

## Introduction

GEO QUINOT AND SUE ARROWSMITH

### 1. Background

‘Public procurement’ refers to the process through which the state acquires goods, works and services needed to fulfil its public functions. In its broadest definition, the function of procurement captures the entire process from the identification of the goods or services needed, through the course of identifying a supplier, to the maintenance (performance, administration, cancellation) of the contract concluded between the contracting authority and the supplier.<sup>1</sup> Unlike analogous commercial transacting in the private sector, public procurement is often governed and thus structured by specific detailed rules – the distinct field of law called public procurement law or public procurement regulation. Within this field of law, the focus of many regulatory instruments is on the rules governing the process leading up to the conclusion of the contract and in particular the process through which a supplier is identified and a contract awarded to that supplier.<sup>2</sup>

The development of this field of law and its academic study has gained significant momentum globally in the last two decades. Most recently, the two major international regulatory regimes on public procurement – the World Trade Organization’s Agreement on Government Procurement and the UNCITRAL Model Law on the Procurement of Goods, Construction and Services – have both gone through comprehensive

1 See generally S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn, London: Sweet & Maxwell, 2005), p. 1; S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (The Hague; London: Kluwer Law International, 2000), pp. 1–2.

2 This is not to say that the focus in public procurement law is exclusively on this stage in the broader procurement process. Matters outside of this narrow focus have also been subjected to legal regulation, such as post-contractual variation of terms, particularly in countries of the civil law tradition.

revision.<sup>3</sup> Many African systems have also recently experienced major development in public procurement regulation.<sup>4</sup> As Stephen Karangizi notes, these developments have largely been in the form of ‘the recognition of the need to enact specific legislation to provide for clear and unambiguous laws on procurement’.<sup>5</sup> While reforms in governance, including public procurement reforms, have been ongoing for some time on the African continent,<sup>6</sup> the current wave of reforms seems to have gathered momentum following the 1998 International Conference on Public Procurement Reform in Africa held in Abidjan<sup>7</sup> and continued to the most recent High Level Forum on Public Procurement Reform in Africa held in Tunis in November 2009,<sup>8</sup> both of which were sponsored by the African Development Bank Group (AfDB), the Common Market for Eastern and Southern Africa (COMESA), the West African Economic and Monetary Union (WAEMU), the African Capacity Building Foundation (ACBF), the Organization for Economic Co-operation and Development (OECD) and the World Bank.

The 1998 conference was attended by over thirty African governments and many more international development partners. At this conference, described as a ‘watershed in bringing to the fore the importance of public

3 On the reform of the WTO’s Agreement on Government Procurement, see S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011); and R. D. Anderson, ‘The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement in December 2011: What It Means for the Agreement and for the World Economy’ (2012) 21 *Public Procurement Law Review* 83. On the UNCITRAL Model Law on Procurement, see J. Tillipman and S. Arrowsmith (eds.), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (Eagan, MN: West, 2010–11); C. Nicholas, ‘The 2011 UNCITRAL Model Law on Public Procurement’ (2012) 21 *Public Procurement Law Review* NA111.

4 S. Karangizi, ‘Framework Arrangements in Public Procurement: A Perspective from Africa’ in Tillipman and Arrowsmith (eds.), *Reform of the UNCITRAL Model Law on Procurement*, note 3 above.

5 *Ibid.*, p. 244.

6 See B. Basheka, ‘Public Procurement Reforms in Africa: A Tool for Effective Governance and the Public Sector and Poverty Reduction’ in K. V. Thai (ed.), *International Handbook of Public Procurement* (Boca Raton, FL: Taylor & Francis, 2009), p. 133.

7 See S. Karangizi, ‘The COMESA Public Procurement Reform Initiative’ (2005) 14 *Public Procurement Law Review* NA51, NA52; African Development Bank Group, *COMESA Public Procurement Reform and Capacity Building Projects, Project Performance Evaluation Report* (2012), pp. 2–3.

8 See the Tunis Declaration on Public Procurement Reforms in Africa, 17 November 2009, [www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/FINAL%20DECLARATION%20TRANSLATED%20ENGLISH.26-11-09.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/FINAL%20DECLARATION%20TRANSLATED%20ENGLISH.26-11-09.pdf) (accessed 25 February 2012).

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procurement, its linkages with governance and the far-reaching implications of its poor performance on African economies',<sup>9</sup> parties agreed to:

- (a) the need for modernisation of public procurement in Africa to meet international standards and best practice;
- (b) the need to forge a consensus among all stakeholders on the urgency of engaging in public procurement reforms; and
- (c) the need to promote national reform programmes with a common strategic framework focusing on accountability, transparency and efficiency.<sup>10</sup>

The conference identified 'enabling legislation and regulations' as one of the four pillars of public procurement reform in Africa.<sup>11</sup> The scope of subsequent developments in public procurement regulation on the continent generally is staggering, with many African countries having adopted new regulatory regimes in the last ten years.<sup>12</sup> At the 2009 High Level Forum in Tunis, participants recognised the major developments in public procurement regulation since the 1998 Abidjan conference and renewed their commitment 'to consolidate the reforms and promote a multi-sector and participatory approach, mainstreaming public procurement into all State reforms in order to improve their economic impact, particularly in innovative sectors'.<sup>13</sup>

One of the most significant drivers of public procurement regulation reform has been the COMESA<sup>14</sup> Public Procurement Reform Project and its successor, the Enhancing Procurement Reforms and Capacity Project, both sponsored by the AfDB. Karangizi describes the 'twin objectives' of the reform initiative as follows:

9 S. R. Karangizi and I. Ndahiro, 'Public Procurement Reforms and Development in the Eastern and Southern Africa Region' in R. Hernández García (ed.), *International Public Procurement: A Guide to Best Practice* (London: Globe Law and Business, 2009), p. 113.

10 African Development Bank Group, note 7 above, p. 3.

11 Karangizi, note 7 above, NA53. 12 See the chapters in Part I of this volume.

13 Tunis Declaration on Public Procurement Reform in Africa Sustaining Economic Development and Poverty Reduction (17 November 2009).

14 The member states of COMESA are Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. This represents the largest economic zone in Africa, with an estimated annual public procurement market of US\$50 billion: African Development Bank Group, note 7 above, pp. 1, 2.

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The first was to contribute to the liberalisation of trade in goods and services in the COMESA region. Secondly, the project had as its broad objective the contribution to enhancing good governance in the Member States. This involves laying the groundwork for ensuring accountability and transparency, combating corruption, and creating an enabling legal infrastructure in public procurement in the COMESA countries.<sup>15</sup>

These objectives include the need to ‘modernise public procurement rules and practices throughout COMESA as well as to attain their uniformity and harmonisation’.<sup>16</sup> It is furthermore noteworthy that the project also aims to align such a uniform approach to ‘practices that [are] of internationally accepted standards’.<sup>17</sup> This programme therefore not only exerts its own influence on local public procurement regimes, but also acts as a medium to transfer wider international influences on national systems in the region. Under this initiative, COMESA has developed a model strategy for public procurement reform in its member states, which includes a regulatory model.<sup>18</sup> Most recently, at its 26th meeting held in June 2009, the COMESA Council adopted a standard set of public procurement regulations that applies to all public procurement within set thresholds, which are conducted within the common market.<sup>19</sup> Member states are required to align their domestic procurement legislation to these regulations for procurement within the thresholds. The COMESA reform initiative has been particularly successful. By 2012, fourteen of the nineteen COMESA members states had aligned their procurement systems with the model developed under the initiative and the members had committed to implementing the regional procurement system under the 2009 COMESA Procurement Regulations by 2014.<sup>20</sup>

Another AfDB supported<sup>21</sup> regional public procurement reform project is that of WAEMU.<sup>22</sup> This initiative developed over two phases, with the first phase involving comprehensive reviews of member states’ procurement regimes and resulting in the adoption of two regional public procurement directives in 2005 aimed at modernising and harmonising

15 Karangizi, note 7 above, NA52. 16 *Ibid.*, NA53. 17 *Ibid.* 18 *Ibid.*, NA56.

19 COMESA Legal Notice No. 3 of 2009, COMESA Official Gazette, vol. 15, No. 3, 9 June 2009.

20 African Development Bank Group, note 7 above, p. vi.

21 Other sponsors were the WAEMU Commission, ACBF and the International Organization of Francophone (OIF).

22 WAEMU, or UEMOA from its more commonly used French name, Union Economique et Monétaire Ouest-Africaine, consists of Benin, Burkina Faso, Côte d’Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

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national procurement systems of member states.<sup>23</sup> The second phase, starting in 2007, aims at implementing these directives in the national laws of member states.

While public procurement law reform in Africa has reflected international developments, the same cannot be said of the academic study of this area of law. Public procurement law is now an established field of study in the developed world. There are thriving research and teaching programmes in law schools in Europe and the United States of America in public procurement law and a substantial and ever expanding volume of literature on the topic.<sup>24</sup> In stark contrast, there are no comparable programmes on the African continent, and the literature dealing with public procurement law in Africa is almost negligible in comparison.<sup>25</sup> In many African states, there are no published studies of the local public procurement regulatory regime at all and neither has there been any major study of the topic on a cross-continental scale. The recent books by Phoebe Bolton<sup>26</sup> and Dominic Dagbanja,<sup>27</sup> setting out the public procurement regulatory regimes in South Africa and Ghana respectively, are rare exceptions. In addition, there have been a number of dedicated research studies<sup>28</sup> as well as chapters in books and articles published recently. However, these are still few and far between, with no published work on the topic in many African countries at all, as is indicated in

23 African Development Fund, *Appraisal Report Project in Support of Public Procurement Systems Reform in the WAEMU Zone (Phase II)* (2006), p. 1.

24 For institutions that focus on public procurement regulation in higher education, see the information on the Procurement Law Academic Network at [www.planpublicprocurement.org](http://www.planpublicprocurement.org), in the section on institutional membership. For literature, see the comprehensive global *Bibliography on Public Procurement Law and Regulation*, which aims to capture all major works on public procurement regulation published in English worldwide, developed by the EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation, [www.nottingham.ac.uk/pprg/documentsarchive/bibliographies/co?mprehensivpublicprocurementbibliography.pdf](http://www.nottingham.ac.uk/pprg/documentsarchive/bibliographies/co?mprehensivpublicprocurementbibliography.pdf) (accessed 25 February 2012).

25 In the *Bibliography on Public Procurement Law and Regulation*, above, works dealing specifically with procurement in Africa comprise only nine pages of the 325-page document. In contrast, works dealing specifically with procurement in Europe cover ten times that amount of pages (totalling 91 pages).

26 P. Bolton, *The Law of Government Procurement in South Africa* (Durban: LexisNexis Butterworths, 2007).

27 D. N. Dagbanja, *The Law of Public Procurement in Ghana* (Saarbrücken: Lambert Academic Publishing, 2011).

28 See e.g. S. De la Harpe, 'Public Procurement Law: A Comparative Analysis' (unpublished doctoral thesis, University of South Africa, 2009); K. T. Udeh, 'A Critical Analysis of the Legal Framework for Supplier Remedies System of Kenya in the Light of International Standards' (unpublished LLM dissertation, University of Nottingham, 2008).

the ‘Materials on public procurement regulation in Africa’ section at the end of this volume. As a result, it is extremely difficult, if not impossible, at present to develop an understanding of the state of public procurement regulation on the continent. This state of affairs hampers effective legal development in Africa, and also limits the ability of those working in procurement outside Africa to incorporate African perspectives into their work, including in research and policy-making activities that have a potential impact on Africa (such as the World Trade Organization’s Agreement on Government Procurement and the UNCITRAL Model Law on Public Procurement). In 2009, the Public Procurement Research Group at the University of Nottingham and the University of Stellenbosch Faculty of Law launched a three-year research partnership, funded by the British Academy, aimed at addressing this deficit in scholarly engagement with procurement regulation in Africa. This collection is the primary outcome of the partnership.

The aim of the book is to provide an analysis of the legal rules governing public procurement in a cross-section of African systems and to explore key issues emerging from such a comparative perspective. The objectives are to provide up-to-date information on the main legal rules governing public procurement in a number of African systems; to facilitate a comparative perspective on public procurement regulation on the African continent; to provide context-based analysis of the regulatory situation that is relevant for policy-making and academic debate in this field; to assist African domestic development and to inform legal research and policy-making; and to enable researchers outside Africa to incorporate African perspectives into their work.

## 2. Structure of the study

The book is divided into two parts. The first part comprises doctrinal analyses of the legal rules governing public procurement in nine African states. These states are Botswana (Chapter 2), Ethiopia (Chapter 3), Ghana (Chapter 4), Kenya (Chapter 5), Namibia (Chapter 6), Nigeria (Chapter 7), Rwanda (Chapter 8), South Africa (Chapter 9) and Zimbabwe (Chapter 10). While this collection of countries does not claim to be representative of the entire continent, it does contain examples from the major sub-Saharan geographical areas. The choice of systems to include has been guided by a desire to present a broad cross-section of African systems from across the continent, but has also been determined by the pragmatic factor of keeping the study to a manageable scope working within language and

access constraints. These constraints have also meant that our focus has been primarily on English-speaking African countries and thus largely on common law systems. However, Ethiopia and Rwanda represent systems with a civil law tradition and a number of countries, including Namibia and South Africa, have mixed common law/civil law systems.

The analysis of each system considers both hard law (jurisprudence and legislation) and soft law in the form of guidance, which is important in some legal systems in this area. The analysis of the individual African country systems in Part I is organised in accordance with a detailed template that has been set up by the editors. This seeks to ensure that all chapters provide pertinent background information and use standard terminology to describe phenomena, and a standard approach to analysis, making the information clear to all readers; that all the chapters comment on all key issues; and, related to the above points, that the position of different African states can be compared and contrasted with ease.

In the second part of the book, the current state of procurement regulation in Africa is considered by reference to key themes in which regulation can play an important role using a comparative methodology based in part, but not exclusively, on the country-specific analyses in the first part. These are: the impact of development aid on procurement regulation and policy (Chapter 11); procurement methods (Chapter 12); supplier complaint (remedy) systems (Chapter 13); the use of regulatory techniques to address corruption (Chapter 14); and the use of procurement to promote social policy objectives (Chapter 15).

The remainder of this chapter sets out the basic principles of public procurement regulation to serve as a point of departure for the individual country studies in Part I and the thematic studies in Part II.

### 3. Principles and aims of public procurement regulation<sup>29</sup>

Public procurement regulation functions within the tension between the ostensibly private or commercial nature of the activity at hand, that is, the purchasing of goods, services and works in the market, and the public nature inherent in the contracting authority's existence and powers. A too narrow regulatory focus on the commercial nature of the activity

29 This section draws heavily from S. Arrowsmith (ed.), *Public Procurement Regulation: An Introduction* (2010), Chapter 1, which is freely available at [www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf](http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf) (accessed 2 April 2012).

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may lead one to lose sight of the public function necessarily underlying the procurement. Public procurement is thus never an end in itself, but always a means to a public end: for example, books are purchased from private publishers to provide public education or medicine from private pharmaceuticals to provide public health services. Public procurement regulation should thus effectively take account of these public functions. At the same time, it is obviously in the public interest for the contracting authority to obtain value for money in its procurement, that is, the best goods, services or works on the best terms. The latter perspective on public procurement focuses the attention more on the commercial nature of the conduct and emphasises the need to allow contracting authorities to benefit from the private market. The overarching objective of public procurement regulation is thus to obtain a balance between these competing aims.

Value for money has in many systems come to be considered the key objective of public procurement regulation.<sup>30</sup> This is also true of the African systems reviewed in this book as appears from the chapters in Part I.<sup>31</sup> While it is thus often argued that this is the primary objective of most public procurement systems, this is, however, by no means a universal view, nor perhaps true of every procurement system. Dekel, for example, considers that integrity rather than value for money is the overriding goal of competitive bidding in public procurement, and also that the principle of equal treatment as an independent objective of the procurement process should be equal in status to value for money.<sup>32</sup> Certainly, it is the case, however, that many of the regulatory rules that apply in public procurement – such as the basic requirements for transparency and competitive bidding – have the realisation of value for money as one of their aims. Such rules are designed, in particular, to ensure that value for money is not prejudiced by inefficient behaviour, and also that it is not prejudiced by certain deliberate conduct, notably corrupt behaviour and (in some systems) discrimination in favour of national firms.

For taxpayers, value for money is of obvious concern, not only to ensure that public funds achieve as much as possible, but also to ensure

30 See Arrowsmith, *The Law of Public and Utilities Procurement*, note 1 above, pp. 2–5; Arrowsmith, Linarelli and Wallace, *Regulating Public Procurement*, note 1 above, pp. 15, 28–31.

31 See section 2.1 of the respective chapters in Part I below, setting out the objectives of public procurement policy in each of the countries investigated.

32 O. Dekel, 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 *Public Contract Law Journal* 237.



general control over public spending. Value for money does not simply mean acquiring the goods at the lowest price. The quality of the goods and the terms upon which the goods are procured are also important considerations in achieving value for money.<sup>33</sup> The objective of value for money can thus be seen as consisting of three aspects:

- (1) ensuring the goods, works or services acquired are suitable; this means both: (i) that they can meet the requirements for the task in question; and (ii) that they are not over-specified ('gold-plated');
- (2) concluding an arrangement to secure what is needed on the best possible terms (which does not necessarily mean the lowest price); and
- (3) ensuring the contracting partner is able to provide the goods, works or services on the agreed terms.

In order to achieve value for money, public procurement rules commonly require contracting authorities to purchase through some competitive method, allowing multiple suppliers to compete for the contract. Competition is thus a crucial means to achieve value for money (but not, however, an end in itself, as is discussed further below). From a legal perspective, the enforceability of clear rules requiring competition, which is often understood as part of the notion of transparency in procurement, is another key mechanism to ensure value for money.

However, efficiency in conducting the process of procurement is another important objective that also holds significant cost implications and that must be balanced against competition as a means to achieve value for money. From an efficiency perspective, it would not be sensible to approach hundreds of suppliers to buy an item of small value, since the better value for money that may be achieved through such a comprehensive procurement method will almost certainly be negated by the high cost of the procurement method.<sup>34</sup> An important objective of public procurement regulation is thus to define the trade-off between value for money and efficiency in procurement.

Value for money and procedural efficiency are not, of course, goals that are unique to public procurement, but are key considerations in private contracting as well. On their own, these two objectives would thus not justify the existence of distinct rules governing public procurement. The

33 See Arrowsmith, Linarelli and Wallace, *Regulating Public Procurement*, note 1 above, pp. 28–31.

34 *Ibid.*, pp. 31–2.

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rationale for a distinct set of rules governing public contracting lies in the distinct nature of the procuring entities. Even in its commercial guise, that is, as a player in the private market, government has distinct characteristics setting it apart from other market participants.<sup>35</sup> Government is also, of course, subject to non-commercial requirements distinguishing it from other buyers. These public considerations play an important role in shaping public procurement regulation. In broad constitutional terms, government is accountable to the public for all its actions. It follows that the public has an interest in government conduct and that government is not simply free to pursue its own private interests in procurement as a private party would be.<sup>36</sup> From a regulatory perspective, this means that the public interest must be factored into the way that government procures, i.e. in the manner that procurement decisions are taken, as well as that there must be mechanisms for holding government accountable, including mechanisms to enforce public procurement rules.

Apart from the interest that the public has in state contracting, government is also often subject to higher standards of fairness and integrity as compared to private parties. A common view is that a higher standard of fair dealings should be expected of government, and even in commercial transactions government should remain the role model or 'moral exemplar' for society.<sup>37</sup> This perspective entails that procuring entities should treat bidders in a particular procurement fairly and equally. It also requires that government makes participation in public procurement contracts open to all members of society so that everyone can fairly share in government business. In some countries, such a policy in public procurement may be a reflection of a more general value adopted in those countries of equal treatment of persons by the administration.

It is important to note at this point, however, that the concept of equal treatment in public procurement may take on two different roles. Thus, it may serve as an objective of the procurement process in its own right, reflecting the notions outlined above such as the right to equal opportunities in government business.

In addition, however, it can also serve simply as a means to achieve other objectives of the public procurement system, such as value for money in

35 On the state as *commercially* distinct from other market participants, see G. Quinot, *State Commercial Activity: A Legal Framework* (Cape Town: Juta & Co., 2009), pp. 155–7, 224–9, 268–9.

36 *Ibid.*, pp. 102–4, 227–8.

37 *Ibid.*, pp. 130–1 and in particular p. 131 note 561; Arrowsmith, *The Law of Public and Utilities Procurement*, note 1 above, p. 6.