

CPA Australia and Pacific Regional Conference on Parliament, People and Pandemics November 2021: Paper by Christine Tonkin MLA

Before I start, I acknowledge the traditional owners of the land on which we meet, the Whadjuk people of the Noongar Nation and I pay my respects to their elders past, present and emerging.

Abstract

In this paper the different forms of public procurement legislation are discussed along with their implications for managing the supply chain disruptions that are being experienced due to the pandemic.

There are three genres of public procurement legislative framework evident internationally including the rules-based approach typified by the UN Commission on International Trade, (UNCITRAL), Model Law on Public Procurement, the principles-based approach typified by the Western Australia Procurement Act 2020 and the results-based approach typified by the Republic of Trinidad and Tobago's Public Procurement and Disposal of Public Procurement Act 2015. These different approaches to legislation are considered with a focus on the implications of each for achieving policy objectives including under the emergent circumstances of the COVID19 pandemic.

Introduction

Comprehensive statistics on the size of public procurement in economies around the world are generally difficult to come by. The World Bank has estimated that low-income countries have the highest share of public procurement in their economies, at 14.5 percent of GDP, followed by upper-middle income countries, at 13.6 percent.¹

Regardless of public procurement's share of an economy, the impact of the COVID19 pandemic has demonstrated the vital importance of the effectiveness and efficiency of public procurement systems in delivering the goods, works and services necessary to directly manage the pandemic as well as to deliver projects that are critical to stimulating what would otherwise be flagging economic activity. This has been a key finding of the OECD that has recently examined the size of public procurement. The OECD concludes that:

“Governments procure large amounts of goods and services to help them implement policies and deliver public services. As has been demonstrated during the COVID-19 crisis, public procurement strategies, practices and systems directly affect the quality of life and wellbeing of citizens. It is important that countries aim for maximum efficiency, effectiveness and value for money in public procurement.”²

1 World Bank, Benchmarking Public Procurement 2017: Assessing public procurement regulatory systems. <https://documents1.worldbank.org/curated/en/121001523554026106/Benchmarking-Public-Procurement-2017-Assessing-Public-Procurement-Regulatory-Systems-in-180-Economies.pdf>

² OECD (2021), "Size of public procurement", in *Government at a Glance 2021*, OECD Publishing, Paris, <https://doi.org/10.1787/18dc0c2d-en>.

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The general nature of the goods, services and works procured by public sector agencies is remarkably similar internationally as are the broad policy imperatives underpinning legislation. However, the operation of different legislative frameworks may give rise to very different policy outcomes. This is particularly relevant in view of the agility required during the pandemic. In fact we have a “pandemic” of supply disruptions in local, national and international markets. These are not just related to health and medical supplies and equipment or importantly to vaccine roll-outs. They are also related to all manner of goods and services and works. They involve many different and sometime interrelated supply chains. For example, anything requiring computer chips is likely to be more difficult to source and this means everything from computers to motor vehicles. These disruptions to supply present considerable challenges for governments and their procurement systems.

Public procurement is generally governed by either legislation or executive policy depending on the jurisdiction but the efficacy of these regimes in achieving policy objectives is often taken for granted by law-makers.

Three broad approaches to public procurement legislation are considered here:

rules-based typified by the UNCITRAL Model Law on Public Procurement but also to be found in the European Procurement Directives and in much of the legislation governing procurement in the US and Latin American jurisdictions;

principles-based typified by the Western Australia Procurement Act 2020 but also evident in the Australian Government’s framework and in that of the UN Secretariat; and,

results-based typified by the Republic of Trinidad and Tobago Public Procurement and Disposal of Public Procurement Act 2015 but also to be found in the Queensland Government’s procurement framework, in that of the International Atomic Energy Agency as well as in significant aspects of the frameworks of the World and Asian Development Banks governing project procurement.

The rules-based approach is transaction focussed, prescribing procurement procedures for the pre-qualification of suppliers or contractors, the solicitation of tenders and their evaluation and for the awarding of contracts. It is assumed that the consistent application of the prescribed procedures will achieve the desired policy outcomes. In the case of the Model Law on Public Procurement, the expectation is that it “...promotes economy, efficiency and competition in procurement and, at the same time, fosters integrity, confidence, fairness and transparency in the procurement process”. These policy imperatives arise in the context of the work of UNCITRAL on the “progressive harmonization and modernization of the law of international trade.”. This framework has been developed by the UN system for ease of widespread adoption by legislatures internationally.

The principles-based approach requires that consideration is given to the application of certain policy principles or objectives. Similar to the rules-based approach, the focus is transactional with consideration given to the application of the policy

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principles or objectives when selecting suppliers and awarding contracts.

Under the WA Procurement Act 2020, the policy considerations include: “ (a) to promote best value for money in government procurement so as to deliver sustainable economic, social and environmental benefits to Western Australian; (b) to reduce barriers to the participation of small and medium businesses in government procurement by streamlining procurement procedures; (c) to strengthen integrity in government procurement and to promote ethical and accountable practices so as to provide confidence that government procurement is conducted fairly; (d) to enable coordinated government procurement strategy, governance and leadership and devolved accountability and decision-making; (e) to provide a legislative scheme that is responsive to changing community expectations and that supports innovation in the Western Australian economy.”

The results-based approach focuses strategy on achieving policy objectives. This is analogous to the approach in the private sector where procurement strategy is crafted to align with business objectives such as profitability, innovation, quality, market positioning, speed to market and today of course, removing carbon from supply chains.

Maximising value to the firm is the clear strategic focus of procurement in the private sector. In the public sector, this translates into transforming public resources to achieve policy objectives through project, programme and service delivery.

As a results-based framework, the objects of the Trinidad and Tobago Public Procurement and Disposal of Public Property Act are “to promote: the principles of accountability, integrity, transparency and value for money; efficiency, fairness, equity and public confidence; and, local industry development, sustainable procurement and sustainable development...”.

These policy imperatives are very similar to those expressed in the WA Procurement Act. However, under the Trinidad and Tobago framework, it is not sufficient to merely give consideration to these objects as is the case in WA, it is a legal requirement that a “public body shall carry out public procurement...in a manner that is consistent with the objects...” To reinforce this requirement, any procurement or contract awarded that is not undertaken in accordance with that provision is void and illegal.

Therefore, in Trinidad and Tobago it is necessary to proactively consider the opportunities to achieve the objects of the Act and to be able to substantiate having done so. This involves critical consideration of procurement requirements, attention to the needs, issues and influences of stakeholders and a thorough analysis of the operation of the relevant markets. Without this basis for framing strategy, procuring in a manner consistent with the objects of the Act would be hit and miss.

Each of the three genres of public procurement legislation has a very different take on achieving policy objectives. Under the rules based approach, it is assumed that the policy objectives will be achieved through the application of prescribed procedures to each procurement transaction. There is no direct focus on results.

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Under the principles-based approach consideration must be given to a range of policy imperatives when soliciting offers from suppliers or contractors. This is more of a “best endeavours” way of addressing policy imperatives.

The results-based approach is focussed directly on achieving the desired policy outcomes. This necessitates proactive consideration of the opportunities arising in the procurement of each category of goods, works or services and under projects.

So how inherently responsive are each of the forms of procurement legislation to the policy imperatives they seek to address and in dealing with the supply chain disruptions experienced during the pandemic?

Discussion

Generally, under all forms of procurement legislation there is scope to suspend or expedite procurement processes or procedures to accommodate emergencies. Internationally there is certainly evidence of these provisions being invoked during the pandemic. In theory at least, such accommodations should not impact on addressing policy imperatives because the various forms of legislation continue to operate as they should albeit in a modified manner.

On the face of it, the rules-based approach is likely to be the least responsive to the policy imperatives which it is expected to address. There is also very little evidence of testing that the assumed outcomes are actually delivered under these regimes. However, analysis of the policy effects of the European Union’s Public Procurement Directive, a rules-based approach concluded that:

“ the directives seek to promote the internal market and that they seek to do so solely by three means—prohibiting discrimination, implementing transparency, and removing barriers to access. It rejects, on the other hand, certain broader conceptions of the directives, including that they promote a single market by standardising procedures; that they replicate in the public market the competitive process of the private market; and that they seek value for taxpayers’ money. ”³

It is likely that there is a similarly narrow policy effect of the Model Law on Public Procurement because it arises in the context of the work of UNCITRAL in “...developing and maintaining a robust cross-border legal framework for the facilitation of international trade and investment”.⁴

³ Arrowsmith, S. (2012). The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies. Cambridge Yearbook of European Legal Studies, 14, 1-47. doi:10.5235/152888712805580390 <https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/abs/purpose-of-the-eu-procurement-directives-ends-means-and-the-implications-for-national-regulatory-space-for-commercial-and-horizontal-procurement-policies/121F2BAA1AD9168B22F8EA62992DC0F5>

⁴ <https://uncitral.un.org/>

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Therefore apart from accommodating expedited emergency procurement procedures, the rules-based frameworks are unlikely to be inherently responsive to supply chain disruptions arising from the COVID19 pandemic because of their narrow focus on prescribing transactional procedures that are invariably applied regardless of the underlying supply market challenges.

Under the principles-based approach, performance is usually assessed in terms of compliance and sometimes transactional efficiency. It is assumed that compliance will result in the policy imperatives being effectively addressed. As only best endeavours are required, the extent to which this approach is actually responsive to the policy objectives is unclear.

There is evidence that where particular policy objectives are targeted and performance against targets reported, the principles-based framework is responsive. For example, under the Western Australian framework, the Aboriginal Procurement Policy provides progressively increasing annual targets for the award of contracts to Aboriginal businesses and for reporting the results. Importantly, it also requires market research by agencies to proactively identify opportunities for contracting with Aboriginal businesses. The success of this policy indicates the importance of targeting and reporting on achieving policy-linked objectives and the implementation of practices that ensure that these opportunities are proactively identified and addressed.

Under the principles-based approach there is no general requirement for proactively analysing and targeting opportunities or for addressing challenges in supply markets. To this extent, public procurement under principles-based regimes is unlikely to be sufficiently responsive to the challenges of pandemic disrupted supply chains.

As a matter of course, the results-based approach targets policy objectives and requires substantiation of results. It necessitates the implementation of management techniques and practices that provide a basis for developing sound procurement strategy. Significant among such techniques and practices is the capability to analyse and understand the operation of key supply markets including: market structure, the basis of competition between participants, the quality of supply chains, the agency's value as a customer, potential substitutes, and, contextual factors such as political, environmental, legal and social. It is this type of analysis that is most likely to enable effective procurement strategy in pandemic disrupted supply chains because the risks and opportunities are known.

Conclusion

The rules-based legislative frameworks cannot be relied upon to effectively manage the risks in pandemic disrupted supply chains. Generally, these regimes have very narrow policy related outcomes. There is more scope under principles-based regimes to respond effectively to supply disruptions but only to the extent to which there is comprehensive market analysis underpinning procurement strategy. Basically, this means the extent to which the types of management techniques and practices used under the results-based regimes are applied.

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So is most of the world condemned to procure sub-optimally during the pandemic because most operate under public procurement regimes that do not and cannot deliver what is expected of them by legislators? The answer is that fortunately both the rules and principles-based regimes are largely silent on management techniques and practices that underpin the framing of responsive procurement strategy in the face of supply chain disruptions. To the extent to which those managing and undertaking public procurement have the permission and the capability to apply these techniques and practices, pandemic-related supply chain disruptions may be managed effectively and in compliance with both the rules-based and principles-based regimes. This of course begs many questions about the limitations of public procurement legislation.