it is further noted by analysis of interview results that the present laws which regulate construction procurements are found in scattered legislations and there is no comprehensive special law that regulates construction procurement in Ethiopia.

As discussed under chapter three, with regards to institutional framework for public construction works procurement in Ethiopia, both PPA Agency and Complaint Reviewing Board framework are not free to exercise their power independently because of their nature of accountability to the same organ (MOFED) which is not free of political influences. Both are expected to contain the required professionals to deal with public construction works procurement. Furthermore, the PPA Agency doesn't have an efficient and independent inventory system for federal government construction works procurement projects of the country. It is hard to find government construction procurement related cases in the Agency records. In this regard, an independent recording system is required in the Agency institutional setup for government construction projects.

It also found the absence of coordination and overlap of mandates among government organs charged to check and balance the activity of procuring organs in public construction works in Ethiopia. To this end, the PPAA Agency regulates public construction works procurement at different levels without making connection and coordination with other relevant government authorities like Ministry of Urban and Construction and other federal government authorities. In connection to this, another weakness in the regulatory framework is the failure to establish a separate

entity under Ministry of Urban and Construction that monitor and follow up the PPAA Agency especially in relation to public construction procurement in Ethiopia.

4.2. Recommendation

Based on the major findings of this thesis work, the following recommendations are recommended.

I) Legislative Measures

- The public procurement regime should introduce new methods like ‘with dialogue Electronic reverse auction’ for public construction works procurement. A comprehensive piece of legislation that governs electronic procurement methods and procedure should be enacted for public construction works procurement.
- A new provision should be added to the public procurement proclamation that introduce new approach that adopt reasonable cost of procurements effectiveness checking tools and engineering price pre-estimation for government construction works.
- The public procurement proclamation should further amend the general threshold set for application of restricted tendering, request for quotation and international competitive biddings for a construction works with the view to adjust itself with the practical needs.
- The government should enact specific new legislations that regulate the procurement methods, procedure and standards between public bodies engaged in public construction works procurement process as a client and construction contractor or state enterprise.
- The Ministry of Finance and Economic development should enact legislations dealing public private partnership for public construction works and the application of joint venture agreement arrangement in accordance to procurement method and procedures.
- The government should enact clear guidelines as to application of other international procurement procedure in restricted tendering, request for quotation, two stage tendering and direct tendering for public construction works procurement.
- The public procurement proclamation, regulation and directives should add comprehensive piece of provisions that governs the use of PBC approaches in public construction works procurement.

- Government construction work standard bidding documents has to be revised considering the practical needs and best practice.
- The government should consider the need to enact a specific construction works procurement audits and devising adequate anti-corruption preventive measures with effective sanctions, administrative and criminal penalties code of ethics.
- On top of amending existing legislation and introducing new legislations as recommended above, the government should work hard to develop the country's construction sector technological capability in introducing network based data recording and information sharing scheme for public construction work procurement cases, procurement laws and concerned organizations to public construction works procurement and organization engaged in construction procurement in Ethiopia.

II) Institutional Related Measures

- In relation to the problem of absence of coordination, overlap of mandates, bureaucratic hurdles, and absence of clear institutional regulatory framework seen to government construction works procurement in Ethiopia, apart from establishing a separate entity of PPAA Agency that monitor and follow up federal government construction works projects procurement, concerned authorities like MoUCD and Ethiopian Construction Engineers Association should coordinate and cooperate each to add their contribution and avoid redundancy of efforts.
- In order to select the competent and suitable contractor for certain construction work projects, there needs to institutional check and balance mechanisms to check the reasonable performance of the procurement which makes engineering pre-estimation of price checking mechanisms. Such institutional setup should create for independent pre-evaluations mechanisms that consider not only evaluation on the basis of price and time offerings, but also on experience, financial standing, effective capacity and expertise and additional requirements like environmental friendly application of projects and requiring the construction works delivering plan defense schedules as per construction project's procurement specification made by public bodies.
- The regulatory framework should also establish a special governmental agency that monitor and follow up Federal government construction work project procurement. The organ should

be staffed with multidisciplinary personnel who have the required competency to efficiently deal with the complex issues of construction works procurement. To this end, so far composition of professionals and team to handle public construction works procurement cases, both the Agency and Compliant Review Board should adequately be staffed with specific professional with required field background for handling construction works procurement. Further, Unlike MOFED, both PPA Agency and Complaint Reviewing Board should be entrusted to be accountable to the House of People's Representatives of Ethiopia.

- Crucially, the construction sector should provide adequate incentives under the legal regime to government officials and construction contractor who has implemented and achieve best performance in public construction works procurement process in Ethiopia.
- The PPA Agency should develop efficient and independent inventory system for federal government construction works procurement project of the country.
- In addition, as part of institutional frameworks, the PPAA agency or Ministry of Urban Development and Construction (MoUDC) have to develop a mechanism to follow up whether the available preferential treatment in public construction works procurement applied to the relevant target small construction associations in the construction industry.
- Moreover, government procurement unit in Ethiopia while they are procuring construction projects, they are expected to adjust institutional setup of minimizing red tape; that would minimize unnecessary and excessive bureaucratic procurement procedures in the public construction work procurement procuring authorities.
- Finally, well arranged institutional coordination and cooperation structural set up should be set between PPAA agency and construction industry authorities & other stakeholders for sake of developing conducive environment for working together and integration of best practice that facilitates the public construction works procurement process. To this end, developing a strong institutional network with the stakeholders in construction industry and PPAA Agency in Ethiopia would help to provide solution to common problems related to during construction works procurement process.

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7. Interviews

- Interview Mr. Shunka Adugna and Mr. Solomon Fantahun who are the offices in PPPAA Agency
- Interview with Ato Butuna Burika, who is a Construction Procurement officer of the Design and Contract Administration department of Construction Authority
- Interview with Ato Matteme Tadesse, Government Construction Projects Supervisor, and Interview was held
- Interview with Ato Solomon Fantahun, Contract Administration Directorate Director of Public Procurement Service
- Interview with Ato Yimtu Dukamo (Eng), General Construction Contractor
- Interview with Contract Administration Officer whose name is anonymous due to privacy issue
- Interview with Engineer Ato Abraham Gizawu who serves as Higher Officer of Contract Administration of Hawassa University
- Interview with Legal Advocate of Grade 1 General Contractor whose name is kept for privacy reason
- Interview with Office Engineer Mr. Getu Genale, Grade 1 Construction Contractor (GC, RC, BC)
- Interview with PPAA complaint hearing officer
- Interview with senior government construction works procurement evaluating committee chief (whose anonymity is respected)
- Interview with senior high expert of South Nation, Nationalities and People's Regional State of Ethiopia government construction procurement evaluation team whose anonymity is respected for privacy reason
- Interview with senior South Nation, Nationalities and Peoples Regional State government construction procurement evaluating high expert whose anonymity is respected for privacy