

How Relevant is the Principle of Transparency in Public Procurement?

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Abstract

Transparency in governance in general, and in public procurement in particular, has become the focus of lawmakers and civil society in preventing corruption among other objectives. In this paper, the relevance of the principle of transparency in public procurement has been espoused using a framework of definitions and reviews of purpose and importance of public procurement transparency. Specifically, the agency theory has been deployed to explain the purpose and importance of public procurement transparency. Through this the centrality of the principle in the fight against public procurement corruption has been confirmed. Although this essay espouses the position that there cannot be corruption-free procurement system without transparency, it has been argued that, despite its importance and attempts at legislating for it by many regimes, there have been difficulties in practice at achieving complete transparency.

Keywords: Public Procurement Transparency, Why Public Procurement Transparency? Transparency and Corruption,

1. Introduction

Various commentators on modern systems of governance have professed the principle of transparency as a key factor in promoting good governance. It has been generally known for some time now that public entities are obligated to be transparent not only because the law may require it but also because of the real benefits provided by transparent systems of governance (Issing, 2005). The significance of transparency is exemplified in the extent to which every significant institution goes to operate a press office in recent times (Issing, 2005).

In public procurement, the principle of transparency has been recognised by legislators, government officials, procurement practitioners, academics and professionals alike as a necessary condition for reducing corruption (Jeppesen, 2010 & Bovis, 2009). But what does public procurement transparency mean? Is the principle of transparency that relevant in the system for acquiring goods, services and works for the public? If the principle of transparency is considered relevant and important, why is transparency in a public procurement system not absolute and sometimes difficult to achieve? An attempt has been made to provide answers to these questions in this essay.

2. The Meaning of Public Procurement Transparency

In its generic form, transparency has been defined as “openness, honest visibility and ready accessibility to information” about individuals, businesses and government entities (Rawlins, 2008). In principle, transparency requires that people at the helm of governance, be they public officials or managers and directors of companies and organisations operate in an open and honest manner, such that observers are enabled to easily see through their activities (Rawlins, 2008). Where there is transparency, officials consciously reveal in a readily accessible manner, true, adequate, useful and balanced information such as would enable interested parties to form informed opinions about the organizations they are interested in (Wakefield and Walton 2010). Transparency is not achieved only by making information available. Availability of information must be accompanied by relevance, accuracy, timeliness, predictability and comprehensibility which are necessary conditions for it to meet the standard definition of transparency (Wakefield and Walton 2010).

Where there is no transparency, there is opacity. There is opacity where officials are prohibited from releasing information by means of official code of secrecy or where they deliberately act under cover. Between transparency and opacity lies a continuum of a grade of transparency that Wakefield and Walton (2010) have dubbed translucency. Translucency represents a condition in which full disclosure of information is not considered appropriate and therefore information may be released just enough to “inform, guide, and engage key” stakeholders.

The concept of transparency connotes conscious release of all conceivable information by the holder, whether as government official, business or government entity or even a private individual, to those for whom it is relevant. However, in practice, the definition of transparency that implies unfettered and complete openness may not be appropriate because of ethical, legal and logistical constraints. As a result of these constraints, the meaning of transparency may be restricted to the release of information that is ethically and legally allowed (Rawlins 2008).

The need may arise to distinguish between voluntary transparency and involuntary transparency. An example of voluntary transparency is where an individual, who, although is entitled to privacy as a fundamental right may decide for personal reasons to open up and volunteer to provide information to others. Involuntary transparency often occurs in governance where it may be compelled by the law or regulation because of its implication for good governance. Generally, governments and organizations may strive to provide information that is true and honest as a moral obligation and a virtue for good government (Lord 2006). Moreover, where the need for transparency becomes a matter of public interest, laws or regulations may be formulated to compel it. Although involuntary transparency (i.e. that compelled by law or regulation) may be more relevant in public procurement, in practice, voluntary transparency is required to make transparency more meaningful and practicable.

As applied to public procurement, the principle of transparency has been described as the attributes of a public procurement system that enable all relevant stakeholders to be conscious of the processes and procedures leading to the award and the management of public contracts (Wittig, 2005 & Bertók, 2005). The relevant public procurement stakeholder may be an official of the procurement entity acting on behalf of government; a business sector representative either as contractor, supplier, consultant, prospective contractor, supplier or consultant; a civil society organisation or a member of the public at large. Under a transparent system stakeholders are made to know or are empowered to find out what is going on in a public procurement process if they so wish. Thus, in a transparent public procurement system all participants have access to reliable, accurate, relevant, complete and timely information on the procurement process (Kolstad & Wiig, 2009; Organisation for Economic Co-operation and Development and World Bank, 2006). Such a system provides sufficient publicity for contract opportunities, the terms of engagement governing the procurement process including the procedures at all stages, the qualifying requirements for participation in the process and the criteria for taking the award decision (Evenett & Hoekman, 2003 & Arrowsmith, 2011a).

To enable transparency in the public procurement system, the contract management processes should be well-documented and widely publicised in a manner that ensures easy accessibility to all information by all the stakeholders. Moreover, such a system should ensure that the award decisions are based on a widely publicised set of criteria and the winner's name and prices are published. It should also provide a stress-free system for verifying compliance with procedures (Evenett & Hoekman, 2003 & Arrowsmith, 2011a). The system should also provide an opportunity for rectifications and restitutions in case of proven compliance deviations (Evenett & Hoekman, 2003 & Arrowsmith, 2011a). A public procurement system that enables transparency must provide information on what a player in the procurement process should know and do in seeking award of a government contract. As a principle, in a transparent public procurement system, decisions are based on rules rather than discretion by officials.

In a transparent system all prospective suppliers and contractors have equal opportunity of being selected in a competitive manner. The OECD-World Bank methodology prescribes it as good practice to ensure that only firms with proven record of guilt for corruption (or disqualified as a result of legal "prohibition of commercial relations with the country of the participant" or adherence to the UN Security Council Sanction) can be excluded from participating in a public procurement activity (Organisation for Economic Co-operation and Development and World Bank, 2006).

The practical implication of the principle of public procurement transparency is accessibility to all information regarding the laws, procedures, regulations and the existence of procurement opportunities (Bertók, 2005) and this should be achieved by putting in place mechanisms right from the commencement of the process of the procurement activity that will make the whole world aware of what, how and when the government proposes to buy. Transparency should continue to reflect fully throughout all the stages of public procurement up to the completion of the process, from preparation, through solicitation, award, management, invoicing to payment.

But accessibility to information is not a sufficient condition for transparency. Participants must understand the information and must have the capacity to react appropriately to what they get to know (Lindstedt and Naurin, 2005). Such information must be comprehensive, simple and easy to understand (Kolstad & Wiig, 2009), providing avenues for clarifications. Therefore a transparent system should give ample opportunities for the education of participants (Kolstad & Wiig, 2009).

In principle, the definition of transparency could be stretched to include bringing visibility to all stakeholders, insiders and outsiders alike, to the extent that they are substantial and useful to them (Wakefield and Walton 2010). However, Schooner *et al.* (2008) have stated that when used in relation to public procurement, transparency should rather emphasise the provision of opportunity to those outside the public procurement process (outsiders) to see into its procurement activities, since by definition, insiders (public procurement officials) are already beneficiaries of information asymmetry. Indeed, in practice, the insiders are believed to be in command of the information on procurement activities to the near exclusion of other stakeholders (La Chimia *et al.*, 2011 & Trepte, 2005). Transparency will enable the outside stakeholders to look into the processes leading

up to the acquisition for the public (Schooner *et al.*, 2008). But this writer is in agreement with some other authorities on public procurement who posit that transparency should apply equally to all stakeholders, whether as insiders or outsiders (Wakefield and Walton 2010, Beth, 2005, Trepte, 2005 & Wittig, 2005). The principles of transparency require that all stakeholders, be they officials of the procurement entity, business sector representatives, civil society or the government, should be given appropriate and proportionate doses of information. Indeed transparency must manifest among all stakeholders in any particular procurement activity since the relevance of the concept of transparency may be appreciated from the peculiar perspective of each group (La Chimia *et al.*, 2011) since they all suffer from one kind of information asymmetry or the other (Trepte, 2005).

3. The Relevance of Transparency in a Public Procurement System

The relevance of transparency in public procurement may be explained by the agency problem. Whenever there is an agency relationship, the agency problem arises (Jensen & Meckling, 1976) because the agent always has monopoly over certain information which he can exploit to his personal benefit against the interest of the principal. Layers of principal-agent relationship exist in the public procurement process. For example the politician in government who uses public funds to procure for public good acts as an agent of the citizens who are the eventual principals as they vote to elect the politician into power. Very often the power of the citizenry to hold the politician accountable may coalesce into civil society organisations who may act to exact that authority on their behalf. But the government as a buyer uses its agents, the public procurement officials in the actual process of buying. In this regard the officials become the agents of government.

Public procurement officials, because of their strategic position in the public procurement process, are arguably the controllers (and in many cases, if not restrained, may be the monopolists) of information on procurement activity from the planning phase through the contract award process to contract management stage (La Chimia *et al.*, 2011). In public procurement, it is the problem of this “information asymmetry” that may accentuate the agency problem.

A “resourceful, evaluative and maximizing agent” would want to benefit from the agency relationship against the interest of the principal taking advantage of the information asymmetries (Jensen & Meckling, 1976). On the other hand an evaluative, discerning, objective and maximising principal would put in place measures that would minimize the agency problem. One of these measures is the requirement by the principal that the agent accounts for his stewardship and this is required to be done manifestly. The principals would require transparency in this accountability process which would enable them to effectively control and monitor the agents. But on the part of the agents, transparency is not only required to monitor and control them, it is also required to assist them in the performance of their duty. For example, procurement officials, agents, may need information on the procurement laws and regulations as a means to ensure effective management of the procurement process (Trepte, 2005) in the performance of that duty.

Similar information asymmetries may exist between the procurement officials and the business sector participants in the public procurement process. By the stretch of the agency argument, it can be inferred that the business sector participants, as agents of development, are also agents of government and therefore agents of the citizens. The principle of transparency therefore requires that relevant information about the business sector participants is accessible to such stakeholders as civil society, procurement officials or even to some extent other businesses. The procurement officials need to have access to information on business sector participants and the market conditions to enable them take sound, objective and informed procurement decisions (Trepte, 2005). On the other hand, the business sector participants would require access to information controlled by the officials to enable them participate fully in available business opportunities and to meaningfully engage in any protest process thereby effectively holding procurement officials accountable. In the case of civil society, they would be interested in information that will enable them to assess the transparency, fairness and the economy of the procurement process.

In all the above relationships, transparency will ensure that the actions of the stakeholders that could otherwise be hidden away from each other are rather made easily discernible and verifiable (Trepte, 2005). The main purpose of transparency therefore is to promote openness in the public procurement system so that all the stakeholders will be enabled to have unhindered access to information about the procurement activities and thereby reduce potential public procurement corruption. Generally, transparency, and the resultant access to information enables relevant stakeholders to participate meaningfully in the procurement activity and in the process, facilitates complaint procedures, enables monitoring and accountability and thereby put corruption in check (Strand, 2010).

Bovis (2009) has named the principle of transparency among the most essential and notable principles of any system of public procurement. For this reason, transparency is considered a major component of good public

procurement practice which, if applied properly, can lead to reduced corruption (Jeppesen, 2010 & Bovis, 2009). Lack of transparency is an enabling environment for corruption. Indeed corruption flourishes in opacity (Schooner *et al.*, 2008), but transparency provides the searchlight which serves to expose the shadowy public procurement corruption which otherwise can blossom in phenomenal proportions. Since in a transparent system there is limited scope for discretion by procurement officials, there is virtually no need for participants to bribe officials before winning contracts and it becomes unprofitable to collude (Ohashi, 2009). Again, when the players in a public procurement system are aware of the existence of transparency, the fear that they may be exposed and likely punished will compel them to desist from corrupt practices (Kolstad & Wiig, 2009). The 2004 Global Forum identified opacity in public procurement to be a major challenge in the effort to bring integrity to public procurement (Burton, 2005). Hence transparency has been recognized by the OECD as a major pre-requisite for enhancing integrity and deterring corruption in public procurement (Beth, 2005). As estimated by Pieroni and d'Agostino (2009) the absence of transparency yielded more corruption in Africa and transition economies. The corollary is that transparency can lead to reduced corruption in Africa.

Furthermore, transparency enables stakeholders and society at large to ask appropriate questions, monitor progress and subject the procurement process to scrutiny. Thus transparency provides appropriate social audit trail. In a transparent system, participants have the confidence and assurance that when the system is subjected to scrutiny at anytime, it can be seen to be capable of ensuring that nothing improper had occurred (Organisation for Economic Co-operation and Development and World Bank, 2006). The openness, equality, equity, simplicity and fairness that are generated by transparency enable competitive tendering which in turn lead to reduced public procurement corruption.

Various authorities (professionals, academics, World bodies etc) whose pronouncements matter on public procurement matters are in agreement on the assumption that transparency bears indirect relationship to corruption {Wittig, 2005, Beth, 2005, Schooner *et al.*, 2008, Bertók, 2005, the World Bank (Organisation for Economic Co-operation and Development and World Bank, 2006), the OECD (Organisation for Economic Co-operation and Development, 2009), the Procurement Lawyers' Association (PLA) (Procurement Lawyers' Association, 2010), (Kolstad & Wiig, 2009) and Arrowsmith, 2011b}. An empirical testimony of this relationship is also provided in Brunnetti and Weder (2003) who concluded that the more transparent the system of procurement, the less corruption there tends to be and vice versa. Consequently these bodies and many other donor institutions and countries have made improvement in transparency a major area of concern in bringing reduced corruption to the public procurement systems of the beneficiary countries, particularly the developing ones. In Finland, the role of transparency in the public procurement process is regarded as so important and significant that, most of the relevant documents in the public procurement process, particularly the tender documents and those relating to the actual award decision are classified as non-confidential and therefore are accessible to the wider public (International Legal Group, 2010).

Apart from checkmating corruption and enhancing integrity, there are other benefits accruing from improved transparent procurement systems. Transparency provides an effective means to eliminate, identify or correct impropriety and waste in the procurement system (Jeppesen, 2010 & Wittig, 2005). Transparent procurement procedures can lead to a more efficient allocation of resources as a result of increased competition. Moreover, transparency enhances efficiency in the procurement system which eventually results in higher quality procurement. As tenderers get to have access to more information about the requirement and the procurement environment they are enabled and positioned to provide better solutions with positive effect on efficiency and value for money. Good quality procurement and efficient resource allocation will in turn lead to budgetary savings for governments.

Transparency can also help attract more investment by reducing the risk of doing business. As more businesses take advantage of the openness, transparency and associated competition for public contracts, business opportunities become more predictable whilst businesses become more confident in taking risks. Another important welcoming effect of transparency is that by enhancing competition it forces tenderers to show their true values thereby giving rise to lower contract prices (Estache and Iimi, 2009). Analysis by Ohashi (2009) on the effect of transparency on government expenditure in Japan revealed a reduction of procurement cost by up to 8% with improvement in transparency.

It is worth noting that transparency, as applied to governance in general, is an ingredient for ensuring participatory democracy. As the activities of public officials are made open to stakeholders, the latter are empowered to make positive and meaningful contribution to the process of governance. Furthermore, as the governed get convinced that their participation is assured, they tend to accept the process of governance and thereby are encouraged to internalise the process and outcomes of governance.

4. Is absolute Transparency always Desirable and Allowable?

Although the positive relationship between transparency and reduced corruption is not in doubt, in practice absolute transparency may not be always desirable, necessary or even allowable. In the first place, if transparency is conceptualized as absolute, implying a requirement to provide every conceivable piece of information the decision making process will run into implementation hiccups as “the sheer volume of information” can choke the communication channel and overwhelm recipients (Lord, 2006). Indeed, “the costs of procuring and processing” more information, may sometimes not improve the utilitarian expectations of users (Blackwell, 1953) and may sometimes not be appropriate on cost-benefit basis. Moreover, under certain conditions and circumstances it may not be ethically, legally and logistically appropriate to disclose information (Wakefield and Walton 2010). The concept of transparency therefore may be evaluated within the boundaries of ethical, legal and logistical constraints. The existence of laws that prohibit the release of certain information on the basis of confidentiality, privacy and national security may be grounded in this reasoning. It is submitted that in practice, the existence of ethical, legal and logistic constraints render the search for absolute transparency an exercise in futility and hence a mere academic exercise.

Again, in practice unmitigated transparency may expose the transparent entity to several risks since one cannot be sure of what the holder of information will do with it. Naturally, holders of certain information are tempted to hide them (Rawlins, 2008) unless the coercive force of the law is applied to make them available.

But in some cases, officialdom may take conscious steps to keep information out of the reach of stakeholders. In certain circumstances operators of the system may be reluctant in allowing transparency for the simple reason that opacity will further personal and selfish interest and enable them to cover same. Indeed this may happen under autocratic systems, where officialdom, including civil servants and procurement officials may benefit from opacity. In reality, not every entity found preaching the need to be transparent may be genuinely interested in it (Wakefield and Walton 2010). Some may therefore employ all resources at their disposal including subterfuge to reduce transparency. Sometimes they can go to the extent of gagging free press and civil society and suppressing opposition in general. In some cases laws that enable transparency are resisted and reasons are found to shroud information under official secrecy regulations. Even under some democratic dispensations transparency may be ignored using flimsy justifications (Vishwanath & Kaufmann, 2001).

With reference to transparency as it affects public procurement, the increased knowledge associated with transparency may prove counterproductive. According to Jenny (2005) unmitigated transparency may breed anti-competitive practices, facilitate tacit collusion among the tenderers and thereby foment corruption. Under certain circumstances, the bureaucracy associated with the need to provide more information may indeed assist bribe givers to identify potentially corrupt officials (Bac, 2001). Bac (2001) argues that, this may facilitate corruption by enabling easy identification of people with whom “connection” may be established for the purpose of corrupt practices. In addition, knowledge acquired by potentially corruptible officials through transparency measures will enable them to learn the “ways and means” of perfecting and promoting the art of corruption.

Moreover, transparency for the sake of it is not a final-one-stop cure for the corruption in procurement syndrome. It must be supported by other corruption-reducing imperatives including assurance of effective competition and efficiency in managing public resources (Beth, 2005). Nowadays, as indicated by policy developments and experience in advanced countries spearheaded by the United States, the OECD and WTO, and reflected in “internationally shared norms”, effective competition is being maintained through the international trade liberalisation crusade (Anderson and Kovacic, 2009).

In addition, sometimes unmitigated transparency may be at variance with other requirements of good governance. It is therefore important to establish an appropriate balance between transparency and other tenets of good governance by ensuring that information is released with due regard to established rules (Wittig, 2005). Thus absolute, unmitigated transparency may not be always desirable. The degree of transparency and openness should be adapted accordingly to suit the nature, status and value of recipient of information, the stage of the procurement cycle, the sensitivity of information, the size of the contract and the nature of the item to be procured. Therefore it becomes necessary to time the release of information to suit the nature, status and value of recipients.

Sometimes the need to protect confidentiality and sensitivity of information may make some level of opacity appropriate. Thus when the need arises legal provisions may be used to restrict disclosure of certain information if it would run contrary to the law, impede law enforcement, against public interest, prejudice the commercial interest of the parties or inhibit fair competition as provided in Section 28 (4a) of the Public Procurement Law of Ghana (Act 663). Restrictions may be placed on the extent of disclosures of information to outsiders when they are considered sensitive or confidential as in the typical case of open tenders where detailed content of tenders containing commercial, technical and strategic secrets may not be disclosed to competitors. Confidentiality in this case will create a level playing field for participants, prevent collusion, enhance corruption control without

the attendant bureaucratic bottlenecks in the system (Organisation for Economic Co-Operation and Development, 2008), protecting the interest of participants in the process.

Again, procurement activities requiring urgency as in emergencies during natural disasters cannot wait for the organisation of competition and there may be the tendency towards less transparency. In such exigencies as may be the case in extreme urgency or national security, full competition may not be feasible but sub-competitive alternative procedures like sole sourcing and restricted tendering that are normally resorted to in such cases may actually promote opacity. It is advisable if reduced transparency becomes necessary, that risks to integrity are checkmated by effective monitoring and control mechanisms. These should include they implementation a well publicised rules and conditions in making such exceptions..

Sometimes benefits from full disclosure may not be worth the cost associated with it simply because of the value and nature of the contract. Careful balance would have to be drawn between the expectations of full transparency and other considerations, like expediency, efficiency and value for money.

5. Conclusion

In this paper the principle of Transparency has been shown to be relevant in the process of acquiring goods, service and works as a function of modern governance using the agency theory. It has been argued that, eventually, the relevance of transparency will lie not only in its capacity to bring openness to stakeholders and thereby check actual corruption and reduce perceived corruption but also to serve other important purposes including: bringing efficiency to the public procurement business through the elimination, identification or correction of impropriety and waste in the procurement system, the reduction of procurement cost, bringing down contract prices and improving value for money.

It is therefore not surprising that anti-corruption measures in public procurement are built around the principle of transparency. But transparency is not an all cure remedy to corruption. Over reliance on transparency may not be always appropriate as it may also have counterproductive tendencies under certain circumstances. Moreover, anti corruption advocates must look out for threats to transparency arising from actions by people in authority, whose nefarious activities may be exposed by the light of transparency.

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