

## **Goals of Public Procurement: A Fine Balancing Act for Malaysia**

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### **Abstract**

Public procurement is used to achieve various objectives which can be broadly termed as economic and non-economic (secondary or collateral). From an economic perspective, efficient procurement should ensure value for money (VFM). Further by virtue of the public element in procurement, another main aim is the avoidance of abuse in the procurement process. These two core objectives of VFM and avoidance of abuse are achieved through principles of Competition and Transparency. Public procurement can also be used as a policy tool for social and industrial objectives as is the position in Malaysia. Where public procurement is used to accomplish redistributive and developmental goals, it can bear aims, methodology and effects that may be in conflict with, and compromise the other core objectives of VFM and abuse of process. In Malaysia, a fine balance needs to be struck to obtain the full benefits of Government Procurement.

### **I. Introduction**

It is widely acknowledged that public procurement plays an important role in a country. It impacts not only on a country's economy but also has significant political, legal and social implications. Public procurement, that is, purchasing by government, accounts for a large proportion of a country's gross domestic product as well as a government's budget. Public procurement can be used to achieve various objectives. A well designed public procurement system which is properly implemented will benefit a nation and its citizens. The aim of this article

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is to consider the goals of public procurement and in relation to Malaysia, to address the balance to be sought from its core objectives.

## II. Definitions and Scope

Despite the existence of institutional governments and government purchases from time immemorial, public procurement as a field of study is relatively new amongst economists, lawyers and other social scientists, particularly so in developing countries such as Malaysia. "Procure" simply means to obtain something by care or effort. Following this, "procurement" is seen as a management process essentially starting with the identification of needs at the initial stage, followed by planning, organizing and deciding on methods to acquire and disposal of products and services.<sup>1</sup> "Public procurement" is the process that public authorities follow for the acquisition of various kinds of goods and services they need for performing their duties and "public authorities" include all the conveyors of public power, namely the State (central government), regional or local governments and legal persons governed by public law.<sup>2</sup> The field of public procurement thus involves the government purchasing goods or services to perform its governing duties. Another synonymous term used is "government contracts". In Malaysia, the official terminology is "Government Procurement" (*Perolehan Kerajaan*).

Public procurement raises varied questions: the government as purchaser has to decide (i) what to buy, (ii) who to buy from and as a process (iii) how to buy. As to the first, it is a question of identification of needs and this can range from small stationery items used in all government offices such as pens and staplers to complex technical equipment required by a ministry of defence such as missiles. The second and third matters involve planning, organization and decision-making on the sources and methods of acquisition, described above as a management process. The decisions to these factual questions depend

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<sup>1</sup> Norma Mansor, "Public Procurement in Malaysia: E-Procurement", Faculty of Economics and Administration, University of Malaya, Kuala Lumpur, available at [www.napsipag-research.com/pdf/E-Procurement-Malaysia.pdf](http://www.napsipag-research.com/pdf/E-Procurement-Malaysia.pdf).

<sup>2</sup> Georgopoulos, Aris, *Regulating Public Procurement*, presentation at EU-Asia Inter-University Network, University of Malaya, 2008.

to a large extent on the application of principles governing public procurement.

Public procurement also interacts with different dimensions of the law. As the procurement is in the course of performing governing duties towards the attainment of public goals, the dimension of public law sets in. At the same time, public procurement essentially involves the government as a purchaser who enter into contracts to purchase goods or services; such contracts are ordinarily governed by private law, specifically the law of contract. In cases where the government is the major purchaser of some specific goods or services, competition law<sup>3</sup> issues can arise as the government can influence the exit and entry of suppliers or even the size or the structure of the particular industries. In other instances such as public utilities, where the government is in a position as owner, regulator or industry player,<sup>4</sup> whether directly or indirectly, more complex issues of competitive neutrality<sup>5</sup> arises. The above situations involve unique interactions of public procurement with many related fields which are not within the scope of this article which focuses on the goals of public procurement and how this has been addressed in Malaysia in the context of its unique socio-political and economic environment.

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<sup>3</sup> For an introductory article on competition law in Malaysia, see Cheong, May Fong, "A New Catalyst for Malaysia: The Competition Act 2010" [2011] *The Law Review* 107 - 123.

<sup>4</sup> For an example from the telecommunications industry, see Cheong, May Fong, "State Relations in the Telecommunications Industry in Malaysia" (2011) *MqJBL* Vol 8 279 - 299. See also Cheong, May Fong and Yong, Chiu Mei, "Competition Law Perspectives on the Water Services Industry in Malaysia" [2009] *LAWASIA J* 112-126.

<sup>5</sup> Competitive Neutrality requires that "government business activities should not enjoy net competitive advantage over their private sector competitors simply by virtue of public sector ownership", see the Australian *Commonwealth Competitive Neutrality Policy Statement*, June 1996. Competitive Neutrality principles have been introduced in Australia as part of the reforms to the National Competition Policy; see *Report by the Independent Committee of Inquiry into National Competition Policy*, 1993.

### III. Public Procurement Goals

There are different objectives that may be achieved from public procurement which have been broadly termed as economic and non-economic (secondary or collateral). From an economic perspective, efficient procurement should ensure value for money (VFM) given the limited resources to secure optimum utilization of scarce resources. This can be further rationalized on the basis of public goals and the accountability to public funding through *inter alia* taxes paid by citizens. VFM is primarily established through a competitive process: "a strong competition from a vibrant market will generally deliver a VFM outcome".<sup>6</sup> Following this, one of the key principles in public procurement is *Competition*. Competition involves awarding contracts through a process in which the public body sets out its needs, interested firms submit offers, and the contract is awarded to the firm with the best offer.

By virtue of the public element and that government enjoys much discretion making in its purchasing powers, another main aim of public procurement is the avoidance of abuses in the procurement process, making *Transparency* the other key principle in public procurement. Transparency requires that procurement opportunities are made public and the procurement is conducted according to clear rules.

These two main objectives of public procurement, VFM and avoidance of abuse, are reflected in the *2011 UNCITRAL Model Law on Public Procurement*<sup>7</sup> which replaced the *1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services*.<sup>8</sup> The 2011 Model

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<sup>6</sup> Office of General Commerce, United Kingdom, "An Introduction to Public Procurement" at p 16, available at [http://www.ntac.nhs.uk/web/FILES/InsulinInfusion/nhs\\_1270725126\\_Introduction\\_to\\_Public\\_Procure.pdf](http://www.ntac.nhs.uk/web/FILES/InsulinInfusion/nhs_1270725126_Introduction_to_Public_Procure.pdf).

<sup>7</sup> The 2011 Model was adopted on 1 July 2011, available at [http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement.2011/ML\\_Public\\_Procurement\\_A\\_66\\_17\\_E.pdf](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement.2011/ML_Public_Procurement_A_66_17_E.pdf).

<sup>8</sup> According to UNCITRAL, while the 1994 text was recognized as an important international benchmark in procurement law reform, reform was necessary to include modern commercial techniques in particular e-procurement and framework agreements which enable maximisation of VFM procurement. The updated Model

Law contains procedures and principles aimed at achieving these two core objectives. The Preamble of the 2011 Model Law reads as follows:

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (d) Providing for the fair, equal and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process;
- (f) Achieving transparency in the procedures relating to procurement

The two main principles of competition and transparency interact with each other. The efficient market promoted in competition allows best value for taxpayers' money used in public procurements. Transparency promoted in public procurement contributes towards an open and competitive environment. It has been said that "competition is the cornerstone of public sector procurement. It underpins the pillars of fairness and transparency and is the primary driver of VFM in virtually all procurements".<sup>9</sup> Increasingly governments have recognized that financial savings can be obtained from a better organized and transparent

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also enabled the inclusion of new practices from experiences gained, see [http://www.uncitral.org/uncitral/en/uncitral-texts/procurement\\_infra](http://www.uncitral.org/uncitral/en/uncitral-texts/procurement_infra). See also Arrowsmith, Sue, "Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) *International and Comparative Law Journal* 17-46.

<sup>9</sup> "An Introduction to Public Procurement", *Ibid*, above n 6, at p 14. The Guide provides useful illustrations as to how competition issues should be considered at three key stages of the procurement process, i.e. (i) pre-procurement, (ii) tender process/contract preparation and (iii) contract management.

procurement system.<sup>10</sup> Studies on the effect of procurement in opening up to international competition show that competitive procurement practices promote efficiency in public spending and help public authorities acquire cheaper and better quality goods at cheaper prices.<sup>11</sup> A European Commission report suggests that enhanced competition and transparency reduce prices of government purchases by about 30 per cent.<sup>12</sup>

The principle of transparency applies in many facets of a procurement process. First, procurement opportunities need to be made public. Secondly, there is the obligation to make publicly available all relevant laws and rules that will be applied by contracting authorities including the criteria for selecting suppliers. It is important that these information are made known in advance so that interested parties will know how to plan and conduct themselves. After a procurement decision has been made, there needs to be disclosure of both the substantive basis for the decision and the procedures by which it was arrived. Opportunities to scrutinise decisions to ensure that a procurement agency has adhered to rules and that the decision was not motivated by self interest but by having regard to relevant commercial considerations should be afforded. Although these may involve tedious procedural processes, its importance cannot be underestimated. As bidders must trust in the fairness of the process in order to participate in a tender, the perception of transparency is crucial in attracting the largest possible number of tenders thereby increasing competition.<sup>13</sup> Lack of transparency increases government

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<sup>10</sup> Hunja, H, "Obstacles to public procurement reform in developing countries" in Arrowsmith S and Trybus (eds), *Public Procurement: The Continuing Revolution* (The Hague: Kluwer Law International, 2003).

<sup>11</sup> Falvey Rod, Chimia Annamaria La, Morrissey Oliver, Zgovu Evious, "Competition Policy and Public Procurement in Developing Countries", Credit Research Paper No 08/07, Centre for Research in Economic Development and International Trade, University of Nottingham, available at [www.nottingham.ac.uk/economics/credit/](http://www.nottingham.ac.uk/economics/credit/).

<sup>12</sup> European Commission, "Report on the Functioning of Public Procurement Markets in the EU: Benefits from the application of EU directives and challenges for the future", (Brussels: EC document 03/02/2004).

<sup>13</sup> OECD, "The Impact of Pro-competitive Reforms on Trade in Developing Countries", Trade Directorate, TD/TC/WP (2006) 31/REV1.

budgets, information costs,<sup>14</sup> corruption and self-interests of procurement officials. Transparency makes visible what would otherwise be disguised and allows the actions of procurement agencies to be scrutinised. Transparency also assists in preventing public authorities from concealing discrimination in favour of certain suppliers, a form of covert discrimination. The gains from transparency and open procurement not only increase competition but also contribute to reducing corruption.<sup>15</sup> Corruption is an endemic problem in the area of public procurement through fraudulent claims or awards of contracts obtained by bribery. The effect is 'wrong choices' made where competition is in the bribe rather than price or quality. It also adds to increased costs as it tempts the design of overly large and complex procurement projects as a means of generating larger bribes.<sup>16</sup> In view of the huge costs of corruption on procurement, much attention has been given to efforts in curbing corruption in most national systems on public procurement.<sup>17</sup>

At the international level, the aim of public procurement regulation is two-pronged; first the opening up of domestic markets to foreign competition. In this respect, it aims to eradicate "protectionism" policies found in public procurement frameworks. The second related aim is the prohibition of discrimination on the basis of nationality. These goals are reflected particularly in the Agreement on Government Procurement

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<sup>14</sup> Evenett, S and B, Hoekman, "Government procurement: market access, transparency, and multilateral trade rules" *European Trade Journal of Political Economy*, 21:1, 163-183.

<sup>15</sup> See Falvey *et al.*, above, n 11.

<sup>16</sup> Langseth Petter, Staphenurst Rick, and Pope, Jermey, "The role of a national integrity system in fighting corruption" (1997) *Commonwealth Law Bulletin*, 23:1-2, 499-528 at p 499. At p 521, the authors conclude that a mutually reinforcing national integrity system which includes public sector anti-corruption strategies, watchdog agencies, public awareness and participation, accountability of the courts, roles of the media and the private sector and international cooperation are necessary in the fight against corruption.

<sup>17</sup> See for *e.g.*, "Curbing Corruption in Public Procurement in Asia and the Pacific" (2006) and other the publications of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, available at <http://www.oecd.org/corruption/asiapacific>.

(GPA).<sup>18</sup> Thus, in agreements on procurement covered by the GPA, parties are required to accord to the products, services and suppliers of any other party to the Agreement treatment “no less favourable” than they give to their domestic products, services and supplier. Further, parties may not discriminate among goods, services and suppliers of other parties. In addition, each party is required to ensure that its entities do not treat domestic suppliers differently on the basis of a greater or lesser degree of foreign affiliation or ownership. These aims may however discouraged membership to the GPA,<sup>19</sup> in particular from countries which also have other priorities which use public procurement as a policy tool to further social, industrial or environment goals.<sup>20</sup>

In contradistinction with economic goals, where public procurement is used as a policy tool for social, industrial or environmental objectives, it has been considered as non-economic in nature where its aims may conflict with objectives of free trade or the maximization of overall economic welfare. Public procurement has been used to achieve such outcomes in different contexts. McCrudden has made an introductory survey which shows that the role of procurement has enlarged both in

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<sup>18</sup> The current GPA was signed in Marrakesh on 15 April 1994 and came into force on 1 January 1996. The first Agreement on Government Procurement was signed in 1979 and entered into force in 1981. It was amended in 1987, with this amended version entering into force in 1988.

<sup>19</sup> For a discussion on GPA membership and obstacles to wider participation, see Arrowsmith, Sue, “Reviewing the GPA: The Role and Development of the Plurilateral Agreement After DOHA” (2002) *Journal of International Economic Law* 761-790 at pp 768-771, also “Towards Multilateral Agreement on Transparency in Government Procurement” (1998) *International and Comparative Law Quarterly* 793-816 at pp 799-806. Malaysia has been cited as an example of a developing country that has declined to become a member of the GPA although the GPA also have provisions that recognize the need of developing countries to “promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backwater areas; and economic development of other areas of the economy”, see McCrudden, Christopher & Gross, Stuart G, “WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study” *The European Journal of International Law* (2006) Vol 17 No 1, 151-185.

<sup>20</sup> McCrudden & Gross, *Ibid.*, at pp 175-176.

<sup>21</sup> McCrudden, Christopher, “Using procurement to achieve social outcomes” (2004) *Natural Resources Forum* 28, 257-267.



geographical coverage and in the subject area of social policy in which it was used to promote.<sup>21</sup> In that survey, examples were given of public procurement been used to promote equality on the basis of ethnicity and gender drawn from Malaysia, South Africa, Canada and the European Community. Such social aims often involve a disadvantaged segment of society which is achieved through price preference to tenders from particular segments, whether social or ethnic groups. Public procurement has also been used as an instrument to promote human rights by international organisations such as the International Labour Organisation. In this respect, the aim is to use public procurement policies to create or protect employment. In terms of industrial aims, public procurement policies may aim to protect the domestic industrial base or certain national champions. Having set out the different aims of public procurement, the next part sets out public procurement in Malaysia which will be referred to as Government Procurement (*Perolehan Kerajaan*).

#### IV. Government Procurement in Malaysia

Government Procurement is an important subject matter in Malaysia, making a substantial component of the government budget as seen in the table below. Over the last ten years, the average percentage of government budget spent for procurement of supplies and services averaged 16.3 per cent.

**Malaysian Government Procurement Budget**

Year	Total Government Budget (RM million)	Percentage for procurement (supplies & services)	Budget for procurement (RM million)
2010	189,499	11.0%	20,845
2009	205,899	12.9%	26,561
2008	168,799	15.1%	25,487
2007	157,496	14.7%	23,152
2006	134,748	15.3%	20,616
2005	117,445	16.0%	18,791
2004	109,990	15.6%	17,158
2003	71,737	19.9%	14,253
2002	66,706	17.8%	11,854
2001	63,757	16.8%	10,703

Source: Collated from [www.mof.gov.my](http://www.mof.gov.my).

There are two main bodies responsible for Government Procurement in Malaysia. The Ministry of Finance of Malaysia is responsible for all financial matters and establishes the policies regarding financial management of the government including procurement. Section 6(1) of the *Financial Procedure Act 1957 (Act 61)* empowers the Finance Minister to supervise and coordinate government procurements. The Treasury of Malaysia is the central body for Malaysian Federal Government procurement. The national annual budget for all expenses for development is conducted and controlled by the Treasury. The Treasury is also the body that controls, enforces, supervises, coordinates, utilizes, divides and stocks goods. It regulates the criteria, registration conditions and registration of individuals, firms and companies to enable them to contract with the government. For the purpose of improving efficiency in financial management of government agencies, the Treasury practises the concept of decentralization through delegated powers (*kuasa penurunan*) to officers to make decisions. For the purpose of fulfilling these duties, the Treasury has issued relevant Treasury Instructions (TIs), Treasury Circular Letters and Federal Central Contract Circulars. The rules governing Government Procurement apply to all ministries, government departments and government agencies; either statutory bodies or government companies and cover works, services and supplies. Individual ministries conduct their own procurement according to centralized laws and procedures.

Government Procurement in Malaysia<sup>22</sup> has been categorized into three main classes; (i) works including construction and engineering activities, (ii) supplies including supply of raw, intermediate and finished goods and products for any activity or users, and (iii) services including engagement of manpower, expertise and consultants. Three types and modes of procurement are practiced, (i) direct purchase, (ii) quotation and (iii) tenders. The question as to which mode is used depends largely on the value of the procurement. In relation to the last mode, the tender procurement process consist of (i) preparation of tender specifications by Ministries and Departments, (ii) preparation and distribution of tender

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<sup>22</sup> See "Malaysia's Government Procurement Regime" available at [http://www.treasury.gov.my/pdf/lain-lain/msia\\_regime.pdf](http://www.treasury.gov.my/pdf/lain-lain/msia_regime.pdf).

documents, (iii) advertisement of tenders, (iv) sale of tender documents, (v) tender deposits, (vi) closing and opening of tenders, (vii) evaluation of tenders, and finally (viii) selection of the successful bidder. Selection of tenders are decided by Agency Procurement Boards and in cases where the tender value is above RM100 million for works, and above RM50 million for supplies and services, the recommendation of the Agency Procurement Board will be sent to the Ministry of Finance for final decision. A significant development on the tendering process is the launch of the *Myprocurement* website<sup>23</sup> by the Prime Minister Dato' Sri Mohd Najib Tun Razak on 1 April 2010. According to the Prime Minister, "The move is to boost transparency and to prevent any corrupt practices in the awarding of projects and procurement."<sup>24</sup> The portal provides tender advertisements and names of successful bidders. To further enhance government integrity, bidders will have to sign a declaration upon submitting their bid and sign another letter if the bid was successful.

An earlier development to Government Procurement in Malaysia is e-Procurement (*E-Perolehan*) which is part of the Malaysian e-Government policy and aspiration to employ multimedia technologies to re-invent the way government operates.<sup>25</sup> One of the eight projects under the e-Government Flagship since 1997, e-Procurement links the government and suppliers in an online environment. With e-Procurement, government agencies wishing to procure goods or services can browse through catalogues advertised by suppliers which are available electronically. It was introduced in 1999 and was developed in stages with four objectives:

1. To ensure best value for money for Government Procurement;
2. To ensure suppliers receive faster and more accurate payment;
3. To ensure accountability and transparency in all Government Procurement;
4. To increase collaboration between the business sector and the Government.

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<sup>23</sup> See <http://myprocurement.treasury.gov.my>.

<sup>24</sup> See *The Star Online*, Friday 2 April 2010.

<sup>25</sup> See generally Norma Mansor, above, n 1.

E-Procurement was aimed to be the main procurement mechanism to enable government agencies to procure electronically and to improve the competency of procurement transaction process between suppliers and federal government agencies. The system was outlined to save time, energy and money, to be more transparent, fair and easy to use as well as enabling government agencies and suppliers to be more ingenious and more competitive. However, despite significant savings to the government, a study has indicated that the uptake among the vendor community is still not satisfactory and challenges remain in the implementation of e-Procurement and it has been proposed that the government pursue a dual policy of coercion and persuasion to increase the usage of e-procurement.<sup>26</sup>

#### V. Balancing the Goals of Government Procurement

Before a discussion of the goals of Government Procurement in Malaysia, the governing policies, objectives and principles are reproduced in full as follows:<sup>27</sup>

The policies have been stated as follows:

1. Promotion of growth of local industries through the use of local material/goods and services sector;
2. Enhancement of the competency of local industries through technology transfer;
3. Promotion of participation of *Bumiputera* entrepreneurs; and
4. Preservation and protection of the interests of government procurement policies in order to achieve national objectives in facing challenges of globalization and liberalization.

The objectives are set out as follows:

1. To manage procurement efficiently and effectively;

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<sup>26</sup> See Maniam Kaliannan et al, "E-Procurement Adoption in the Malaysian Public Sector: Organizational Perspectives", available at [unpan1.un.org/intradoc/groups/public/documents/un.../unpan040591.pdf](http://unpan1.un.org/intradoc/groups/public/documents/un.../unpan040591.pdf).

<sup>27</sup> See "Malaysia's Government Procurement Regime", above, n 22.

2. To obtain best price that benefits the Government;
3. To encourage development of local industry and use of local materials/goods/services (promotion of local industries);
4. To encourage transfer of technology suitable to current needs of the national industry sector; and
5. As a tool to achieve national goals.

Besides the policies and objectives, five principles of Government Procurement are also set out as follows:

1. Public accountability - the management of procurement must be carried out responsibly in compliance with the policies and regulation established
2. Transparency – all policies, regulation and procurement processes carried out must be clear, made known and understood by the public as well comply with established policies and regulations.
3. Best value for money – best return for every ringgit spent
4. Open competition – procurement process must provide opportunities to all qualified to compete; and
5. Fair dealing – each procurement is invited, processed and considered fairly based on established policies and regulations.

It can be seen that the Government Procurement regime in Malaysia adopts general public procurement objectives of VFM and avoidance of abuse, incorporating both principles of Competition and Transparency. The first two objectives set out are clearly economic in nature towards the achievement of VFM by referring to managing procurement efficiently and effectively and to obtain the best price. The third and fourth principles on best value and open competition support these objectives. Transparency is set out as a principle together with public accountability and fair dealing. However, the Malaysian regime provides for wider objectives than these two core objectives and principles. It extends to three other objectives where public procurement is used as a policy tool. The third, fourth and fifth objectives verbalize their aims to encourage the development of the local industry, transfer of technology suitable to current needs of the national industry and the achievement of national goals. It is also relevant that besides these wider aims, the stated policies of Malaysian Government Procurement include the participation of

*Bumiputera* entrepreneurs. This aspect has been discussed by McCrudden & Gross in a case study on Malaysia.<sup>28</sup> In this study, the authors traced the present system of preferences to the historical context of colonial Malaya to the run-up to Independence and the recommendations of the Constitutional Commission to the post-Independence period, the May 1969 riots leading to a solution through the New Economic Policy (NEP) to rectify economic imbalances between the races.<sup>29</sup> The thrust of the study highlighted two interlinking policies as part of the NEP; first the policy to increase *Bumiputera* share ownership in Malaysian companies and secondly, the use of government procurement to bolster the system of preferences<sup>30</sup> for majority-*Bumiputera* controlled companies in the award of government contracts, which are seen as attempts towards 'eliminating the present identification of race with economic function'.<sup>31</sup> With the shift from the NEP to the National Development Policy (NDP)<sup>32</sup> and the increased pace for privatization, government contracting became more important as activities previously carried out directly by government owned businesses were now carried out by private enterprises under contract to the government.

While procurement policies have been used to accomplish redistributive and developmental goals,<sup>33</sup> where public procurement is

<sup>28</sup> McCrudden & Gross, above, n 19 at pp 151-185.

<sup>29</sup> McCrudden & Gross, above, n 19 at pp 162-165.

<sup>30</sup> There are two main sets of interlinked preferences, the first, involving *Bumiputera* (development policies targeted at improving the economic strength of native Malays) and the second, for domestic providers. See the various Treasury Circulars cited in McCrudden & Gross, above, n 19.

<sup>31</sup> McCrudden & Gross, above, n 19 at pp 166-167 citing *The Third Malaysia Plan 1976-1980*, para 567.

<sup>32</sup> Two of the four focus of the NDP are particularly relevant: "... (b) focus on employment and the rapid development of an active *Bumiputera* Commercial and Industrial Community (BCIC) as a more effective strategy to increase the meaningful participation of *Bumiputera* in the modern sectors of the economy; (c) rely more on the private sector to be involved in the restructuring objective by creating greater opportunities for growth" see *The Second Outline Perspective Plan, 1991 - 2000* (1991), at p 4.

<sup>33</sup> See the examples from other countries cited in McCrudden, "Using procurement to achieve social outcomes", above, n 21. See also Arrowsmith, Sue, "Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation" (1995) *The Law Quarterly Review* 235, also "The Legality of 'Secondary'

used as a policy tool, the other core objectives of VFM and avoidance of abuse may be compromised and the benefits from an optimal application of the main principles of Competition and Transparency may be reduced. Unless properly designed, implemented and monitored by considering all relevant facets impacting public procurement, conceptual and practical difficulties will arise. Four problems have been identified arising from the process of preferences;<sup>34</sup> political corruption, a decline in entrepreneurial activity amongst the target group and the tendency of *Bumiputera* contractors to sub-contract the contracts awarded and lastly, the increasing competition from contractors outside Malaysia. Two other weaknesses of the Government Procurement system in Malaysia have been identified in another study,<sup>35</sup> that is, the related risk of human error at different stages of the procurement process as well as the potent risk of corruption. Other weaknesses identified include the discretionary rule and decision making powers relating to Government Procurement and the lack of a system for feedback/complaint or remedies for aggrieved tenders.<sup>36</sup> Many of these related challenges can be reduced by increasing transparency in the public procurement process through wide publicity of procurement opportunities and the rules and requirements of the award procedures as well as effective monitoring and enforcement of procurement rules.<sup>37</sup> Other proposals include steps to safeguard and enforce integrity including a code of conduct for procurement personnel and adequate sanctions,<sup>38</sup> complaint and review mechanisms including audits.<sup>39</sup>

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Procurement Policies under the Treaty of Rome and the Works Directive" (1992) 1 *PPLR CS* 408.

<sup>34</sup> McCrudden & Gross, above, n 19 at pp 171- 173.

<sup>35</sup> Rohana Othman, Hussein Zakaria, Norlaili Nordin, Zamzam Shahidan & Kamaruzaman Jusoff, "The Malaysian Public Procurement's Prevalent System and it Weaknesses" (2010) *American Journal of Economics and Business Administration* 2(1):6-11.

<sup>36</sup> McCrudden & Gross, above, n 19 at pp 173-175.

<sup>37</sup> Arrowsmith, Sue, "Towards a Multilateral Agreement on Transparency in Government Procurement" (1998) 47 *International and Comparative Law Quarterly* 793 - 816.

<sup>38</sup> Currently public officers are subject to the *Public Officers (Conduct and Discipline) (Amendment) Regulations 2002* with the *General Orders, Anti-Corruption Act and Penal Code* applicable for relevant offences.

<sup>39</sup> ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, above, n 17 at pp 75 - 78 (Country report on Malaysia).

## **VI. Conclusion**

Public procurement is important to the well-being of any country and can be used to further objectives of trade and economic development and as a policy tool for social and industrial purposes. However, when used as a policy tool, it can bear aims, methodology and effects that may be in conflict with the other aims of public procurement, chiefly the objectives of VFM and avoidance of abuse and the application of the principles of Competition and Transparency. In Malaysia, where Government Procurement has also been used as a policy tool, a fine balance needs to be struck so as not to lose the other benefits of public procurement. The problems identified and the proposals made above need to be addressed as the way forward.