

Anti-corruption policies in Asia and the Pacific: Thematic review on provisions and practices to curb corruption in public procurement Self-assessment report Malaysia

Identifying reform needs, assessing progress and evaluating the effectiveness of anti-corruption policies and practices are central principles enshrined in the ADB/OECD Initiative and its Action Plan. In this context, the present self-assessment report from Malaysia was prepared as background to the Initiative's thematic review exercise on measures to curb corruption in public procurement in the Asia-Pacific region.

This thematic review on public procurement was initiated in reaction to the findings of the Initiative's 2003-2004 in-depth analysis of the legal and institutional anti-corruption frameworks of the Action Plan's then 21 endorsing countries against the standards of this Plan ("Anti-Corruption Policies in Asia and the Pacific – the legal and institutional frameworks", November 2004). In this study, public procurement was identified as one of the areas requiring particular attention in the Asia and Pacific region and where consequently the Initiative's Steering Group had a vital interest to promote reform.

With this aim, the group agreed to pursue analytical work on corruption in public procurement through a thorough review of relevant existing policies, practices and rules so as to assist participating governments in better understanding the corruption risks inherent in their countries' institutional settings and procurement practices. This thematic review further seeks to assess how countries translate into practice their commitment made under the Action Plan to curb corruption in public procurement. Eventually, the review's findings will provide governments with an analytical framework to design policies and procedures that ensure greater transparency and integrity in public procurement and to identify priorities for reform in this respect.

In line with the Action Plan's principle of self-assessment, the review is conducted on the basis of information provided by participating countries in reply to a questionnaire specifically prepared for this purpose by the ADB/OECD Initiative. The present document represents the replies submitted by Malaysia in this framework.

Further information on the exercise, on other participating countries and on the analysis' outcome is available at the Initiative's website at <http://www1.oecd.org/daf/asiacom/stocktaking.htm#trpp>.



A. General framework

Legal and organizational framework:

1. Please list and briefly describe laws and regulations related to government procurement, including those that give exemption to the standard government procurement rules. Where available, please attach a copy or indicate an internet-site for download of these regulations, if possible in English language. Ensure to include secondary legislation, rules and procedures. Also, please indicate relevant international or regional agreements¹ that your country is committed under, including its level of involvement (e.g. signature, ratification, implementation).

The information on laws and regulations related to Government procurement can be obtained from the APEC Website at www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement/resources/malaysia.html.

Malaysia is a member of the APEC and participating actively in the Government Procurement Experts' Group (GPEG) and has adopted the APEC Non-Binding Principles on Government Procurement. In addition, Malaysia has signed the United Nations Convention Against Corruption (UNCAC).

2. Please explain the repartition of tasks and responsibilities in the procurement process among centralized, decentralized and specialized authorities (in particular: design of policies and standards; capacity building; definition of needs and terms of individual tenders; execution of different procurement stages from advertising to contract awarding; dispute resolution; control of the fulfillment of the terms and conditions by the contractor).

The information can be obtained from the APEC Website at www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement/resources/malaysia.html.

3. Is procurement of goods governed by the same procedures as procurement of services?

Procurement categories in Malaysia are divided into supplies, services and works and the same procedures apply to all categories of procurements.

4. Does the procurement law establish a Public Procurement Office (PPO)? Is the PPO appropriately staffed against its mandate? In this context, please state the total number of staff involved in public procurement country-wide. Are the procurement entities/PPO provided with adequate financial resources for the execution of their tasks?

By virtue of the Federal Constitution, Schedule 7 Article 39 (96-112), the Ministry of Finance and all the relevant structures and functions under it were established.

¹ e.g. APEC Non-Binding Principles on Government Procurement; WTO Agreement on Government Procurement; etc.

No statistics on the total number of staff involved in the public procurement country-wide is available as procurement is decentralized, whereby the Ministries/Agencies are empowered to procure goods and services on their own based on annual budget allocated.

Yes, the procurement entities are provided with adequate financial resources for the execution of their tasks.

5. Please name the sectors, areas or conditions subject to particular procurement rules (if applicable, e.g. military; local governments; state owned enterprises; urgency).

Procurement of goods and services by all Government and semi-Government agencies are subjected to procurement rules and regulations issued by the Ministry of Finance.

Procurement policies and practices:

6. Do model tender documents exist (e.g. handbooks, model forms, model contracts, etc)? If yes, is their use mandatory, and do they contain a specific anti-corruption clause?

Yes, there are Treasury Instruction (TI), Treasury Circular Letters (TCL) and Procurement Guidelines Book issued by the Ministry of Finance for reference of procuring agencies on Government procurement which explain, inform, clarify and show the examples and procedures of procurement.

In addition, the procuring agencies must make available a desk copy of the tender document for prospective bidders to view.

In our effort to combat corruption, any person should declare interest and not to participate in any deliberation pertaining to procurement exercises. Subsection 15(1) and (2) of our Anti-Corruption Act 1997 (Act 575) states that, “Any officer of a public body who uses his office or position for any gratification shall be guilty of any offence. For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for gratification when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.”

7. Please provide the latest available economy-wide annual total numbers and values of purchases, with breakdown a) by sector and b) by type of procurement. In this context, please describe the procurement types foreseen by law (e.g. sealed tender, direct purchase; limited tendering) and the policy of your Government towards these types.

In line with the concept of “let managers manage”, procurement exercise is delegated to procurement entities.

Please refer to the APEC website for details on the types and modes of procurement in Malaysia

8. Please explain under which conditions pre-selection procedures are conducted.

Pre-selection refers to as an exercise for the purpose of vetting. It means certain procedures have to be complied with before a decision is made. For instance, pre-selection tenders are called when the ministries/agencies identify only a few contractors or suppliers in that specific field.

9. If your country is currently engaged in or planning a major reform of its procurement system, please briefly state the scope and objectives of this reform.

In year 2000, the Government of Malaysia introduced an electronic procurement (eP) system, an internet-based on-line system which is designed to encourage competition among contractors and to expedite the procurement processes. The development of the eP system also has the objective to reduce bidding costs and make the process more efficient and transparent. So far, this system is in the second phase of implementation.

B. Transparency and Fairness

Transparency of general procurement policies and regulations:

10. Are the existing laws, regulations and policy guidelines on public procurement publicly available and, if yes, where/how?

The existing laws, regulations and policy guidelines on public procurement in Malaysia is available in printed form and also can be accessed from the Ministry of Finance website at www.treasury.gov.my

11. In your country, do certain territorial entities or institutions establish lists of eligible contractors (sometimes called “white-lists”)? If yes, please explain the criteria for a company to be included in or excluded from this list, and what use is made of such lists.

In our country, there is no such thing as “white list”. All individuals, companies or corporate bodies intending to participate in Government procurement i.e. to do business with the Government are required to undergo a registration process. This includes all contractors of works, supplies and services. Registration of contractors must be done as below :-

<u>Category</u>	<u>Registration Authorities</u>
Works	Contractors Services Centre, Ministry of Entrepreneurial and Cooperative Development and the Construction Industry Development Board (CIDB) Malaysia
Supplies	Government Procurement Management Division, Ministry of Finance Malaysia.
Services	Government Procurement Management Division, Ministry of Finance Malaysia.

Only locally incorporated companies can register with the above Registration Authorities.

12. Is a bid security and/or a performance guarantee required from the bidder? What are the procedures for advertisement of procurement opportunities?

Bid security is exempted for local suppliers/contractors and only applicable to foreign bidders. As the foreign bidders are not registered with the Registration Authorities, they are subjected to a bid security to safeguard Government interest. A performance guarantee is only required from a successful bidder awarded a contract. The percentage of performance guarantee range from 2.5 to 5% of contract value.

The advertisement of procurement opportunities is further explained in question no. 13.

Transparency of procurement opportunities:

13. Describe where and how tender opportunities are published, including if their publication is mandatory or depends on certain criteria (if so, please list)? Please state if a fee has to be paid to receive tendering documents and – if yes – how this fee is fixed and whether other processing fees apply. Please briefly explain whether your country allows adequate and reasonable time for interested suppliers to prepare and submit responsive bids.

All local tenders are advertised in at least one local newspaper in the Malay language. For international tenders, beside Malay newspaper, they must be advertised in one English newspaper, and local Embassies and High Commissions are also informed. Agencies also advertise all tenders in the agencies' websites and in the Malaysia Government's Official Portal (myGovernment).

All eligible contractors or suppliers who intend to participate in Government tenders are required to purchase tender documents based on rates stipulated in the Treasury Circular Letter. A minimum fee of RM50.00 is charged for the purchase of tender documents for local tenders while a minimum of RM100.00 is charged for the purchase of tender documents for international tenders.

The advertisement must state clearly the type of supplies or services required by the tender, the name and address of the agency which invites the tender, the address where tender documents can be collected and the closing date of the tender submission. The Government agency must make available a desk copy of the tender document for prospective bidders to view.

Bidders are given a submission period of not less than 21 days for local tenders. For international tenders the submission period may not be less than 56 days.

14. Are selection and award criteria prescribed by law? If yes, are they prescribed in an exclusive manner? Please name these criteria a) for procurement of goods, and b) for procurement of services (e.g. technical requirements, qualification of the bidder, evaluated price, expertise/experience, etc.) and those that are explicitly excluded (e.g. nationality of the bidder or other affinity, etc.). Is the description of these criteria in the tender documentation mandatory?

Agency Procurement Boards will consider and select the successful bidder. Selection of tenders will be based on the general procurement principles, pre-determined criteria and final evaluation.

Information such as specification and the terms and condition of a contract must be stated in the tender document so that all bidders are well-informed of agencies' requirement. All tenders have to undergo an evaluation process prior to any perusal by the tender boards. Evaluation is normally done by two separate committees i.e. Technical Evaluation Committee and Commercial Evaluation Committee, based on the criteria set in the tender documents.

Transparency of contract evaluation and award procedures:

15. What is the procedure if none of the bids or too few – relative to a prescribed limit – fulfill the technical requirements as defined in the call for tender (e.g. reopening of the bid, negotiations, etc.)? Do you keep a register of all bids received?

Tenders may be reopened if none of the bidders fulfill the technical requirement. This decision must be endorsed by the Tender Board.

The quotation/tender opening committee will keep a register of all bids received.

16. Where and how are actions and decisions in the procurement process recorded? How long and where are these records preserved, and who can access this information?

All actions and decisions are recorded and will be kept between one to twenty years depending on the types of record. All Government documents are classified ranging from “restricted” to “top secret”. Tender documents are classified accordingly. Generally, they are accessible to authorised procurement personnel.

17. How and to whom is the final decision on awarding the tender disclosed? Do reasons for the selection of the winning bidder have to be stated? Are post-awarding negotiations allowed and, if yes, under what conditions?

The successful bidder will be informed directly by the respective Ministries/Agency through registered letter. Reasons for the selection of the winning bidder are stated in the minutes of meeting of the Agency Procurement Board. Where the lowest evaluated bid is not selected, reasons have to be minuted.

Upon selection of successful bidder by the Agency Procurement Board, if the specification forwarded by the successful bidder require further clarification, the procuring agencies may issue a Letter Of Intent (LOI) to seek clarification on relevant matters. The LOI is a letter issued to a bidder to indicate the intention to accept the bid subject to conditions and requirements from Government. The LOI is not legally binding. The Letter of Acceptance (LOA) is a binding document and must be attached as part of the contract document.

18. Are framework contracts allowed? If yes, what measures are taken to control against corrupt or unnecessary demands?

The Ministry of Finance facilitates the procuring agencies by having central contract for common user items. The selection of the suppliers is through tender exercises by the Ministry of Finance where the prices and other terms and conditions are fixed. All agencies have to procure from the central suppliers. The central suppliers are required to submit sales and deliveries statement on a quarterly basis to the Ministry of Finance for monitoring purposes.

C. Integrity

Integrity of procurement personnel:

19. Do codes of ethics or similar instruments exist that explicitly apply to procurement personnel and entities? If yes, do they specifically address corruption risks, and do they contain conflict of interest provisions (e.g. provisions making mandatory the declaration of personal interests by agents and buyers)?

There is no specific code that explicitly applies to procurement personnel. Rather, there is a code of conduct that applies to all public officials, including procurement personnel, namely, the Public Officers (Conduct and Discipline)(Amendment) Regulations 2002. Sub-regulation 4(2) of the Code addresses issue on conflict of interest which states that :-

“An Officer shall not –

subordinate his public duty to his private interests;

conduct himself in such a manner as is likely to bring his private interests into conflict with his public duty;

conduct himself in any manner likely to cause a reasonable suspicion that –

(i) he has allowed his private interests to come into conflict with his public duty so as to impair his usefulness as a public officer; or

(ii) he has used his public position for his personal advantage.”

In addition, every public official is required to sign a “Letter of Undertaking” for renewing his solemn oath of subordinating his public duty to his private interests.

Sub-section 15(1) and (2) of Anti-Corruption Act 1997 provides for offence of using public office or position for gratification as already explained in Question 6.

Procurement procedures also require procurement personnel who has vested interest in a procurement exercise to declare such interest in writing and withdraw themselves in processing or dealing in the procurement. Any member of the tender board who has personal/vested interest in a tender must declare such interest and leave the meeting room during the discussions and decision-making of the specific tender. This must be reflected in the minutes of the meeting.

20. Does your country provide for specific training for procurement personnel that include integrity issues? Please list manuals or policy guidelines that might exist to clarify procurement procedures and principles to procurement personnel (if existing please attach a copy or internet-address for download).

Yes, we do have specific training for procurement personnel that also include integrity, which are undertaken by the National Institute of Public Administration, (INTAN) Malaysia under the Financial Management Center. Details of the courses are available at www.intanbk.intan.my. Some of the courses conducted by the Center are as follows :-

Government Procurement Management.

Accountability in the Financial Management.

Financial Procedures.

Cost Strategic.

Asset Management.

On top of that, each ministry/agency also takes its own initiative organizing in-house training on procurement procedures with the assistance of INTAN and/or Ministry of Finance.

21. Is procurement personnel required – and if yes by what regulation and to what institution – to report attempts by suppliers to undermine the impartiality and independence of action by offering bribes, benefits or other forms of inducement?

It becomes a legal duty to all public officials including procurement personnel under subsection 17(1) of Anti-Corruption Act (PCA) 1997 to report *any attempt on* bribery to the authority. The section states that, “Any officer of a public body to whom any gratification is given, promised, or offered, in contravention of any provision of this Act shall report such gift, promise or offer together with the name, if known, of the person who gave, promised or offered such gratification to him to the nearest officer of the Agency or police officer.”

Subsection 17(2) of the Act provides penalty to “Any person who fails to comply with subsection (1) shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or both.”

22. Which penal and/or administrative sanctions are applicable to procurement personnel for accepting or soliciting bribes? Are public officials liable for the economic damage that the procuring entity suffers? What is the policy that applies to procurement personnel for accepting or soliciting small facilitation payments such as gifts, benefits, hospitality (e.g. outright forbidden, accepted under certain circumstances, etc.; please explain).

There are provisions under the Penal Code and General Orders against procurement personnel who accept or solicit bribe. The Anti-Corruption Act 1997 is used to prosecute any person who solicits, accepts or receives or gives any gratification or bribe. Depending on the fact of the case, sections 10, 11, 13, 14 and 15 of the Act can be used.

Administratively, all public officials can be dealt with under Public Officers (Conduct and Discipline)(Amendment) Regulations 2002.

Sub-regulation 8(1) states that, “... an officer shall not receive or give nor shall he allow his spouse or any other person to receive or give on his behalf any present, whether in a tangible form or otherwise, from or to any person, association, body, or group of persons if the receipt of giving such present is in any way connected, either directly or indirectly, with his official duties”. Disciplinary action can be taken under Regulation 38.

Regulation 5 of Service Circular Letter No. 3 of 1998 states that, “Public officers shall not receive or give presents if it has connection with his official duty and/or the nature, amount or value of the present does not commensurate with the intention why the present is given.”

Penalty for offenders includes confiscation of wealth. However this is not for the purpose of compensating procuring entities that suffered losses. It is mandatory for the head of department to determine what causes the loss; and thereon determine what action to take – disciplinary or surcharge.

23. Which penal sanctions are applied to a bidding company as a legal person and to its employees if it is found guilty of corruption related to the bidding procedure? Is the company liable for the economic damage that the procuring entity suffers?

There is no penal action against a bidding company but if a director or any of the company’s employee is found guilty of corruption, then the same provisions of the Anti-Corruption Act 1997 applies. The circumstances of the case would determine which section applies.

24. Do your country's laws and regulations permit authorities to suspend, temporarily or permanently, from competition for public contracts and/or from other commercial activities an enterprise determined to have bribed a public official? If yes, is such disqualification mandatory or optional and which body decides on the disqualification and its exact terms? Which means are employed to implement the disqualification (e.g. publicly available list, declaration in the bidding process...)?

The Malaysian Government does not tolerate bribery. Any company that infringes the law will not be considered and will be blacklisted for a specific period to be determined by the Government. Notice to this effect is circulated to Government agencies only.

25. Do bidders have to explicitly declare their abstention from any means that could improperly influence the procurement process or decision and, if yes, do such declarations also cover such unlawful practices by subcontractors or other third parties?

Under the contractual terms, full liability rests with the first party only.

26. Do bidders have to disclose commissions, gratuities, or fees that have been or have to be legally paid to individuals or sub-contractors for their services provided for instance in the preparation of a bid or the execution of the contract?

Bidders are only required to disclose any amount legally due to any entity for the execution of the contract and where such amount have been included in the contract sum.

D. Accountability

Separation of responsibilities and independent scrutiny:

27. Which means are employed to avoid insulation of procurement staff and to ensure mutual control? (e.g. rotation of officers, decisions taken/validated by more than one actor, etc.)?

No single officer is empowered to make decisions. Decisions taken are by consensus or a committee.

The Public Service Department has issued guidelines on the rotation of officers according to areas, sensitivity of the position and the nature of jobs. It is a policy to do rotation of jobs especially so when the person holds sensitive positions. In such cases, it is recommended to rotate every 3 years and for non-sensitive position is every 5 years.

28. Are there regular and systematic internal and external audits of procuring entities/PPOs? If yes, are they mandatory; which bodies are in charge of this audit; are the audit reports publicly available? Are independent actors/NGOs invited to monitor the procurement procedures and what is the setting prescribed by law?

As a management control mechanism, each agency has its own Internal Audit Division/Unit to carry out auditing on financial management and performance compliance. Internal audit reports will include among others, weaknesses and breach of procurement rules, and those responsible are required to give explanations and remedial actions they have taken. Through Treasury Circular No. 9/2004 the role of internal audit has been further strengthened.

The Auditor General also has the authority to monitor and audit procurement procedures and to order corrective actions. Audit Reports are published and presented annually to the Parliament. Audit Reports by the Auditor General are subjected to Parliamentary debate.

Complaints on other aspects of Government procurement should be brought to the Public Complaint Bureau under the Prime Minister's Department. The Bureau will require the procuring ministry to respond to the complaints.

Review and complaint mechanisms:

29. Do your laws and regulations provide for review and complaints procedures? If yes, are they at administrative and/or judicial levels; what is the time limit for complaint/appeal, if any? How many complaint cases related to procurement are handled per year?

A Monitoring and Control Division has been established at the Ministry of Finance to monitor adherence to laws, rules and regulations pertaining to financial management including on areas involving Government procurement. Special Task Forces are formed to investigate any complaints on impropriety in procurement exercises.

Any complaints by bidders can be channeled to the Public Complaints Bureau, the Anti-Corruption Agency, the Security Commission, the Police Force, the Ministry of Finance, the Public Accounts Committee or the relevant agencies for their due diligence, administratively or judicially, which ever is applicable.

30. Who is entitled to initiate a complaint procedure (e.g. competing bidders, any citizen, etc.) and how are potential informants protected against retaliation (e.g. confidentiality, anonymity)? Are the decisions of the body handling complaints binding? What are the consequences if a complaint is proven valid (e.g. reopening of the bidding, liquidation of damages, etc.)?

Anybody is entitled to lodge complaints via letters, emails, telephone, etc. Based on the merit of the report, the complainants are protected under sub-section 21(4) and section 53 of Anti-Corruption Act 1997.

The authority for ultimate decision on procurement matters is vested with the Minister of Finance who shall so decide on the due course of action for any complaint proven valid.