2

Transparent Government Procurement

As indicated in the introduction, we propose to consider the issue of transparent government procurement independently of market access. Whilst increased market access may improve procurement results by providing a greater pool of national and international bidders and a larger variety of products and prices, the real benefits in procurement are to be found in a sound and transparent national procurement system, regardless of whether foreign bidders are given privileged access to the domestic procurement market. Where any country is seeking membership of a regional or international economic organisation in respect of procurement, its membership will depend on the quality and level of transparency of that system. For the purposes of establishing a negotiating position, it is therefore necessary for a country seeking membership or association to be aware of the adequacy of its own procurement system. That will be the first issue for discussion. The question of market access comes later.

Consideration of the national procurement system is of itself a valuable exercise in the course of trade negotiations, since the wider membership of the economic organisation in question will be keen to welcome more members. If the procurement systems of potential members are inadequate, the existing members may well provide technical and financial assistance in improving that national system. Thus, the very act of participating in negotiations may lead to improved procurement regulation at national level which will bring the majority of the benefits to be expected from TGP. Broader (international) competition may enhance the results but the core mechanism for national savings and efficiency is the adoption and implementation of an adequate procurement system.

In this section, we will consider the five core transparency mechanisms referred to in section 1.1 above: publication of the legal framework; publication of procurement opportunities; procedural transparency; transparency of contract awards; and transparent dispute settlement. We will then, in turn, consider the benefits of improved TGP and the costs of improving TGP.

2.1 Core transparency tools

We consider the five core mechanisms in turn, expanding on the general introduction to explain what is involved at the level of the legal framework. Any 'preferred' solutions will be derived from the OECD/Development Assistance Committee (DAC) baseline indicators.[33] We will also summarise the findings of the country assessments in respect of the sample countries to provide an idea of the level of transparency they might achieve. This cannot be a definitive assessment, given the constraints of the study. Information has been collected from secondary sources which are often out of

date.[34] There has been no possibility of verifying the findings on site or with the authorities of the countries in question. The reports do, however, enable us to draw some general conclusions.

2.1.1 Publication of the legal framework

(a) Benchmarks

This is a question of ensuring that the legal and regulatory framework is known. This includes any laws,[35] regulations (and implementing regulations or procedures), directives, administrative decisions or circulars, mandatory bidding and contract documents, and any other binding text which affect the conduct of government procurement in the country. Knowledge and awareness of the legal framework may be effected through publication in official gazettes or bulletins, or by a specific publication of an agency responsible for procurement. It may be done through physical means or by electronic means, such as through a dedicated government website. The objective of such transparency is to ensure that the applicable rules are known and, hopefully, understood by procurement officers and potential bidders, so that all participants know the 'rules of the game'.

This is important first and foremost to all national bidders, but will also be of benefit to potential foreign bidders where these are admitted to the domestic market. Without such knowledge they may be wary of participating and the government would lose the confidence that is necessary for any competitive system to operate optimally. At the level of regional or international economic co-operation, transparency of the national procurement system is generally the *sine qua non* of engagement. It is the first requirement, for example, for entering into GPA accession negotiations.

Such transparency is also beneficial to the general public and civil society. As taxpayers they need to be satisfied that the bureaucracy will be held accountable for expenditures from the public purse.

(b) Achievement level

Among the sample countries, only Samoa and Tanzania would appear to meet the required levels of transparency. In the case of Samoa, statutory provision for the regulation of public procurement is contained in the Public Finance Management Act 2001, supplemented by two new procurement and contracting guidelines adopted in 2006 covering the procurement of goods and works (including also the category of 'non-consulting services') and the procurement of consulting services. These are closely aligned to the World Bank's own guidelines. At the time of drafting, the 2003 guidelines, which have been replaced by the 2006 guidelines, were still displayed on the Ministry of Finance website along with their replacements, which were still marked as drafts. However, the Ministry of Finance has confirmed orally that the new guidelines have now been trialled and finalised, and the 2003 version superseded.

In respect of Tanzania, the legal texts are all publicised and easily accessible via the internet. Standard documents are prepared by the Public Procurement Regulatory Authority (PPRA). All the relevant procurement information is gathered in a manageable format, there are guidelines and a great effort appears to have been made to disseminate this information. This is the result of significant efforts in recent years to reform the procurement system, aided by the strong presence of multilateral and bilateral donors, such as the Public Financial Management Reform Programme (PFMRP) funds.

The situation of Dominica and Nigeria is less clear. In the case of Dominica, there appears to be no legal or regulatory requirement to publicise procurement-related legal texts. There is also no comprehensive piece of legislation, and the applicable rules are scattered among various texts of differing authority. The Ministry of Finance is responsible for making financial and procurement regulations and issuing directions for the procurement of goods, works and services by tender or direct purchase, but these do not appear to have been published. It seems that most of the players involved in the public procurement process, both from the public and private sector, are unaware of the procedures.

Nigeria is currently difficult to assess. At the date of the last available assessment, there was no coherent legal framework for procurement, but instead a number of disparate circulars and regulations, although a comprehensive new Public Procurement Act and supporting documentation was adopted in 2007. The Public Procurement Act 2007 is a significant improvement; once it is fully implemented, it should provide a much more solid basis for Nigeria's public procurement.

2.1.2 Publication of procurement opportunities

(a) Benchmarks

This is a question of publishing procurement opportunities, i.e. advertising the procurement. Most procurement systems are based on the idea of competitive tendering and in order to succeed need to find a way of attracting competition. What for the procurement officer is a market search mechanism becomes an exercise in disseminating their requirements as widely as possible.

Traditionally, advertising has taken the form of advertisements placed in mass circulation newspapers or trade or other specialised journals, broadcast on the radio, posted on noticeboards or sent to selected locations, including in some cases to the embassies of foreign countries for further dissemination. The advent of electronic media, notably the internet and worldwide web, has transformed the landscape by offering increasingly cost-effective means of advertising with much greater coverage than ever before. Almost all reform countries are now in the process of introducing electronic publicity systems.

This concept will also cover the degree of transparency of the procurement proce-

dures actually employed, i.e. the degree to which procedures other than open competitive bidding are used. Whilst most procurement systems allow the use of alternative procedures (such as direct contracting/sole source or negotiated procedures, or procedures for low value contracts) they are usually subject to very strict conditions. Even if they are justified on efficiency grounds, these procedures also remain opaque, so the conditions of use must also be made transparent.

In a purely domestic context, a prudent government should be concerned if the level of alternative (i.e. non-transparent) procedures used is excessive. It may be that procurement officers are using less competitive procedures (which are, by definition, exceptional) where they should not. It may be that contracts are being artificially split up into a series of smaller contracts with a view to avoiding the applicable rules. From an international perspective, trade negotiators would be inclined to see a high level of non-transparent procedures in a negative light either because it: (i) demonstrates lack of government commitment to TGP; or (ii) indicates that the national rules, even where appropriate and acceptable, are not being implemented.

(b) Achievement level

Both Samoa and Tanzania appear to meet the requisite levels of transparency. In Samoa, the procurement guidelines require that all invitations to pre-qualify or bid in open procedures and other procurement notices be advertised in 'a widely circulated newspaper', and internationally, where required by a donor or financier, or where this is advisable in the interest of maximising competition. There does not appear, however, to be a requirement to advertise internationally over a certain threshold. There is a risk that no foreign bidders will be invited even where that is desirable. This does not affect the level of transparency at domestic level, but would probably need to be addressed in the context of any procurement-related trade negotiations. More generally, the rules also provide for a variety of methods in the procurement of goods and works, and outline the circumstances in which they may be applicable. The Tenders Board must approve the procurement method to be used in each case.

As far as advertising is concerned, Tanzanian rules ensure a high level of transparency. Procuring entities need to prepare and advertise a tender notice before carrying out any of the open tendering procedures available. Tender opportunities are advertised in the official *Tanzania Procurement Journal*, which is available online. Further, when tenders are open to international competition, the invitation to tender must be advertised in an international newspaper. The legislation does not specify the name of the international journal/newspaper; the provision should probably clarify that the international newspaper should have a wide international circulation. At the wider level, competitive tendering is the preferred procurement method, but derogations from this principle apply and public authorities can use alternative methods, provided that they respect certain thresholds and the conditions laid down in the regulation are respected. Further, the general monitoring mechanisms continue to be in place (for

example, approval by the tender board needs to be sought), records need to be kept and rules are also provided for avoiding splitting up contracts so to lower the value of the procurement.

The situation is more mixed in the case of Dominica. There is a legal requirement to advertise contract opportunities. This is generally done through the *Gazette*, local press and radio announcements. The *Gazette* is published regularly and is available to the public. For the procurement of works, in practice works projects are advertised and contractors can be invited to pre-qualify, depending on the complexity of the project. Projects are advertised in local newspapers, with larger projects being advertised in international newspapers, as well as in the *Gazette* and in the broadcast media. It seems, however, that selective tendering, with a request of a minimum of three quotes, is usually preferred to open tendering. This would need to be addressed in the context of any negotiations. In the case of Nigeria, the existing reports suggest that how and when advertisements should be posted is not clearly spelled out in the financial regulations. In some states and federal ministries bidding opportunities are seldom posted. The official *Government Gazette* is not published on a regular basis.

2.1.3 Procedural transparency

(a) Benchmarks

Procedural transparency is a critical element of any system of TGP and refers to the procedural aspects of the legal framework, i.e. how procurement is conducted. In the broad sense, this refers to the conditions of bidding (when, where and how to submit bids and the time allowed for submission), bid opening and of the ultimate contract. In a narrower sense, this will include:

- the technical specifications;
- the eligibility[36] and qualification/selection criteria to be applied;
- the award criteria to be used in comparing the bids.

The most obvious purpose of such transparency is to enable the potential bidders to know what it is they are bidding for and how the bidding process is to be conducted. This will allow them to decide whether or not they are in a position to bid. Clearly, they will need to know what products, works or services are required (as well as the date of delivery), the quality and quantity that needs to be delivered, what qualifications bidders must have, on what basis their bids will be compared and whether they can accept the terms and conditions offered.[37] Only then will they be in a position to bid. This is coupled with the notion of fairness and equal treatment to the extent that these various specifications, conditions and criteria need to be made clear (transparent) at the outset to all bidders (and at the same time) and applied to them equally. If anything should change during the course of the procedure, then a transparency obligation

would require simultaneous disclosure of those changes to all the bidders.

Public bid opening procedures, where they are applied, are an additional means of providing transparency by requiring procuring entities to disclose the identity of bidders and bid prices. They provide an additional check of conformity of the procedure with the rules and enhance confidence in the procedure by allowing bidders to identify any subsequent irregularities, e.g. the appearance of new bidders or award on the basis of prices that are different to those initially disclosed.

From the government's or the regulator's point of view, procedural transparency is the critical component of administrative control. In order to be sure that the procuring officer is acting in the interest of the government according to the rules and instructions imposed on him, the government needs to be able to verify (should it so wish) that the officer has acted in accordance with those rules and instructions. This is a question of verifiability and the government needs to see how well the instructions have been complied with.

These two complementary objectives, the promotion of objective and fair competition and the ability to exercise administrative control are essential tools used for the benefit of the government. They form the core elements of the efficiency of the national procurement system.

From an international perspective, their importance is one of degree. An international trade partner or international regulator will be interested in the same issues, since they are relevant to the effectiveness of the national system as a whole. In addition, however, they would also be keen to ensure that the system does not operate in a biased or discriminatory way to the detriment of foreign bidders.

(b) Achievement level

Samoa and Tanzania are again the most transparent. The assessment shows, for example, that the level of procedural transparency in Tanzania is acceptable. In particular, it is clear that Tanzanian measures on technical specifications, qualification criteria and award criteria all comply with international standards. Subject to the preference rules applied,[38] there is little risk of discrimination.

In Samoa, the guidelines provide that government procurements are 'normally open to all qualified and eligible bidders regardless of nationality and without restriction as to the origin of their inputs'. The guidelines make extensive provision for the content of bidding documents, including the use of standard bidding documents required by donors or financiers as appropriate and the use of government standard bidding documents for self-financed procurement, subject to any exemptions approved by the Tenders Board. None of the provisions relating to bidding documents discriminates against foreign suppliers. Pre-qualification of bidders is used for works contracts and for the supply of technically complex equipment where the expected value is above US$500,000. Pre-qualification must be based entirely on the ability to perform the relevant work or supply the goods required, taking account of experience and past

performance, capabilities and financial position. There is no limitation on the number of pre-qualified bidders and all of them must be invited to bid. Post-qualification is applied in a similar manner to verify the capability of the lowest bidder where pre-qualification does not apply.

For works and goods and non-consulting services, the rule for the selection of the first ranked tender is essentially that it should be the lowest responsive technically compliant offer within the maximum available budget. Technical compliance is assessed on a pass/fail basis and not scored. The standard bidding period is 30 or 45 days when international bidding is anticipated, and an extension of the bidding period is foreseen where that would result in greater competition.

Much improvement would seem to be needed in Dominica to render the transparency level acceptable. There are a number of obvious problems. There are no legislative guidelines on qualification criteria, but contractors appear to be listed in an unofficial register, which is not updated on a regular basis. There is no statutory requirement to include evaluation criteria in bidding documents. The bid evaluation and contract award criteria are not fully provided to the bidders, and where they are, they tend to be vague. Procuring entities do not consider themselves bound to give reasons for not accepting the lowest tender or any tender. A bid evaluation (as opposed to qualification) can take into account past dealings with the contractor, the past performance of the bidder and the completion date and price. It appears that the bidding documents do not contain many formal instructions on the conduct of the procedure.

Nigeria's system also appears from the reports to be in need of improvement, although the situation may well have changed following the 2007 Act. Current information indicates that the description of what procurement methods should be used is very limited and there are no detailed rules on when or how they should be applied. The choice of method is left to the discretion of individuals. In addition, there are other major weaknesses, such as the lack of standard bidding documents; the absence of a requirement for or guidance on bid openings in terms of timing, location and participation; the lack of a requirement to include evaluation criteria in the bidding documents. The use of non-transparent criteria such as 'reference price' and 'profit margins' are often part of the evaluation and the standard use of negotiations.

2.1.4 Transparency of contract awards

(a) Benchmarks

The transparency of the award decisions is, in a sense, the corollary of procedural transparency. It is a method of ensuring that the stated requirements, specifications and criteria have been complied with and that decisions have not been made on any other grounds. It allows for further verification. It also serves the purpose of putting bidders on notice of the outcome so that they are in a position to react and launch a challenge where they perceive that a breach of the rules has taken place.

A frequent additional requirement is that bidders should not only be informed of the final decision, but should also be notified when they have failed to qualify or when their bids have been rejected on other grounds and that they should be given the reasons for those decisions. Clearly, this provides further opportunities to check that the rules have been complied with and applied fairly; it also encourages the improvement of the supply base by indicating to failed bidders those areas where they need to improve, whether in respect of their qualifications, compliance with formalities or general terms of trading.

(b) Achievement level

In Samoa, the legal provisions include requirements for the disclosure of relevant information to prospective bidders, for public opening of tenders and proposals, and suppliers' debriefing. There does not appear to be a requirement for the publication of a contract award notice. There is such a requirement in Tanzania, although the practice does not seem to reflect the legislation in respect of notification of awards. The same appears to be the case in Dominica: contract information should be published in the *Gazette* but this is not done in practice. No mention of the publication of contract awards appears to be made in Nigeria. In both these cases, therefore, it may be necessary to review the level of transparency.

2.1.5 Transparent dispute settlement

(a) Benchmarks

The issue of dispute settlement is generally stated to be a matter of ensuring that bidders have and are seen to have enforceable rights in respect of any breaches of the procurement rules. The mechanism foreseen is the publication not only of the provisions relating to the availability of and the conditions for commencing review procedures (essentially part of the transparency of the legal framework), but also of the decisions of the competent authorities in respect of any bid challenge or complaint.

The transparency of the bid challenge procedures is a mechanism to ensure that verification can take place where required. The transparency of the ultimate decisions of the reviewing bodies provides evidence that bid challenges are possible and successful, thus building the confidence of the bidders in the system itself. Unless bidders have confidence in the system, they will not challenge inappropriate decisions and the government will not know whether its instructions are being followed. It will also not know whether the benefits it expects from having introduced procurement regulation will be achieved.

(b) Achievement level

In Tanzania, the review mechanism largely follows the provisions of the United Nations Commission on International Trade Law (UNCITRAL) model law and

complies with the recommendations of the *Country Procurement Assessment Report* (*CPAR*). Samoa would also seem to provide similar procedures, although these are based on administrative rather than quasi-judicial solutions. Recourse to the courts remains a final option, but the process is far from clear. In Samoa, any bidder should first seek debriefing. If not satisfied, the unsuccessful bidder may submit a written challenge to the procuring ministry or corporation, with a copy to the Secretary of the Tenders Board. If the challenge is unsuccessful, the bidder may submit a written request (with supporting reasons) for Tenders Board review. The Tenders Board is required to issue a decision within 30 days of receipt of a bidder's request. The Board's decision is final, but if the bidder believes that it is not consistent with the procurement guidelines or is otherwise contrary to law, it may appeal to the courts within six months of its receipt of the Tenders Board's decision.

In Dominica, there is no independent body to which a supplier or a contractor can address their complaints or report irregularities during a tendering procedure and no formal complaints procedure. Judicial review is possible, but the procedure appears to take 5–7 years. In Nigeria, there is no well-defined structure for handling complaints and appeals, much less an administrative body assigned to carry this process out that has been given proper authority and is properly staffed and funded. Currently, the system establishes ad hoc committees to review complaints.

2.2 The benefits of improved transparency

The benefits of transparency or, more precisely, the degree of transparency are intimately linked with the benefits of an effective and efficient procurement system. Where the system itself is sound, it may well benefit from improved transparency. That is to say, where a system relies on, for example, open bidding, it can be improved by moving from advertising in physical media to advertising in electronic media. This, however, presupposes that open bidding is the preferred method of procurement. If the procurement system in question does not provide for open bidding, then the transparency issue goes far deeper. In this case improved means of advertising will not bring additional benefits, and the procurement system itself needs reform. The same may be true of the transparency of the legal framework: if there is a sound legal framework which is not widely known or understood because it is not readily available to the public, the situation can be improved by ensuring that it becomes widely accessible. If the lack of information with regard to the legal framework is the result, on the other hand, of the absence of a legal framework, then the issue is far more deep-rooted than deciding whether there is a sufficient degree of transparency.

In a sense, therefore, the concept of TGP presupposes that the underlying procurement system is sound, so that 'cosmetic' improvements may be made through improved transparency tools. Thus, TGP is a sound procurement system which is transparent. It is not a poor procurement system which is made better through the application of transparency tools. A poor system needs improvement independently of any trans-

parency tool, but any improvements to the system will be made more effective by being more transparent.

2.2.1 The economic rationale of transparency

It is not surprising that the most frequently stated benefit of TGP is increased competition. This reflects the common belief held by those operating within a market economy that competition is what produces the optimal result in terms of efficiency. In a market economy, products are bought and sold on the basis of price. Leaving aside for the moment the question of the quality of products and services or the terms on which they are supplied,[39] the interest of the buyer is to buy the lowest priced product. This is based on the assumption that price is an indicator or guidepost to the scarcity of a particular product in the market and the equilibrium price is the price which results from the operation of the laws of demand and supply. The 'marvel' of the price system is its efficiency in communicating information 'in a system in which the knowledge of the relevant facts is dispersed among many people'.[40] Determining that equilibrium market price depends, however, on perfect information and this is a difficulty faced by the government, and other buyers, who will rarely, if ever, possess such information.

Even in the case of perfectly homogeneous products, supply and demand are constantly changing so that a given equilibrium price will only reflect supply and demand at a precise moment in time. A competitive market is by its very nature dynamic. The nature of economic competition is not 'equilibrium', but a perpetual state of change.[41] As supply and demand changes, so too does the equilibrium price. Differences in prices will also result from the terms and conditions of sale, as well as the level of distribution (wholesale or retail). Each seller will offer different terms or different services or may carry larger or more varied stock and these will be reflected in the price.

Since the necessary underlying information will be unknown, the procurement officer needs to rely on the guidepost of price; to do so, he needs to be able to identify the prevailing market prices. Competition operates as a discovery procedure by allowing different suppliers to communicate the prices at which products are available and which may be produced using different quantitative combinations of the various factors of production. In the absence of perfect information, identifying the market and/or prevailing prices requires a method of search.

This is where advertising comes in. The availability of printed media such as newspapers, journals and bulletins, and the emergence of the internet as a tool of mass media have led to the availability of information which may be easily and widely circulated. The most efficient modern method of undertaking a search of buyers, sellers and prices is by advertisement either in the printed or electronic media or both. Regulated procurement makes great use of advertising, requiring procurement contracts to be advertised so that all potential suppliers have the opportunity of identifying potential buyers. Advertising enables the buyer to reach a broader audience, outside its immediate locality and, in the case of international procurement systems, advertis-

ing in a central organ, distributed throughout the relevant territory or on a website to which access is unrestricted, is a specific requirement.

Transparency of bidding opportunities thus has an important role to play in overcoming the informational disadvantage faced by the procurement officer and in ensuring the widest possible choice for the government, and therefore the highest potential gain in terms of lower prices and higher quality. Clearly, the wider the choice, the greater the potential savings; this is one of the objectives of attempts to 'internationalise' procurement. Again, however, wider choice through international competition and negotiated access to foreign markets are quite separate issues.

One of the by-products of transparency in the domestic context will be to highlight the existence of inefficient firms. If companies (bidders) do not produce efficiently and cannot match the prices of their competitors (i.e. if they offer higher prices than the prevailing market prices), then they will, in theory, lose out. If their situation is irredeemable, they may well be forced to close. If, on the other hand, the government continues to buy from them at inflated prices, then they will be protected and may be able to continue to operate. This does not mean that they will improve; indeed, they will probably get worse, since they will benefit from a privileged position in which they are rewarded for their inefficiency. There is, in fact, no incentive to improve. The consequence for the government purchaser is that it pays a higher price for the same product it could get elsewhere from a lower priced company (bidder). It makes an economic trade-off: it pays a higher price for the benefit of protecting an inefficient company.

There may be political reasons why it wishes to do this: fear of causing unemployment, or fear of losing votes in a particular area and failing to get re-elected. These are all non-economic reasons, some of which may be legitimate and some of which may not be. The point, however, is to emphasise that the decision involves an economic trade-off. Where the inefficient solution is chosen, the national budget and, therefore, the taxpayer will lose.

This issue clearly comes to a head in the context of discussions aimed at trade liberalisation. Where markets are opened to international competition, there is a fear that such competition will be so efficient as to force competing domestic industries to close. The choice facing the government is the same: to protect inefficient domestic industry and pay too much, or to accept the competition and risk seeing some domestic companies fail. The economics are clear: protection will result in continued overexpenditure (losses) and will also probably condemn domestic companies to perpetual inefficiency since they will have no incentive to improve. The politics are less clear: it may be unacceptable for a government to be seen as failing to protect a domestic industry, even if that is a poor economic choice. This, however, is a political choice resulting in an economic trade-off. It relates to market access conditions and not to transparency as such.

Economic theory is also important in explaining the benefits of transparency. As indicated above, the principal/agent relationship raises a problem of information. In terms of procurement, the agent is closer to the procurement process and will conse-

quently have more information on the market and the suppliers. This creates an informational asymmetry between principal and agent which may, where their interests diverge, allow for exploitation by the agent. This poses an immediate threat to the procurement process in terms of market purchases.

The agency relationship provides many opportunities for exploitation, both deliberate and unconscious. Corruption and bribery are obvious examples of deliberate exploitation for personal gain. The danger is that the goal of the agent is not to maximise social or economic welfare (the government's assumed goal), but to maximise their own personal welfare or that of their department, i.e. increased personal income or departmental budget, better working conditions or job prospects. The agent's goals are thus not necessarily co-extensive with the goals sought by the government, and to the extent that these personal goals conflict with the principal's goals of social welfare, social welfare is correspondingly reduced.[42] The issue becomes one of control over the agent in an attempt to realign the goals or at least to provide incentives and penalties in such a way as to ensure that the agent performs in accordance with government goals.

The agency relationship may itself be responsible for waste and inefficiency, even where the agent does not set out deliberately to exploit the situation. The lack of a common identity of purpose between the principal and agent can also give rise to less obnoxious, but hardly less damaging, inefficiencies. If the buyer is a private firm, its objective is to maximise profits. The government has no such profit motive and the absence of any comparable measure of efficiency will affect the agent. A reduction in their work effort or failures in their work may reduce a firm's or the government's efficiency, but it does not directly affect the agent's profit (income). Inefficient procurement rarely leads to the closure of the department (whereas a private firm may well suffer to the extent of bankruptcy), and only in cases where the lack of probity is proven will it lead to redundancy. Further, knowledge of the procurement market is likely to be in the hands of the agent, not the principal, so that it may be difficult for the principal to recognise that there has been inefficiency.

As a result, it is often the case that agents buy goods and services without regard to the 'profit' (in terms of reduced expenditure) that the government may be assumed to need for the pursuit of other socially desirable objectives. If there is no direct benefit from the increased profit assumed to result from the application of economically efficient procurement, there may be a tendency to ignore such efficiencies. The agent may also be concerned with the 'profit' of the bureaucracy, rather than with the 'profit' of the government as a whole. Government departments tend to be run on the basis of annual budgets which are set according to the perceived needs of those departments. The greater the need, the greater the budget, with consequent increases in size, manpower, power and prestige. Failure to spend the allocated budget will be seen as a reflection of decreased needs and will lead to a decreased budget with commensurate loss of manpower and prestige.

Notwithstanding any lack of probity on their part, the agent may simply become careless because they have no incentive to do otherwise. Equally serious is the agent

who, far from being careless, has the public good at heart. The agent sees it as their duty to get the best results; the problem is that the 'best' result in their mind is the best product, which is almost invariably the most expensive. There is a danger here that contract specifications are overly optimistic (the problem of 'gold-plating') and that the government obtains products which are far above what is needed, with concomitant over-expenditure and vulnerability to excessive long-term costs. The lack of profit motive is reflected in the desire to provide the best service, regardless of the increased costs of doing so.

The economic rationale of TGP is, therefore, to rein in the corrupt, incompetent, careless or wasteful procurement agent and ensure that they conduct the procurement function in the interests of the government. This is done by way of transparency controls and transparency tools, which limit deviance and promote economic efficiency.

Economic theory also predicts that decisions are made by individual consumers and producers attempting to maximise utility and profits, respectively. Consumers (in terms of procurement, the government is nothing other than a consumer) are presumed to make purposeful choices so as to pursue consistent ends using efficient means. Assuming that consumers are able to process all the relevant information (a critical problem in this context), they will choose to consume according to maximum utility. This rests on a straightforward cost-benefit analysis determined by the preferences of the consumer. In non-scientific terms, the choice made expresses the 'value for money' obtained by the consumer, an assessment which is individual to that consumer because it reflects that consumer's assessment of benefit.

However, the government is not a buyer like any other. It is a buyer which also has responsibility for the welfare of its people. The result of this responsibility is that, even in terms of procurement, the pursuit of economic efficiency is unlikely to be its only function. It will have endowed itself with objectives of social as well as economic welfare; it will have political imperatives and priorities;[43] it will want to ensure its position in the international arena. As a purchaser, the government's preferences will also reflect those social and political (ethical) policies it has been elected to pursue. 'Value for money' will, as a result, incorporate a cost/benefit analysis which takes into account the achievement of such policy goals. These are all considerations which will have an effect on the objectives of its economic, social and political policies in relation to the economic efficiency pursued. These policies also imply a trade-off against economic efficiency.

Such objectives may, and currently often do, include policies such as promoting 'green' procurement (i.e. the purchase of products and services which cause least harm to the environment) and various social objectives such as the reduction of unemployment and the protection of minority interests. In the case of the USA, for example, preferences are given in the case of procurement to bidders owned by minority groups (based on gender or ethnicity) or people with certain disabilities. In the EU and under the WTO, preferences may be given to companies which employ prison labour or disabled workers. These are all issues which fall outside the transparency debate since

they relate directly to the substance of the procurement rules in place. The role of transparency, however, remains the same. Whatever preferences are given or whatever economic trade-offs are made, TGP allows the correct use and implementation of the rules to be monitored, protects the competitive process (however circumscribed), provides confidence to bidders and enables the government to effect administrative control over the bureaucracy. From the point of view of assessment, transparency will also enable those looking at the systems to take a position on the acceptability of the rules in place.

2.2.2 Qualitative benefits of improved transparency

This section provides a summary of the previous sections, indicating where and how the transparency tool enhances the benefits of a sound procurement system.

Publication of the legal framework will ensure that public procurement officers are aware of their obligations to conduct efficient and effective procurement. Familiarity with the legal framework enables all potential bidders to understand and assess the rules of the game. This provides the necessary confidence for bidders to act as honest brokers and thus make their best offers. From an international perspective, and where access by foreign bidders is permitted or unrestricted, these benefits are commensurately enhanced and will lead to greater participation by such bidders; this will have the effect of increasing foreign investment in the country. In addition, transparency provides a basis from which civil society can be engaged in the procurement process.

As a market search mechanism, the publication of procurement opportunities (advertising) enables the procurement officer to attract the widest possible choice of products and prices from which to make an informed procurement decision. It does so by enhancing competition by reaching the widest possible number of potential bidders, thus enhancing also value for money. From a regulator's perspective, requiring advertising (at least above certain thresholds) ensures that procurement officers cannot choose their preferred bidders in an arbitrary manner. From an international or trade liberalisation perspective, the idea is to ensure competition from foreign bidders as well.[44]

Procedural transparency also has a number of aspects. From the bidder's perspective, providing clear bidding documents, specifications, and qualification and award criteria will enable the bidder not only to decide whether it is in their interest to bid, but also to improve the quality of their bid; given the physical distance, this is even more important in the case of non-domestic tenderers. From the procurement's officer's point of view, this provides a clear set of instructions and guidelines to manage the process. For the purposes of the regulator, it provides the essential mechanism of controlling or checking the actions of the procurement officer to ensure that the officer is acting in the interests of the government and, ultimately, the taxpayer. As a verification tool, procedural transparency provides guarantees against inefficiency, bias and corruption. From the international perspective, it will enable international partners to monitor any instances of access restrictions or discrimination against foreign products

or bidders.

As a corollary of procedural transparency, transparency of contract awards provides a means of guaranteeing the appropriate implementation of the procurement system because it allows bidders to identify any potential breaches at a stage where there may still be remedies. Additional benefits to bidders include information on deficiencies in their bids, enabling them to improve in preparation for future contracts.

Transparent dispute resolution provides the mechanism to ensure enforcement of the rules in the event of a breach and represents the method of verification at the hands of the bidders. Enforcement of the rules imposes accountability on procurement officers and provides bidders with increased confidence in the system.

2.2.3 Quantitative benefits of transparency

Despite the widely accepted recognition that TGP provides tangible and significant cost benefits, this is usually based on general observations arising from experience and apocryphal examples. This does not mean that such examples are untrue. The difficulty in obtaining hard empirical evidence of the cost savings is due mainly to the problems in obtaining accurate and reliable data, and in particular in obtaining data with which to provide a meaningful comparison. First, many of the goods and services that are procured by government (e.g. roads) are procured only by government (at least in the same quantities); it is hard to make a comparison between purchases made by governments in an uncompetitive environment and those made by private undertakings in a competitive environment. Second, procurement reform will often precede adequate record keeping by a long margin. The reforms are introduced before the data have been collected with which to make a 'before and after' comparison. Third, market prices can change rapidly (compounded by currency and exchange rate fluctuations), so that historical price data are not always reliable.

One of the few relatively recent reports to have taken a solidly scientific approach is the 2004 European Commission's Report on the functioning of public procurement markets in the EU.[45] Though it does not have any easier a task in terms of collecting and assimilating the relevant data, the EU has the advantage of applying procurement rules to a large number of member states, so that prices paid across the European Community (for example, in those countries which apply the rules correctly and those which do not) can be compared and the results analysed against the yardstick of the degree of compliance with the procurement rules. Consultants conducting these studies have also applied econometric techniques to compensate for distorting factors. The evidence collected suggests that prices paid by public authorities are lower when procurement rules (in this case, the EC directives) are applied. The overall conclusion is that prices are, on average, 30 per cent lower.

Earlier EC assessments of the success of its procurement directives were often disappointing, but this was probably due to the fact that they asked the wrong question. The assessment sought to ascertain the level of cross-border trade, but it might have

been better to consider the way in which modern business works. Generally, companies that are interested in bidding for contracts in various countries will set up local offices, even if they are no more than representation offices. This is true both in the case of works and large ticket goods, and it is often true in the case of certain transportable services (e.g. auditing, accounting or engineering services). In the case of off-the-shelf products, manufacturers and large retailers will use distributors and agents. As a result, the assessment should have been trying to find out how many bids in a given country were made by locally established 'foreign' companies or which contained products produced in other member states. The Commission did ask these questions in this later assessment, with the result that it was able to demonstrate greater success. The executive summary states:

> New data suggest that previous studies may have underestimated the actual dimension of cross-border procurement. In a sample of firms involved in procurement activities, 46% carried out some type of cross-border procurement. However, direct cross-border procurement remains low, accounting for just 3% of the total number of bids submitted by the sample firms. The rate of indirect cross-border public procurement is higher, with 30% of the bids in the sample being made by foreign firms using local subsidiaries … It is important to note that domestic firms and foreign subsidiaries have similar rates of success when bidding for contracts in the country where they are located (30% and 35% respectively). This confirms the importance in Europe of bidding for contracts through subsidiaries.

The results of the EU study are broadly similar to those obtained on a smaller scale by the World Bank during the preparation of its *CPAR* of the Former Republic of Yugoslavia (FYR) in 2001. Given the significant purchases of pharmaceuticals made through the national budget of the FYR and the existence in the same territory of other pharmaceutical purchasing organisations, it was possible to make a meaningful comparison based on the available figures. The *CPAR* mission undertook a limited analysis of historical prices paid for selected pharmaceuticals and medical consumables from a series of procurement transactions in Serbia during 2001. The objective of the exercise was to compare federally mandated prices, prices actually paid under local tenders financed by the Serbian Health Insurance Fund (HIF) and prices for the same products resulting from competitive tenders financed by external sources (Pharmaciens Sans Frontières (PSF) and the European Agency for Reconstruction), so as to form an opinion as to whether prices paid for commonly procured pharmaceuticals and materials offer reasonable value for money.

Taking the average of the 21 products purchased, the prices paid under the tender financed by the European Agency for Reconstruction (EAR) were 36.2 per cent lower than federally approved prices. Finally, the total quantities of all 21 pharmaceutical products procured by the EAR cost a total of €4,085,353 (US$3,728,784); had these products been procured in the same quantities at federally approved prices, the total cost would have been €5,493,574 (US$5,014,096). This translates into a notional

saving of €1,408,221 (US$1,285,311) or 25.6 per cent. In the case of the PSF purchases, and having calculated the cost of the estimated annual supply of these 46 drugs, the costs incurred by the Serbian HIF were calculated to be 23.7 per cent higher in total than those based on the prices paid by PSF for a year's supply of those drugs. The *CPAR* also cited an earlier survey which found that competitive contracting by the public sector in the UK yielded savings in the order of 20 per cent without any reduction in quality.[46]

One of the sample countries, Dominica, is a member of the Organisation of Eastern Caribbean States (OECS), which has set up the Pharmaceutical Procurement Service (OECS/PPS), designed to improve the use of existing resources by efficient procurement practices.[47] OECS/PPS is an agency of the OECS, a formal grouping of nine Eastern Caribbean Countries – Anguilla, Antigua and Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, St Kitts and Nevis, St Lucia, and St Vincent and the Grenadines – with a combined population of approximately 550,000. The OECS/PPS was established under a project funded by USAID and by 1989 the scheme was financially self-sufficient. The core function of the OECS/PPS is the pooled procurement of pharmaceuticals and medical supplies for the nine ministries of health of the OECS countries. The OECS/PPS presented suppliers with a public sector monopsony, so that products tendered by the OECS/PPS are purchased exclusively through annual contracts. It operates a centralised, restricted tendering system in which all approved suppliers are pre-qualified by a vendors' registration questionnaire. Pre-qualification is necessary to assess quality, technical competence and the financial viability of competing suppliers. Following a bid solicitation from over 75 international suppliers, the OECS/PPS awards annual contracts, places orders directly with suppliers and monitors delivery and supplier performance. Prior to the establishment of the OECS/PPS, the OECS countries purchased drugs individually from suppliers by direct negotiation. During the 2001/2002 tender cycle, the annual survey of a market basket of 20 popular drugs showed that regional prices were 44 per cent lower than individual country prices.

2.3 The costs of improving transparency

As well as considering the benefits of improved transparency in the domestic context, any country negotiating access to an international procurement agreement also needs to be aware of the costs of making the necessary improvements. They may benefit from financial assistance in making those improvements, but the costs will not be negligible.[48]

The costs of transparency involve two issues. The specific transparency tools itemised in the above sections will have associated costs which may be quantified. This also brings us back to the question of the underlying procurement system. To the extent that a sound procurement system exists, any transparency improvements are likely to be relatively modest. Where the underlying system is deficient, the improvements needed will be more fundamental. The costs of reforming an unsound procurement system can be very significant. In developing countries, those costs are usually

shared with the multilateral development banks and other donors assisting those countries with the reform process. (There are examples of such reform initiatives costing several million dollars, although the costs of creating a reformed system would generally appear to start closer to US$500,000.) Even then, the benefits from the introduction of an efficient and effective procurement system are likely to outweigh the costs involved in establishing it. Whilst there is always a 'cost' to conducting a procurement process, the benefits are less obvious and can only be measured by the loss of savings.[49] An inefficient procurement system is expensive and implies a higher than normal expenditure. A sound procurement system will lead to significant budget savings (see section 2.2.3), which are likely to far exceed any costs involved in creating such a system.

The second issue concerns the broader costs, including the 'cost' of not applying TGP. Since the transparency tools are linked to the underlying system, the failure of the system is reflected in the lack of transparency and the costs of such a system will be the failure of the government to make any of the expected budgetary savings. In this section we will look at both the associated costs of improving transparency in the case of a basically sound procurement system and the more general costs, represented by lost benefits, of failing to apply TGP.

2.3.1 Associated costs

On the assumption that the underlying procurement system is basically sound, the costs associated with improved transparency are relatively easy to determine. Taking once again the specific transparency tools identifies in the previous sections, the anticipated costs are as follows.

Publication of the legal framework:[50] This requires a vehicle for publication. Given the one-off nature of any initial publication, the costs associated with ensuring transparency of the overall legal framework will be modest. To this must be added, however, the costs of any subsequent interpretative guidelines or implementing regulations. Such publication would generally be made by way of the government's official gazette and would ordinarily form part of the general transparency of government operations. To ensure accessibility and availability, however, it would probably not be sufficient to allow this information to be consigned to such documents, where they are not widely distributed. Fulfilment of the requirement would imply a significant distribution of such documents and the possibility of either consulting or buying copies of the documents relatively cheaply.

In addition, it would be necessary to publish other decisions which affect the procurement environment, such as reports of the decisions made following bid challenges. Where these are made by judicial bodies, it may be that they are published anyway. Even then, however, they would need to be disseminated in a more targeted and accessible way and could require a specific publication.

Traditional methods of providing transparency through physical means such as

official gazettes, court reports or specialised bulletins are both time-consuming and often subject to delay (at least in respect of the continuing transparency obligations). Most modern systems now rely extensively on electronic media and means of communication. Legal texts can very easily be provided on CDs, for example, at a fraction of the cost of printed versions. For the purposes of the legal framework, the usual mechanism is to provide an information website which contains all the relevant information. The costs of setting up an establishing a website are relatively small. The real cost, however, is in maintaining the system, which requires the services of an IT expert, and in ensuring that there is a trained operator to input the updated information. These can be significant.

Publication of procurement opportunities: Traditionally, advertisements have been published in newspapers or official gazettes. In some cases, they are also published in specialised bulletins. In the case of advertisements placed in newspapers, it is generally the procuring entities that cover the cost. Since such advertisements are generally required only in cases of higher value contracts, the cost of the advertisement usually becomes a relatively insignificant part of the overall transaction costs, and is far exceeded by the benefits to be gained through obtaining more competitive prices. The cost of publishing gazettes and specialised bulletins is generally borne by the government or by a specialised regulatory authority. The cost of such bulletins which, to be useful and timely, need to be published and distributed on a regular basis, is not insignificant, but may be reduced by charging for the bulletin. Such charges of course need to be realistic and not designed to make a profit

The advantages of electronic means of communication have been recognised in this context also, and many countries and organisations now regularly publish opportunities on national or international websites. These websites are also used extensively at a national level. The benefits of such a system, notably where it is coupled with the ability for procuring entities themselves to upload the required opportunities, is that they are generally self-sustaining, although they clearly need a more sophisticated team of operators and IT specialists than is necessary for a purely informational website.

Procedural transparency: The costs of procedural transparency will not be significant and will mostly be borne by the procuring entities. The costs involve the preparation of documents[51] and the inclusion of relevant information in the appropriate documents. Such documents need to be prepared in any event if the procurement process is to run smoothly. The only difference is the care that the procuring officers are required to take in compiling the documentation.

In view of the verification function of procedural transparency, much will depend on the recording and reporting obligations of the procuring entities. While it is in any event be in the interests of procurement officers to keep adequate records, an obligation to do so involves some extra work in preparing the records. Nevertheless, as part of the job description, this would be covered by the officer's salary and does not imply any additional direct costs.

Transparency of contract awards: Contract award notices would generally be published in the same vehicle as the bid opportunities and do not require any additional expenditure. Since they are comparatively short notices, their publication only implies a few extra pages in any existing publications or some extra web space. Assuming these have already been set up, publishing award notices add very little extra cost.

Debriefing of unsuccessful bidders generally takes time and will, therefore, be covered by the officer's salary, but it does not imply any additional direct costs.

Transparent dispute resolution: Most of the transparency elements in this context would be covered by the costs associated with the legal framework. The rules applicable to review procedures, the procedural requirements and standard forms all need to be made available as part of the publication of information in respect of the legal and regulatory framework. The same would probably be true of the resulting decisions, although specific provision may need to be made in the case of any specially created bodies.

The absence of an appropriate review mechanism would, on the other hand, imply the need for significant expenditure in creating such a mechanism. Its absence is not something that can be remedied by simply imposing transparency tools.

2.3.2 Broader costs of transparency

If the benefits to be achieved by introducing and improving TGP are, as described above, increased competition and lower prices, together with increased control over the bureaucracy in terms of creating greater efficiency and reducing instances of corruption, then the costs of failing to introduce TGP may be expected to be the opposite. Failure to implement TGP could, therefore, lead to a financial cost to the government equivalent to the figures cited above.

It should be remembered that the benefits of TGP flow first and foremost to the government, and lack of competition or fairness in the procurement process will lead to higher prices since: (i) there will be less competition, which reduces the available choice of producer and product and serves to give the privileged few who are admitted to the competition (who may thus charge monopoly rents) a quasi-monopoly position; and (ii) the potential bidders will have no (or will have lost) confidence in the system, so that they have no incentive to act as 'honest brokers' and offer their best or most favourable terms.

These 'costs' relate to the failure of introducing TGP. As discussed above, however, there may be other costs of actually introducing TGP. These are not economic or financial costs; they are *political* costs, or costs which the government may wish to bear for *social welfare* reasons. The two main costs referred to above are:

- **The possibility that inefficient firms will go out of business with a consequent loss of jobs:** This may pose a political problem for the government (especially if it is the result of international market access agreements) but, from an economic

point of view, is not necessarily a negative consequence. There is little point in paying higher prices simply to protect inefficient firms. It would be better to seek ways of improving national firms through technical improvement programmes or legitimate subsidies where appropriate, and expose them to competition in order to provide incentives for improvement.

- **The difficulty in pursuing purely social or environmental objectives where the procurement system seeks economic efficiency:** It is not always the case that such policies will result in higher prices,[52] meaning that they could be promoted through a procurement system based on lowest price, but this will generally be the case. Even in an international context, some of these objectives are also acceptable; the question is not whether international partners will accept them, but whether the government is prepared to make the economic trade-off that the pursuit of such policies implies.

In both these cases, the government has a choice between the economically efficient solution or the solution which will cost more financially, but which may please the electorate or, in the case of protected companies, industry lobby groups.