

ETHICS IN PUBLIC PROCUREMENT: A MISSING LINK IN THE EDUCATION AND TRAINING OF CONSTRUCTION INDUSTRY PRACTITIONERS

By: Ramadhan S. Mlinga - Public Procurement Regulatory Authority (PPRA)

Abstract

Construction industry practitioners are involved in various stages of procurement of construction projects. Successful implementation of such projects depends on how well they have been conceived, designed, tendered, supervised and constructed. This has a bearing on the technical and ethical skills of those involved in the whole process. The author reckons that the problems of poor quality, late completion and cost overruns of construction projects are attributed not only to the technical skills of the experts but rather their ethical skills.

The paper attempts to discuss the ethical issues related to procurement of construction projects to form a basis for discussion on what steps should be taken to equip the construction industry practitioners with necessary ethical skills.

1.0 INTRODUCTION

1.1 Background

The construction industry, taken from public procurement point of view, brings in a matrix of sophisticated cases of procurement. Given that a procurement cycle encompasses all the processes from the identification of the need to the eventual disposal of an asset, it is obvious that procurement of some the construction projects which, with the existing techniques and technology, is tedious and complicated. It is therefore, no wonder that we need to equip our construction practitioners with the best education and training that will enable them to deliver, and in this particular case, in all stages of procurement from identification of the need to the eventual disposal of the asset.

In Tanzania, we have, although not adequate, a sizeable number of construction industry practitioners including economists, planners, architects, quantity surveyors and engineers that have been for some time involved in the realization of some completed and ongoing construction projects.. Unfortunately some of these projects have not been successfully implemented as expected. Cases of poor quality, late completion and cost overruns are being reported in many projects. A question to ponder here is: Are our experts devoid of the necessary education and training required to implement such projects? The analysis of the author, being a construction industry expert himself, is that most Tanzanian experts have the necessary skills to handle the technical aspects of these construction projects. What they lack is ethical skills – which to a large extent is related to experts attitude's towards the works they design, supervise or construct. Some people have developed an attitude that to make easy money you just need to establish a consulting firm or a construction company. Indeed some companies are established only to rob tax payers money through dubious contract deals with public employees.

Some public employees establish own companies and award contracts to their own firms. All these are ethical issues, which to the author, are not very well articulated in the current education and training of construction industry practitioners.

1.2 Definition of Procurement

Procurement encompasses the whole process of acquiring goods and/or services. It begins when an organization has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the goods and/or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract. Procurement also extends to the ultimate disposal of property at the end of its useful life.

Ethics and probity are important considerations throughout the entire process of procurement. “Procurement is a hotbed of ethical challenges because the decisions and choices made in procurement affect the entire public sector.”

2.0 ETHICS IN PROCUREMENT

2.1 Ethical Behaviour

Value for money is the core principle underpinning public procurement, incorporating ethical behaviour and the ethical use of resources. The application of the highest ethical standards will help ensure the best achievable procurement outcome. It entails more than just getting the best price – ethics are important when considering value for money. Figure 1 shows five important pillars of any good public procurement.

Ethical behaviour and good probity practices enhance the procuring entities reputation in the marketplace. This increases business confidence in procurement processes, and is likely to maximize the number of suitable responses for future tenders. Equally important ethical behavior on the part of the contractors or consultants increases their chances of completing the assignment successfully and therefore the possibility of winning more tenders in the future.

2.2 Abuse of Power/Position

Officials involved in procurement must not make improper use of their position. Officials may have access to very confidential and/or market sensitive information. It is unethical to use inside information provided to the Procuring Entity as part of a tender process, either for the material benefit of the official or for another person.

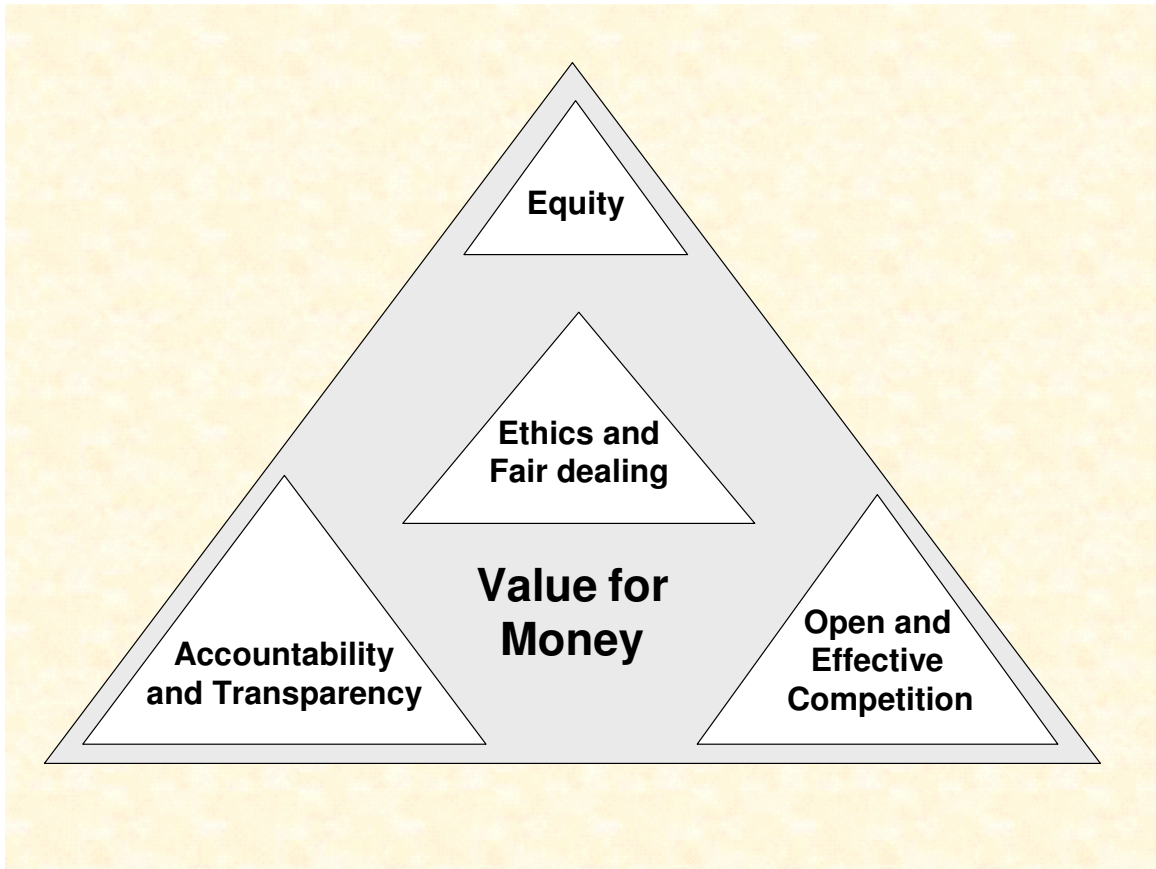


Figure 1: Pillars of Good Public Procurement¹

Employees involved in public procurement should be mindful of potential conflicts of interest that might arise and must not use their position to gain or seek to gain a benefit for themselves or any other person. They must also strive to avoid *perceptions* of conflicts of interest, or of undue influence, as well as avoiding them in fact. It is important that businesses and the general public are confident that employees involved in procurement are impartial and professional in their approach, and that their activities will withstand public scrutiny. Officials conducting procurement need to be able to demonstrate that their decisions are fair and equitable, and made in accordance with the law, Procuring Entity rules and guidelines, and conditions of contract.

3.0 PROBITY IN PROCUREMENT

3.1 Benefits of Probity

Probity is the evidence of ethical behaviour in a particular process. Probity is defined as complete and confirmed integrity, uprightness and honesty. It contributes to sound procurement processes that accord equal opportunities for all participants.

¹ Public of South Africa, General procurement Guidelines

A good outcome is achieved when probity is applied with common sense. Probity should be integrated into all procurement planning, and should not be a separate consideration.

Procurement must be conducted with probity in mind to enable purchasers and suppliers to deal with each other on the basis of mutual trust and respect. Adopting an ethical, transparent approach enables business to be conducted fairly, reasonably and with integrity. Ethical behaviour also enables procurement to be conducted in a manner that allows all participating suppliers to compete as equally as possible. The procurement process rules must be clear, open, well understood and applied equally to all parties to the process.

Conflicts of interest may arise in the course of business operations, especially during the procurement process. Possible conflicts are extremely varied but include pecuniary interests, legal interests, associations with external associations and non-direct personal interests. In carrying out one's duties, officials must not allow themselves to be improperly influenced by family, personal or business relationships.

Good probity management aims to:

- minimise conflicts/problems and the potential for litigation
- avoid the potential for corrupt practices to occur
- produce better outcomes against stated objectives
- maintain public sector integrity

3.2 Procedures for Ensuring Probity

Ways of maintaining probity in the procurement process include the separation of duties and responsibilities. For example, different officials are responsible for spending approval, evaluation of tenders, and authorisation of award of tenders. Figure 2 shows the separation of duties in Procuring Entities aimed at maintaining fairness in the procurement process.

Procuring Entities should try to ensure that they have a sufficient pool of trained officers who can manage the tender process. An option for smaller Procuring Entities with insufficient staffing is secondment from other Procuring Entities when a large procurement process is taking place.

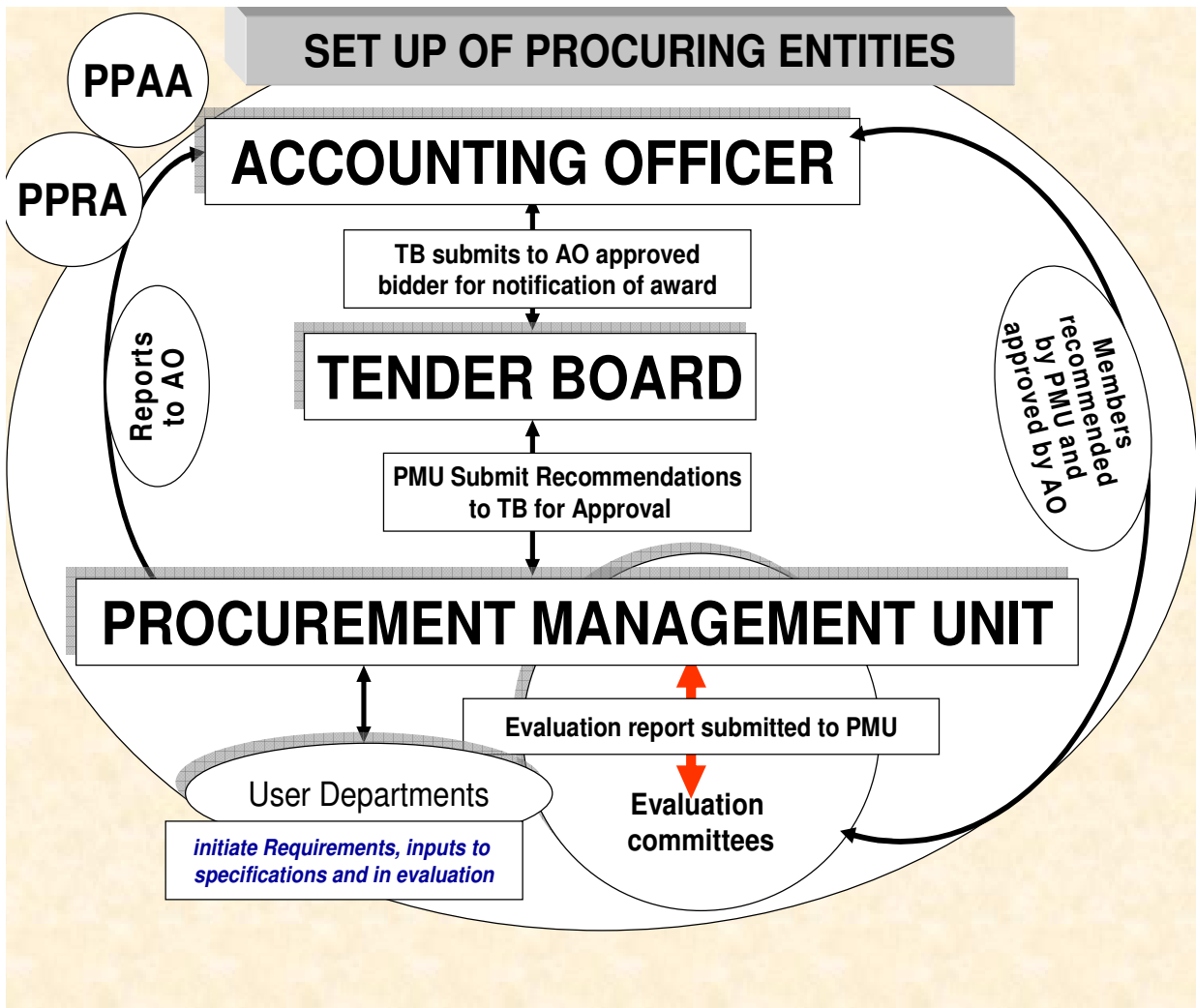


Figure 2: Procurement Responsibilities as Stipulated by PPA 2004²

Perceptions should not be overlooked when considering probity. It is important not only to do the right thing, but also to be seen to be doing the right thing. The public should be confident that officials conducting procurement will maintain a professional relationship that stands up to public scrutiny.

4.0 PRINCIPLES UNDERPINNING ETHICS AND PROBITY IN PROCUREMENT

The following are principles that underpin ethics and probity:

- Fairness and impartiality
- Consistency and transparency of process
- Use of an appropriately competitive process

² Mlinga, R.S., Implementation of PPA 2004, Seminar for Secretaries of Tender Boards, May 2006

- Appropriate security and confidentiality arrangements
- Identification and management of actual and potential conflicts of interest
- Compliance with legislative obligations and Public policies

4.1 Fairness and Impartiality

It is essential that procurement is conducted in a way that is fair and impartial. Material needs to be available to all interested parties within the same time frame, and each tenderer needs to have access to the same material within the process for it to remain fair. Each bid also needs to be considered in a fair and impartial manner, with no conflicts of interest or bias towards or against certain bidders.

When communicating with bidders, it is important that it is conducted not only in the same timeframe but also in the same manner for all bidders. The most appropriate manner should be selected according to what is being communicated, to whom, and the urgency of the communication.

If all potential tenderers have access to the Internet, additional information provided in response to an individual tenderer's inquiry could be posted on a dedicated website during the tender period so that all potential tenderers have the same clarification of the requirements already provided. It is good practice to always provide information in writing, whether in hard copy or electronic form. This practice also needs to be followed when notifying tenderers whether they are, or not successful. Once the successful tenderer has been appointed, all unsuccessful tenderers should know the results of the evaluation as soon as possible. Procuring Entities need to consider the most effective way of notifying tenderers, taking into account postal delays, particularly if there are international tenderers.

The request documentation must clearly detail the conditions for participation and evaluation criteria and be equally available to all interested parties. Well defined conditions for participation provide the market with a clear indication of requirements that they must meet, and reduce the resources wasted as a result of lodgment of unsuitable or misdirected bids. Decisions on the selection of suppliers must be made purely against these criteria. It is important that potential suppliers feel confident that decisions will not be unduly influenced by external factors.

Request documentation must clearly identify and separate conditions for participation from those evaluation criteria that are 'desirable' or 'optional'. Bids must meet the conditions for participation, and these should be well targeted, clearly measurable, and not excessive in number. The 'desirable' or 'optional' criteria need to be addressed for the Procuring Entity to be able to rank the submissions in order of suitability for the procurement.

To maintain fairness in a process, the separation of duties is important. Officials involved in evaluation should not be those who are approving the award of the tender, etc.

4.2 Consistency and Transparency of Process

Procurement processes used by Procuring Entities must be consistent and transparent. Decisions need to be made in a visible manner and appropriately documented to allow them to be understood or justified upon review - for example, by tenderers, PPRA, and Controller and Auditor-General.

The Public Procurement Act (PPA) No. 21 of 2004 makes transparency a primary consideration throughout the procurement process from the initial identification of need through to the final disposal of any property. It requires Procuring Entities (PEs) to offer unsuccessful bidders a written debriefing, on request, as to why their offers were not successful.

Another important element of transparency is public reporting of procurement opportunities and awards. The PPA 2004 and its Regulations requires this to be done in newspapers, Authority's website and Journal.

4.3 Use of an Appropriately Competitive Process

The method used for procurement processes should suit market circumstances as well as the size and nature of the procurement. It should also provide reasonable access for suppliers to public procurement opportunities. Procuring Entities should investigate the relevant market conditions and consider whether an open procurement process is appropriate. A key element of the procurement framework is open competition

Procuring Entities should aim to ensure that the cost of tendering for opportunities does not deter competent suppliers. They must provide adequate and timely information to prospective bidders, and avoid asking for unnecessary information or requirements. Requests for unnecessary information may occur when details are required for pre-selection, and then the same details are required again in the tender, making it time-consuming and expensive to be a part of the tender process.

Procuring Entities should therefore be familiar with any pre-selection or prior processes to avoid requests for duplicate information. Procuring Entities should also set and meet reasonable timeframes for any procurement process, to enable bidders to confidently allocate resources to their bid.

4.4 Security and Confidentiality

Procuring Entities will need to have measures in place to manage the security and confidentiality of documents, including physical security of submissions and related documents, access to secure documents, and confidentiality of commercial information.

Procuring Entities should establish clear physical security measures for the handling of documents related to the tender. Security measures should include the usage and security of the tender box; appropriate storage of submissions; limiting the number of and numbering copies made of the documents; limited access to the submissions, such as only allowing access by authorised staff; and ensuring documents are not removed from the Procuring Entity's premises.

4.5 Conflicts of Interest

A conflict of interest arises where an official or adviser has an affiliation or interest that might prejudice, or be seen to prejudice, his or her impartiality. The key management strategy is for all parties to be aware, before the process commences, by employees to disclosing, and taking steps to avoid, any conflict of interest (real or apparent) in connection with procurement.

Any person involved in the tender process, including contractors such as legal, business or probity advisers, should make a written declaration of any actual or perceived conflicts of interests prior to taking part in the process. This declaration includes other employment, prior employment or financial interests in organisations who may be potential suppliers and relationships with people who have interests in these organisations.

Conflicts of interest can endanger both the actual and perceived objectivity and probity of the procurement process.

4.6 Compliance with Legislative Obligations and Public Policies

Procurement must be conducted in compliance with all relevant legislation and Public policy. It is important that all staff involved in procurement have access to and are familiar with the relevant procurement policies.

5.0 PROVISIONS UNDER THE PUBLIC PROCUREMENT LEGISLATION

Provisions under the Public procurement legislation if adhered to can go a long way towards solving problems of ethics in procurement. The Public Procurement Act No. 21 of 2004 has tried to address the ethics in procurement. The Act defines:

“Corrupt practice – Means offering, giving, receiving, or soliciting of anything of value to influence the action of a public official in the procurement process or contract execution”.

“Fraudulent practice - Means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Government and includes collusive practices among the tenderers (prior to or after submission) designed to establish tender prices at artificial non-competitive levels and to deprive the government of the benefits of free and open competition.”

The definitions given in the Act capture all forms of corruption which are the result of unethical behaviour of public officials and/or bidders involved in the procurement process.

The Act gives sanctions available for procuring entity, public officers and suppliers involved in corrupt practices. In case of intention to award the contract the Procuring Entity (PE) may reject the proposal for award of a contract involving fraudulent and corrupt practices; and may declare the person or firm ineligible for a period of ten years to be awarded a public financed project. For public official involved in corrupt or fraudulent practices he or she be punished pursuant to the Penal Code, the Public Corruption Bureau (PCB) Act 1971 or any other written law.

Other Sections of the Act and/or Regulations which address corrupt activities are as follows:

- Section 73 of PPA No. 21 of 2004 prevents:
 - offering of gifts, gratuities or other valuable thing to influence tender decision;
 - requires declaration of interest to any of the bidders by public officials in any public procurement – done by members of Evaluation Committee, PMU and Tender Boards;
 - requires declaration by firms participating in tender process of any commissions paid.
- In the tender documents there is a requirement by Tenderers to submit an anti-bribery pledge.
- Regulation 8 of GN. 97³ and Regulation 6 of GN. 98⁴ emphasizes on probity and ethics in procurement process.

Probity and ethics in procurement or disposal by tender

8.-(1) All public officers concerned with procurement or disposal of public assets by tender and members of tender boards must be scrupulously honest in all their dealings with suppliers, contractors, service providers, buyers, members of the public and with the public authority itself.

(2) Procuring entities and members of tender boards must conduct procurement and disposal by tender proceedings with complete probity and in such a manner that public authority is respected and trusted as a client or a customer whilst maintaining good reputation with contractors, suppliers, service providers and buyers.

(3) A procuring entity shall reject the tender of a supplier, contractor, service provider, or buyer who gives or agrees to give, directly or indirectly, to any current public officer or other public authority, a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or omission or decision of, or procedure followed by, the procuring entity or the approving authority in connection with that tender or any other tender.

³ Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005

⁴ Public Procurement (Selection and Employment of Consultants) Regulations, 2005

(4) Procurement or disposal by tender shall not be made from a public officer acting in a private capacity, either alone or as a partner in a partnership or as an officer of a company.

(5) A procuring entity shall not include in any tender document any condition or specification such as to favour any one supplier, contractor, service providers and buyer.

(6) Any procuring entity, approving authority or a member of the staff or any committee of a tender board or of a procuring entity thereof shall declare any interest that they may have in any supplier, contractor, service provider or buyer and shall take no part in, nor seek to influence in any way, procurement or disposal by tender proceedings in which that supplier, contractor, service provider or buyer is involved or liable to become involved.

(7) The disclosure of interest made under this Regulation shall be recorded in the minutes of the meeting at which it is made.

- Regulation 101 of GN. 97 emphasizes on improper inducement;

Improper inducement

101.-(1) Procuring entities, approving authorities and tenderers shall take measures reasonably within their power to ensure that no part of any payment made in connection with a procurement or disposal contract is received directly or indirectly by or for the benefit of a public officer with decision making responsibility or influence or of their relatives or business associates.

(2) Procuring entities, approving authorities and tenderers shall take measures reasonably within their power to ensure that subcontracts and purchase orders relating to a procurement contract transactions are not used as a device to channel payments or other benefits directly or indirectly to or for the personal benefit of public officers with decision making responsibility or influence, or of their relatives or business associates.

(3) Procuring entities and tenderers shall take measures reasonably within their power to ensure that any commission or remuneration paid to any agent, consultant or other intermediary represents no more than appropriate compensation for legitimate services, and that no part of any such payment is passed on by an agent, consultant or other intermediary as an improper inducement in contravention of these Regulations.

(4) Procuring entities, approving authorities and tenderers shall take appropriate measures to ensure that agents, consultants and other intermediaries are not employed to gain any improper influence in connection with obtaining or retaining any business.

(5) A procuring entity shall not include in any tender document any condition or specification such as to favour any one supplier, service provider, contractor or asset buyer.

(6) Any member of an approving authority or a member of staff thereof or of a procuring entity or member of staff shall declare any interest that they may have in any supplier, service provider, contractor, or asset buyer and shall take no part in, nor seek to influence in any way, procurement or disposal proceedings in which that supplier, service provider, contractor or asset buyer is involved or liable to become involved.

(7) A member of an approving authority or an officer of the procuring entity shall be disqualified for being nominated for or appointed or being a member of a tender board if such member or officer, or any partnership in which he is interested, enters into or has entered into any contract in force with the Government or parastatal organisation or local government authority, or any person on behalf of the Government, parastatal organisation or local government authority, or with such tender board or procuring authority for the supply of any goods, the provision of any non consultant service, the execution of any work, the acquisition of any public asset by tender or any other contract in which such member or his firm has any financial interest.

(8) Any tender proved to have been awarded on the basis of inducement as described in the preceding subsections shall be revoked forth rightly and the same shall be reported to Authority and the relevant professional body for ethical proceedings.

(9) A supplier, service provider, contractor or asset buyer whose tender or proposal has been rejected or revoked on the grounds of inducement and corrupt practices shall not be able to qualify or pre-qualify in any procurement or disposal proceeding during the ten years following the date of the notice of such rejection or revocation.

(10) Any rejection or revocation on the grounds of inducement or corrupt practices shall be notified to the Authority who shall in turn take effect to notify all public authorities and approving authorities for the sake of effecting the contents of sub-regulation (9).

(11) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.

- Regulation 102 of GN. 97 and Regulation 100 of GN. 98 emphasizes on disclosure of pecuniary interests.

Disability of members of the procuring entity and members of the approving authority on account of

102.-(1) If a member of the procuring entity or a member of an approving authority has any pecuniary interest, direct or indirect, in any contract, proposed contract or other matter and is present at a meeting of the procuring entity or approving authority at which the contract or other matter is the subject of consideration, he shall at the meeting and as soon as practicable after its commencement disclose the fact and shall not take part in the consideration or discussion of the contract or other matter or vote on any question with respect to it.

interest in contracts

(2) A member of a procuring entity or a member of an approving authority who has disclosed an interest in accordance with this Regulation shall immediately withdraw from the meeting.

(3) Any person who fails to comply with the provisions of this Regulation commits an offence and shall be liable to the provisions of Section 76 of the Act unless he proves that he did not know that the contract, proposed contract or other matter in which he had a pecuniary interest was the subject of consideration at that meeting.

Pecuniary interests for purposes of Regulation 102

103.-(1) For the purposes of Regulation 102 and subject to sub-regulations (2) and (3), a person shall be treated, as having indirectly a pecuniary interest in a contract, proposed contract or other matter, if:

(a) he or any nominee of his is a member of a company or other body with which the contract was made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration; or

(b) he is a partner, or is in the employment, of a person with whom the contract was made or is proposed to be made or who has a direct pecuniary interest in the other matter under consideration.

(2) Sub-regulation (1) shall not apply to membership of or employment under any public body and a member of a company or other body shall not by reason only of his membership be treated as having an interest in any contract, proposed contract or other matter if he has no beneficial interest in any securities of that company or other body.

(3) In the case of married persons living together, the interest of one spouse shall, if known to the other, be deemed for the purposes of Regulation 102 to be also an interest of the other.

All above provisions above to a large extent indicates to what extent the procurement legislation is addressing the problem of ethics and corruption in public procurement.

6.0 THE PREVENTION AND COMBATING OF CORRUPTION ACT, NO. 1 OF 2007

In a bid to combat corruption in contracts and procurement, special sections have been incorporated in the Act as follows:

18. - (1) Any person who offers an advantage to a public official as an inducement to or reward for or otherwise on account of such public official's giving assistance or using influence in or having given assistance or used influence to assist in the promotion, execution or procuring of:-

Corrupt transactions in contracts

- (a) any contract with a public body for the performance of any work, the supply of any service, the doing of anything, the supplying of anything or the supplying of any article, material or substance;
- (b) any subcontract to perform any work, supply of service, the doing of anything or supply any article, material or substance required to be performed, applied, done under any contract with a public body, commits an offence of corruption.

(2) Any public official who solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence to assist in the promotion, execution or procuring of the payment of the price, consideration or other moneys stipulated or otherwise provided for in, any such contract or subcontract as is referred to in paragraphs (a) and (b) of subsection (1), commits an offence.

(3) A person convicted of an offence under this section shall be liable to a fine of not less than one million shillings but not more than three million shillings or to imprisonment for a term of not less than three years but not more than five years or to both.

(4) In addition to the penalty prescribed for under this section the court shall, if such person-

- (a) is an agent, order him to pay to his principal, in such manner as the court may direct-
 - (i) the amount or money value of any advantage received by him or any part of it; or
 - (ii) part of amount or money value of any advantage received by him, and that the whole or part of the residue be confiscated;
- (b) is an agent or not, order that amount or value of any advantage received by him, or any part of it, be confiscated to the Government.

19. - (1) Any person who-

Corrupt
transactions
in
procurement

- (a) offers any advantage to another person as an inducement for or a reward for or otherwise on account of the withdrawal of a tender, or refraining from inviting a tender, for any contract with a public or private body for the performance of any work, the supply of service, the doing of anything or the supplying of any article, material of substance; or
- (b) solicits or accepts any advantage as an inducement for or a reward for or otherwise on account of the withdrawal of a tender, or refraining from inviting a tender, for such a contract as is referred to in paragraph (a), commits an offence

(2) A person convicted of an offence under this section shall be liable to a fine of not less than one million but not more than three million shillings or to imprisonment for a term of not less than three years but not more than five years or to both.

(3) In addition to the penalty prescribed for under this section the court shall such person-

- (a) is an agent, order him to pay to his principal, in such manner as the court may direct-
 - (i) the amount or money value of any advantage received by him or any part of it; or
 - (ii) part of amount or money value of any advantage received by him, and that the whole or part of the residue be confiscated;
- (j) is an agent or not, order that amount or value of any advantage received by him, or any part of it, be confiscated to the Government.

In addition the PCCB acknowledges the existence of PPA 2004 in relationship to investigation of offences of corruption in procurement

21. - The provisions of the Public Procurement Act shall apply in relation to investigation of offences and institution of proceedings for offences of corruption in procurement of goods, works, and the supply of consultancy services. Application of Act No. 21 of 2004

The PCCB is therefore comprehensive enough to deal with corruption matters in procurement and contracts.

7.0 PROFESSIONALS CODE OF ETHICS

Different professionals are involved in carrying out procurement. In the construction industry professionals involved may include Architects, Quantity Surveyors and Engineers. The conduct of Architects and Quantity Surveyors is regulated by the Architects and Quantity Surveyors Registration Act, of Engineers is regulated by the Engineers Registration Act and of Contractors is regulated by the Contractors Registration Act.

Engineers Code of Conduct prohibits corrupt and fraudulent activities as per the following extract:

1. Every engineer shall disclose all known or potential conflicts of interest to his employer or client which may influence or appear to influence his judgment or the quality of his services.
2. An engineer shall not accept compensation, financial or otherwise from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed to and agreed for, by all interested parties.
3. No engineer shall solicit or accept financial or other valuable consideration, directly or indirectly from contractors, their agents or other parties in connection with work for employers or clients for which he is responsible.
4. Except as authorized or required by law, no engineer shall reveal facts, data or information obtained in a professional capacity without the prior consent of the client or employer.
5. An engineer in public service as a member, advisor or employee of a governmental body or department shall not participate in decisions with respect to professional services if he is an interested party.
6. Every engineer shall avoid improper solicitation of professional employment and shall, in the circumstances:
 - (a) not falsify or permit misrepresentation of himself, his associates, academic or professional qualifications, or exaggerate his degree of responsibility;
 - (b) not offer, give, solicit or receive, either directly or indirectly, any financial and/or material consideration of any amount intended to influence the award of a contract.

Similarly, the Architects and Quantity Surveyors By- Laws, 2000 have similar provisions as hereunder:

<p>79(4) The Architect shall not make any material alteration, addition to or omission from the approved design without the knowledge and consent of the Client, except if found necessary during construction for constructional reasons in which case the Architect shall inform the Client without delay.</p> <p>83. In particular and not exclusively and without derogation of the powers of the Board under this by-law, an Architect or Quantity Surveyor may be deemed by the Board to be guilty of unprofessional conduct or professional misconduct if he:-</p> <ul style="list-style-type: none"> (b) accept any work, which involves the giving, or receiving of discounts or commissions or any other means that might amount to, or be construed to be corruption; (c) accept any discount, gift or commission from contractors or tradesmen whether employed upon his work or not; (d) own or have a commercial interest as a director of a company or as a consultant or adviser or as a share holder in any material, device or invention used in a building without first informing his client thereof and obtaining his sanction before specifying the use of it in works under his direction; <p>etc</p>

The code of ethics prepared by the Contractors Registration Board also prohibits corrupt activities amongst contractors as shown hereunder:

<p>A contractor shall uphold and advance the integrity, honor and dignity of the contracting business by :-</p> <ul style="list-style-type: none"> • using his knowledge and skills for the enhancement of human welfare; • being impartial, and serving with fidelity the public, their clients and employers and clients; • striving to enhance reputation and prestige of contractors in Tanzania; • supporting the trade association and technical societies of their disciplines; • enhancing competence through participation in workshops, seminars, training courses and other technical forums
<p>In performance of their duties, contractors shall give utmost consideration to safety, health and welfare of their workmen and general public</p>
<p>Every contractor shall perform services only in the areas of his competence</p>
<p>A contractor shall build his reputation on the merit of his services and shall not compete unfairly with others</p>
<p>A contractor at all times shall refrain from corruption and corrupt practices</p>
<p>Every contractor shall take reasonable care of the environment</p>

Again it is seen that there are adequate provisions to deter experts participating in the construction projects from engaging themselves in corrupt activities.

8.0 ARE WE WINNING THE WAR OF FIGHTING CORRUPTION?

We have seen that there are adequate provisions in various legislations enacted by the Government of Tanzania to combat corruption in all sectors. That shows that there is a will on the part of the Government to prevent and combat corruption. However the question that needs to be paused here is, are we winning the war?

It should be appreciated that despite of having a good law, there are still some activities and/or processes which are prone to corruption. Notable problem areas according to PPRA are⁵:

- (a) Non-adherence to the use of competitive procurement methods;
- (b) Deviations from the use of standard tender documents or use of improperly prepared tender documents
 - Inclusion of tender requirements and qualification criteria which are difficult to be met by most bidders;
 - Overstating of physical requirements and over-dimension project components during design to increase potential corrupt earnings during implementation; OR underestimating of the value of an asset in the case of disposal by tender.
 - Inclusion of non-neutral specifications and/or evaluation criteria that tends to favour certain potential bidders;
- (c) Non-adherence to the use of proper/prescribed tendering process.
 - Allowing inadequate bidding time;
 - Insufficient or inadequate advertising;
 - Non-issuance or delays in issuing clarifications;
 - Improper carrying out of evaluation of submitted tenders;
 - Award of tenders not related to the criteria set out in the tender documents.
- (d) Failure of selected bidders to deliver quality services in a timely manner
 - Delays in delivery of services or completion of the project;
 - Unjustified cost overruns;
 - Delivery of poor quality goods and works

⁵ Mlinga, R.S. (2005), Combating Corruption in Public Procurement available at www.ppra.go.tz

All these problems are there despite of the fact that we have technically competent construction industry practitioners.

Good legislations and code of ethics are important tools in combating corruption but practice has shown that sometimes they are not adhered to. The Retired President Benjamin Mkapa had this to say about Code of Ethics⁶;

“As I was preparing for this event, I was shown the Code of Ethics of the Institution of Engineers Tanzania. It is by all means a very impressive piece of literature, and a commendable commitment to honesty and integrity. If implemented in full by all your members, and strictly enforced in respect of those that are in the breach, we could make great strides in cleaning and elevating the image of the engineering profession in the public eye”

He continued with the following words:

“One wit once defined ethics in the following, rather unkind words : ETHICS ARE A SET OF RULES LAID OUT BY PROFESSIONALS TO SHOW THE WAY THEY COULD AFFORD IT – “And I say you can afford to live by the rules you have set for yourselves in your Code of Ethics. The only way you will find it difficult to do so is when you let others have an unfair advantage over you by keeping silent on their dishonourable conduct, the greasing of palms to get contracts. It is your interest to co-operate with Government to ensure there is always a level playing field in our tendering processes and procedures. Do not let corruption take root in your otherwise very honorable profession”

He concluded thus:

“... the worst thing for the profession and the country is to have corrupt Engineers that are not getting caught. For, then they will continue being corrupt, creating for themselves an unfair advantage, and encouraging others to follow suit. I urge you in the IET not to let that happen. This is your country, and this is your profession.”

The above quotation says it all. Although it was addressed to Engineers it is equally applicable to Contractors, Architects, Quantity Surveyors and other professionals engaged in the construction industry activities.

It is unfortunate the elaborate code of ethics that professions have crafted for themselves are not followed at all. Quoting Judge Warioba⁷, again on Engineers,

⁶ Quoted in S.J. Chavda, Role of Engineers in Curbing Corruption in Engineering Projects in Tanzania, Public Lecture organized by IET at Luther House Dar-es-Salaam, 10th June 2005

⁷ Quoted in S.J. Chavda, Role of Engineers in Curbing Corruption in Engineering Projects in Tanzania, Public Lecture organized by IET at Luther House Dar-es-Salaam, 10th June 2005

“The Engineering profession has an elaborate and there are several professional associations for engineers which have included such ethics in their constitutions or codes. The code of ethics prohibits corruption of every type. It appears however, that the codes of ethics are not respected at all. Professionals complain of lack of action to combat corruption but they do nothing within their professional associations. Sometimes those who complain loudest are the most corrupt”

Nobody can summarize the problem that any country can have with its beautifully crafted Laws and Codes of Ethics beautifully than it has been put by the Words of the Retired President Benjamin Mkapa and Judge Sinde Warioba.

9.0 CONCLUSIONS

With reference to the core problem, (ethics), the concluding remarks are as follows:

- The paper has gone into the details of providing legal provisions in our country to ensure that procurement is carried out in the most ethical manner. They seem however, not to work as expected.
- The provisions in the various Acts and Code of Ethics provides a “technical solution to an adaptation problem⁸”. People were not born unethical. They acquired such behaviours as they grew up. The laws and code of ethics will not work well if there is no system that is going to reverse the way people think and behave. They will not work in a society in which someone with ill-gotten wealth is celebrated instead of being shunned.
- We therefore, need to ensure that we inculcate ethical behaviours to our construction industry practitioners. How this is to be done is a matter for discussion but I am sure people will change if teachings on how to be ethical, benefits of good ethics and sanctions for unethical behaviours are repeated often enough.

WE NEED THEREFORE TO COME UP WITH WAYS TO INCULCATE ETHICAL BEHAVIOURS TO OUR CONSTRUCTION INDUSTRY PRACTITIONERS. I HAVE NO ANSWERS BUT TOGETHER WE CAN FIND THE ANSWERS.

⁸ Heifetz, R.A and Linsky, M., (20020, Leadership on the Line – Staying Alive Through the Dangers of Leading, Harvard Univesity Press, Boston, Massachusetts.