

Procurement Legislation, Compliance, Transparency and Accountability in Malaysia:

A Final Report of IDEAS Procurement Research and
Roundtable Series 2020





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IDEAS 2020 Procurement Roundtable Series were attended by:

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and representatives from the following organisations:

- | | |
|--|---|
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IDEAS is grateful for their participation and contribution in the discussion.

Disclaimer:

All participants involved in these workshops were informed beforehand that their remarks and discussion points will be published in a report.

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Executive Summary

- Procurement legislation has the potential to create greater accountability and combat corruption in the public procurement system.
- To achieve this goal, the upcoming procurement legislation should – as a minimum – adopt the following elements and practices of international model laws: standard of transparency, wide-ranging procurement methods that cater to the complexities of procurement exercises and a robust domestic Review system.
- At the same time, an evaluation exercise should be undertaken to understand how the knowledge and understanding of the regulations, the willingness to comply and the ability to comply affect non-compliance problems in the system. This will help to reduce the problem of non-compliance with future legislation.
- Additionally, procurement legislation needs a supportive environment to achieve its objective. Such supportive environment can be achieved by having Freedom of Information law, free and responsible press, adequately resources parliamentary scrutiny, public participation and a wide use of technology and open data in procurement process.

I. Introduction

This report documents research activity and four roundtable discussions on procurement legislation that the Institute for Democracy and Economic Affairs (IDEAS) undertook from June to October 2020. The aim of the research and roundtables was to contribute to the government's effort to enact procurement legislation by 2023 as provided for by the National Anti-Corruption Plan (NACP) 2020. The roundtable discussions were attended by representatives from Civil Society Organizations (CSOs), Academics, Government Linked Companies, and Chambers of Commerce. IDEAS thanks the participants for the insights and inputs during the discussion.

The discussion was not limited to procurement legislation alone. It also touched on issues in the procurement process and other measures and initiatives to improve procurement system. As such the roundtables were ripe with recommendations that may not directly relate to procurement legislation but will nonetheless be useful to improve the procurement system as a whole.

The report starts with revisiting the discussion questions and key takeaways from each roundtable session and ends with a short summary. The report also presents research activities that were carried out to frame the discussion. The result of these research activities is encapsulated in various notes inside the reports.

2. Procurement Legislation and Transparency

Transparency is key to creating greater accountability, combatting corruption, and fostering healthy competition in government procurement. As such, we focused the discussion in the first roundtable on this topic.¹

Malaysia recognises transparency as one of the important principles in government procurement and its procurement system has practiced a certain degree of transparency. Tender notices and awards are available in the MyProcurement portal and, sometimes, on the website of procuring ministries. The website also discloses some projects awarded through direct negotiation. The portal has been constantly improved, with more information about procurement made available on the website. Information about the Date of Tender Award, Quotation Notice, and Quotation Award have now been added on the portals; this information was not available in 2014.² Additionally, the government has embarked on open data initiatives. Thousands of data sets are put in machine readable format, including data on procurement, in data.gov.my for public use.

However, there remain significant gaps in current transparency measures. Our research has identified that information on awarded direct negotiation contract is not up to date; award notices do not include reasons for choosing winners; and authorities rarely inform market players if methods of procurement have been changed. Additionally, procurement processes are not open to scrutiny by interested stakeholders because of the absence of a review system and Freedom of Information legislation. It should be noted here that procurement process is open to scrutiny by Auditor General. But this mechanism of scrutiny can be complemented by scrutiny by other interested stakeholders such as contractors/suppliers and citizens.

In our view, **procurement legislation provides an opportunity to rectify these gaps if:**

- The upcoming legislation adopts at least basic transparency measures in international procurement laws. Among them are:
 1. Disclosure standard for procurement plan, tender notices and award notices should be on par with international standards.
 2. Direct negotiation should be listed as one of procurement methods in the legislation, therefore subjecting it to discipline and rules of the legislation.
 3. Independent domestic review system/challenge proceedings.
- Reforms to create a robust oversight (i.e Freedom of Information Act, Strengthening Parliamentary Capacity and Auditor General, and Ombudsman) are undertaken.

¹ 1st Roundtable Discussion was held online on Wednesday, 10 June 2020

² In 2014, IDEAS published "Generating best value for taxpayers' money: How to improve transparency and accountability in Malaysia's public contracting system" to document six series of roundtable discussion on procurement that we held between 2013-2014. The paper listed four important information about award notice that should ideally be disclosed in Myprocurement: "(a) Criteria for choosing successful contractors/suppliers. For example, by stating "lowest bid" or "economically advantageous tender". If preferential treatment plays a role in the decision, it should also be stated (b) Date of award (c) Number of total bidders (in tender or quotation), their names and offers (d) Information about whether the project will be subcontracted or not". While information about award criteria, number of total bidders and sub-contracts are not yet available, information about data of award have been made available.

With these in mind, **we asked participants the following:**

- How should the upcoming legislation be maximized and structured to address transparency gaps in Malaysia's procurement?³
- What are the barriers to achieving greater levels of transparency in Malaysia?

Key insights from participants:

- Legislation can help improving transparency, but commitment to transparency should not just be about following the letter of the legislation. There should be an understanding that transparency is not a goal, but a tool that can help achieving the main objective of public procurement such as value for money and cost effectiveness for the *rakyat*. As such the rhetoric for transparency should also reflect this perspective.
- Procurement legislation can improve transparency, but like other regulatory measures, it faces the problem of implementation. In other words, the biggest test for the legislation is whether it will fully be complied with or not. A participant from Georgia shared the same observation from her country.
- A serious effort needs to be taken to understand causes of non-compliance in Malaysia's procurement system so that the upcoming procurement legislation will not suffer the same fate.
- Malaysia has practiced some degree of transparency. But there is a substantial number of regulations and rules that prevent the government from sharing data. Legislation that will supersede these existing impediments is therefore important.
- Improvement in transparency can also be achieved by facilitating dialogue and engagement between civil society groups and procuring authorities.

3. Procurement Legislation and the problem of Non-Compliance

The discussion in the first roundtable indicates that one of the greatest challenges of procurement reform in Malaysia is non-compliance. Participants noted that the current treasury circulars and instructions have been developed to ensure procurement practices achieve its objective and generate the best value for taxpayers' money. However, some of these rules are not being followed by procuring authorities and relevant stakeholders and as a result some procurement activities become costly and fail to achieve the program and policy objectives efficiently and effectively. There is an implicit concern among the participants that the upcoming legislation will suffer the same fate and hence will fail to achieve its intended objective. Considering the result of the 1st roundtable, we decided to devote the 2nd Roundtable to discuss non-compliance problem in Malaysia's procurement system.⁴

³ Questions that may be relevant are (1) should the transparency standard cover small purchase and PPP projects? (2) should open data requirement put into the legislation? (3) should the legislation encourage the adoption of good practices such as external observes and disclosure of information in the implementation phase and? (4) How should the legislation structured to ensure greater transparency: Single legislation and multiple legislation? and what would the current circulars function with the legislation in place?.

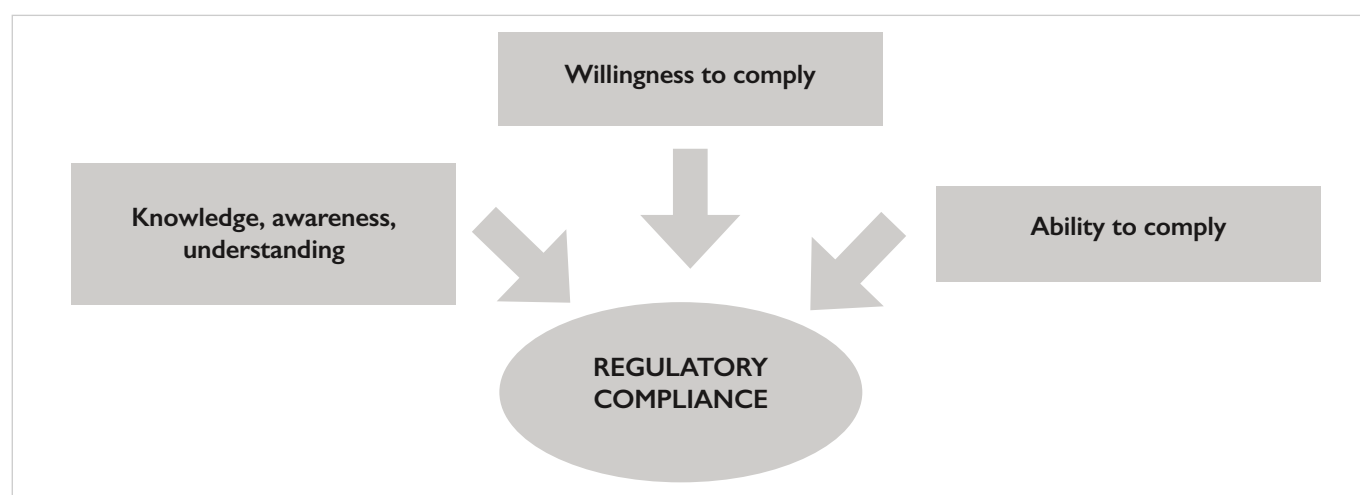
⁴ 2nd Roundtable Discussion was held on Wednesday, 15 July 2020

Using Auditor General Reports from 2015 onward, we identified instances of non-compliance in Malaysia's procurement system. These reports suggest that split purchase, failure to record procurement information in the GPIS, late signing of contracts and incomplete record of procurement board members were the most frequent causes of non-compliance. See **Note 1** for detail on other instances of non-compliance in procurement system based on methods and stages of procurement.

We used OECD's publication on regulatory compliance to frame our research and question for the roundtable discussion.⁵ The publication posits three conditions for compliance: knowledge and understanding of the rules, willingness to comply and the ability to comply (See **Note 2**). Non-compliance therefore can take place for three reasons: (1) if the person who is supposed to comply with the rules do not know or comprehend the rules, or (2) if she/he is not willing to comply and (3) their ability to comply with the rules is hampered.

This framework is important to prevent the cause of non-compliance automatically being attributed to negligence or corruption. In fact, it forces us to examine other potential causes for non-compliance such as lack of training, long approval process for project implementation and intervention in decision making by politicians.

Diagram 1: three conditions for regulatory compliance



In the case of splitting large contracts to avoid tender for example, one may argue that it is caused by the ignorance of procuring officers of the rules. But if we use this framework, it is possible that such non-compliance act is encouraged by unnecessarily long tender process and therefore non-compliance is motivated by the intention to prevent the delay of service delivery. With such assumption in place, the policy to address the frequent “splitting contract problem” is not only delivering sanctions to the procuring officer but also examining the current tender process and identifying factors that contribute to unnecessarily lengthen tender process.

Understanding the cause of non-compliance is key to finding the right policy levers. The government has implemented various mechanisms to address non-compliance problems (For more mechanisms, see Note 3). Some are useful to address problems by knowledge and understanding such as procurement training offered by INTAN. Sanctions, Name & Shame Directory in the MACC website, can serve as a reminder for officers that are not willing to comply with procurement rules. The Government Procurement Information System (GPIS), a

⁵ *Reducing the risk of policy failure: challenges for regulatory compliance, OECD, 2000.*

one-stop platform for procuring officers to carry out procurement exercise, can improve the ability of procuring officers to comply with the requirements of recording all procurement activities, which was hampered before by the use of multiple platforms. However, a policy such as staff rotation which can be useful to address corruption (that can prevent willingness to comply) are not consistent with the need of professional procurement officers who comprehend the rules well.

Based on this framework, **we posed the following questions during the discussion:**

- Is non-compliance with procurement rules simply caused by unwillingness to comply or is it also affected by knowledge on rules and the existence of obstacles to comply?
- Are these factors affecting the efficacy of current measures to instil compliance?
- Would procurement legislation improve compliance?

Key points of discussion

The main role of CIOs and the Integrity Unit is preventive in nature, i.e. to look at risks and recommend steps to overcome these risks. As such for procurement, they should check and report any non-compliance to procurement rules, and ensure relevant information related to tenders (especially directly negotiated ones) are published publicly without delay.

- Chief Integrity Officers (CIO), one of government's initiatives to address problems in procurement system, was discussed quite at length during the discussion. The CIO and the Chief Integrity Unit (CIU) was established by the government under Government Transformation Programme to curb misconduct, violation of rules and corruption in civil service. The CIU is tasked to ensure good governance, strengthen integrity, detect any misconducts, receive complaints related to misconduct and abuse and function as a secretariat for Disciplinary Board. The CIU reports to the Secretary General of the Ministry or Head of Agency.⁶ The reporting mechanism was of concern to some participants because it is not independent enough. Another concern raised on the CIO is whether they will be independent enough to identify and report misconducts by senior officers. However, other participants saw that despite some weaknesses (such as most of them being junior officers), the CIOs have the potential to encourage compliance with procurement rules.
- Fostering compliance, however, should not be the responsibility of CIO alone, there is a need cultivate "compliance culture".
- Compliance level needs to be evaluated regularly. Malaysia has Index of Accountability (IA) that was developed by the National Audit Department in 2007 to measure more objectively the level of government's agencies compliance to the financial rules and regulations, including compliance to

⁶ Information about the functions of CIU and its reporting line is taken from Ishak Ismail et.all. 2016. A Case Study on the Role of Chief Integrity Unit (CIU) as a Control Mechanism in Malaysia Public Sector Organisation. The article also mentions that the government has established 887 CIU in all public sector organisations in Malaysia.

procurement rules and regulation. The current IA however has some limitations (See **Note 4**) and should be improved.⁷

- Interference by politicians in procurement decision is identified to be one of the factors that hampers the ability to comply. In some cases, interference prevent procuring officers' ability to comply with the rules of appointing qualified contractors or carrying out proper market research before procurement exercise proceeds.
- There are certain "unwritten" practices in procurement process that prevent both the willingness and ability to comply with the rules such as
 1. Tender agents. This term is used for local companies that act as middleman for international pharmaceutical companies that intend to supply medicine to Malaysia's healthcare system. According to a report, the tender agent charge between 2-3% of the total procured medicine.⁸
 2. Procurement cartels that act informally as the 'controller' or 'gatekeeper' of contracts and often facilitate contractors/suppliers to get away with registration rules.
- Sanctions and punishment are not the only method to foster compliance, incentives and lenient punitive measures can also be used such as promotions and bonuses and withholding them in cases of non-compliance.
- Procurement process oversight such as audit during the implementation is equally important for both large and small projects.
- The use of technology in procurement can help minimizing non-compliance. Private companies for example use ERP (Enterprise Resource Planning) software and other systems to track and prevent non-compliance in real time. Technology use in public procurement however must be designed to minimize the chances of high-ranking officials being exempted from the process. Similarly, big data or blockchain can be used to analyse for compliance in the public sector.
- The press plays an important role in highlighting the problems in the procurement process. The public and the press however did not sustain significant follow-up from the coverage, while the government felt that the quality of press coverage on the issue need to be improved. The discussants also highlighted challenges that the press face to provide quality coverage.
- Compliance can be improved by providing the public the space to ask for the accountability of the government service providers.

⁷ Compliance Audit is one of three of types of audits carried out by the NAD annually; the other two are attestation audit and performance audit. Compliance Audit aims to assess whether financial management of government entities is in accordance with relevant laws and financial regulations. Attestation Audit is carried out by the NAD to determine whether the financial statements of government entities show a true and fair view, and the accounting records are properly kept and maintained. Performance Audit, on the other hand, is to evaluate whether activities implemented by government entities are efficient and effective.

⁸ See Dump 'tender agents', Klang MP tells Putrajaya after medicine procurement scandal, Malay Mail 22 June 2018 and "We only get 3% commission' The Star Online, 15 June 2018.

Note 1: Non-compliance in the Malaysia's procurement system

The auditor general reports present many instances of non-compliance in Malaysia's procurement practices. Discussion in the AG reports from 2015 onwards suggests that split purchase, failure to record procurement information in the GPIS, late signing of contracts and incomplete record of procurement board members took place more frequently than others. But below are other instances of non-compliance in procurement system (they are categorised based on methods and stages of procurement).

Category	Acts of non-compliance
Planning	<ul style="list-style-type: none"> • Procuring officer do not carry out market research • Department or agencies do not submit annual procurement plan to the Ministry of Finance • Department or agencies fail to record all procurement information in the Government Procurement Information System (GPIS) diligently and accurately
Direct Purchase	<ul style="list-style-type: none"> • The method is used to split contracts that are supposed to be procured through tender or quotation • Purchase order issued made after the purchase is being made • Purchase order is made without the approval of authorised officer
Quotation Tender	<ul style="list-style-type: none"> • Appointment of evaluation board is not recorded properly • Procurement Board or Cabinet decided to not appoint contractors that are recommended by technical, financial, and administrative committee of procurement (e.g JKAS and JTAS in the case of Public -Private Partnership contracts) • Meeting for tender award decision is not attended by required number of committee members • Unqualified contractors bid or are considered in the bidding process
Direct Negotiation	<ul style="list-style-type: none"> • Need assessment and market research are not carried out properly • Request for exemption of certain rules • Condition for direct negotiation is nor properly justified • Decision technical and financial committee is not taken up by the final decision maker • Whole sub-contracting • Additional scope without proper process • <i>Surat Setuju Terima</i> (Offer Letter to Contractor) issued before price negotiation takes place
Contract Management	<ul style="list-style-type: none"> • Contracts signing takes place after the accepted timeframe (4 months after the submission of acceptance letter from the contractor or 1 month for consultant) • Contracts signed by unauthorised officers
Implementation	<ul style="list-style-type: none"> • Payments made are not commensurate with project progress according to contracts • Goods are received by unauthorised and unqualified officers • Variation orders issued after certificate of completion • Project extension is carried out without valid documents and contractors are not slapped with Incomplete Work Certificate

Note 2: Framework for Discussion

A paper by the OECD team on regulatory compliance provides an interesting framework to understand non-compliance to procurement rules. The paper introduces three conditions for compliance:

1. Knowledge, awareness, and understanding of the rules

The OECD paper argues that rules are likely to be complied with if stakeholders know, understand and are familiar with the rules. Research on compliance on procurement regulation in number of countries affirm this argument. This means that non-compliance can take place if either procuring officers or contractors/suppliers are not familiar or do not have clear understanding on procurement rules. Familiarity can be affected by many factors including adequate training, level of transparency and accessibility to procurement regulations and rules.

2. Willingness of the stakeholders to comply

The second condition needed for compliance is the willingness of stakeholders to comply. This willingness can be motivated by economic incentives, sense of responsibility as good civil servants and businessmen, acceptance of policy goals, or pressure from enforcement activities. Non-compliance can take place if stakeholders perceive following rules to be more costly, ineffective to achieve policy objectives, not being monitored regularly, or if they can get away easily from not complying with them.

3. The ability of stakeholders to comply

The third condition that affect level of compliance is the ability of stakeholders to comply. Stakeholders will likely comply with the regulation if obstacles for compliance are removed or if requirements and facilities for compliance are available.

Note 3: Conditions for compliance/non-compliance and available policy levers

Three Conditions for Compliance	Knowledge and awareness of the rules	Willingness to comply	Ability to comply
Conditions for compliance	Stakeholders know, familiar and understand the rules	<ul style="list-style-type: none"> Stakeholders see benefit (perceived gains) Sense of responsibility Acceptance of policy goals Pressure from enforcement and monitoring activities 	Stakeholders will likely comply with the regulation if obstacles for compliance are removed or if support systems for compliance are available
Condition for non-compliance	Stakeholders are not familiar and understand the rules. This condition can be created by <ul style="list-style-type: none"> Inadequate training and engagement High turn-over Level of regulatory transparency 	<ul style="list-style-type: none"> Perceived inefficiency or losses Weak monitoring system Weak enforcement system This situation can be created by: <ul style="list-style-type: none"> Lack of understanding on value for money principle and policy objectives Absence of internal audit Weak integrity system Unqualified monitoring staff Corruption Frequent exemption to the rules Weak Accountability Index 	<ul style="list-style-type: none"> Regulation that are not keeping with changes in procurement practice/method Outdated, non-user friendly and expensive electronic procurement system Weak whistle-blower mechanisms Inadequate compliance/ review/remedies system Political interference
Available Policy Levers	<ul style="list-style-type: none"> Training Staff Retention Regulatory Transparency 	<ul style="list-style-type: none"> Integrity Pact Auditor Dashboard Jawatankuasa Integriti & Tadbir Urus (JITU) Name & Shame in MACC Website Staff Rotation Blacklist Publication of procurement notices Sanctions Chief Integrity Officer (CIO) 	Single platform for procurement system (GPIS)

Note 4: Index of Accountability

The IA was developed by the National Audit Department in 2007 to measure more objectively the level of government's agencies compliance to the financial rules and regulations, including compliance to procurement rules and regulation.

The index assesses ten elements of financial managements⁹, as follows:

Table 4.1: Elements of Accountability Index (IA)

No	Elements	Federal Ministry/ Federal Agencies	Federal Statutory Bodies
1	Organisational structures and procedures	Yes	Yes
2	Budgetary Control	Yes	Yes
3	Expenditure Control	Yes	Yes
4	Revenue Control	Yes	Yes
5	Management of Procurement	Yes	Yes
6	Management of Trust Fund/Trust Account and Deposit	Yes	N/A
7	Management of Asset and Inventory	Yes	Yes
8	Management of government vehicles	Yes	N/A
9	Management of Investment and Borrowing	N/A	Yes
10	Management of Financial Statement	N/A	Yes

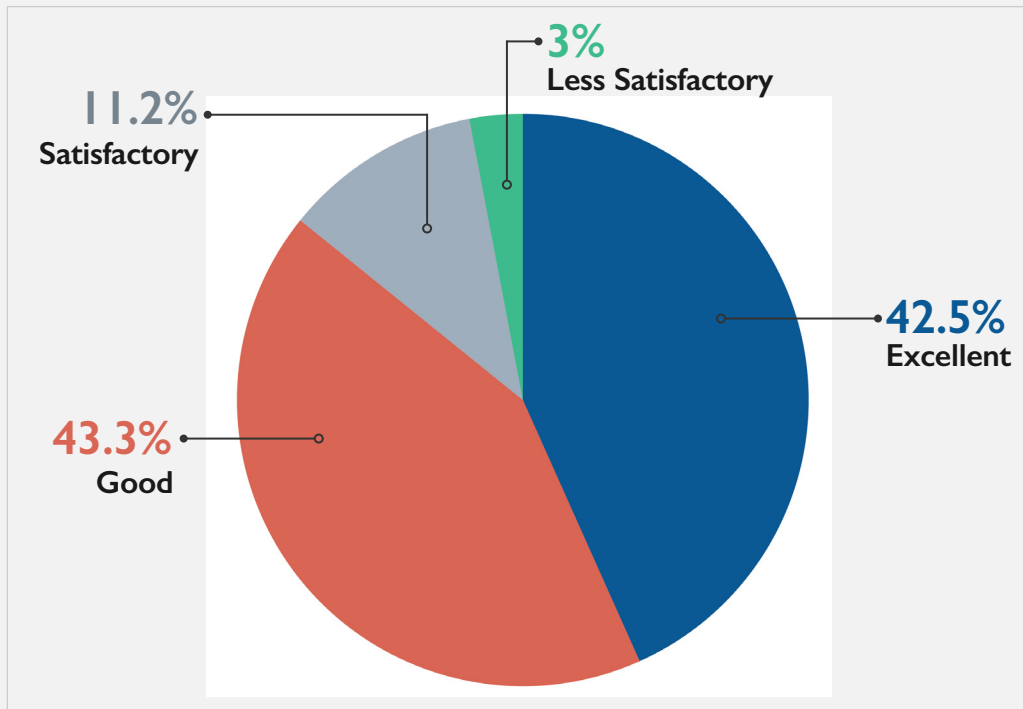
The index then ranks agencies into five categories based on their compliance level: Excellent (*Cemerlang*), Good (*Baik*), Satisfactory (*Memuaskan*), Less Satisfactory (*Kurang Memuaskan*) and Not Satisfactory (*Tidak Memuaskan*).¹⁰ Agencies that receive "excellent" mark are those that fully comply with financial rules, innovate in improving productivity and quality, and therefore they are good examples for other departments. The NAD carried out compliance audit on all federal ministries and 17 government agencies annually. As for other government agencies and statutory bodies, their compliance audit takes place every five years on-rotation basis. In 2018 for example, only 13 federal statutory bodies (out of 114) were audited. Based on the AI, the level of compliance to the procurement rules at the federal ministries and key agencies are good. Most federal agencies receive either excellent or good mark for their level of compliance to financial rules. This means any financial-related activities in their agencies, including their procurement activities, have mostly complied with financial rules and regulations.

⁹The information about the elements of evaluation is based on the Auditor General Report 2018. IA has undergone several revisions. In 2007 management of procurement is not an independent element in the evaluation. It was instead part of the expenditure management (See National Audit Department (NAD). 2007. **Indeks Akauntabiliti Pengurusan Kewangan Kementerian/Jabatan dan Agensi Kerajaan Persekutuan dan Negeri.**

¹⁰The IA starts with four categories of rank in 2007 (See NAD, 2007)

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Diagram 4.1: Performance of Agencies in Accountability Index



However, separate audit exercise on agencies that receive **good** marks result in different picture too. The Universiti of Malaya Perlis (UNIMAP), for example, received a “good mark” for its overall financial management in 2016 (AR 2016, p. 118). In 2017, the NAD carried out an audit to UNIMAP’s procurement exercises in between 2014-2017. The 2017 report indicates otherwise. According to the 2017 AG report, UNIMAP has 220 procurement activities (45 tenders and 175 quotations). The Audit Report audited 21 tenders and 29 quotations and found that all of them were non-compliant (See Table 4).

The Universiti Pendidikan Sultan Idris (UPSI) also received a **good** mark in for its overall financial management in 2016 (AR 2016, p. 118). However, a separate procurement audit in 2017 indicates otherwise. In 2017, the NAD carried out an audit to UPSI’s procurement exercises in between 2014-2017. In this period, UPSI carried out 22 tenders and 295 quotation with a value of RM129.15 million. The NAD audited 11 tender and 40 Quotation exercises. The Report says that the procurement management of UPSI is good. But it raised number of issues in at least 17 projects (out of 51 total samples). Among issues raised by the report are by contract signing by unauthorised officers and procurement exercises without the approval from controlling officer (AG Report 2017). Another sample is Universiti Teknikal Malaysia Melaka which also received a good mark in 2016 AG Report. The total number of procurement that UTM Melaka carried out in between 2014-2017 was 257. The NAD audited 36 of them and raised concern over 24 projects.

¹¹The diagram was based on 135 federal government ministries and agencies.

Table 4.2: Result of audit on UNIMAP's management of procurement

Category	Tender		Quotation		Total	
	(BIL.)	(RM Million)	(BIL.)	(RM Million)	(BIL.)	(RM Million)
Total Procurement	45	88.82	175	33.26	220	122.08
Audited Sample	21	52.42	29	6.35	50	58.77
Sample percentage (%)	46.7	59.0	16.6	19.1	22.7	48.1
Non-compliance in Audited Sample	21	52.42	29	6.35	50	58.77
Percentage of Non-compliance in Audited Sample (%)	100	100	100	100	100	100

4. Realising the potential of procurement legislation

Following the first two roundtables we identified the potential of adopting the UNCITRAL Model Law to address several of the issues raised, particularly given the need to develop additional procurement methods in the face of procurement complexity being one of the drivers of non-compliance. The 3rd Roundtable¹² was intended to explore the potentials of adopting UNCITRAL's procurement method, especially the non-competitive methods.

Below are the key questions posed to the floor in the third roundtable:

- Are Malaysia's current procurement methods adequate to address the increasing complexity and challenges in procurement exercises? Should Malaysia adopt procurement methods in international procurement law such as the UNCITRAL Model Law?
- What are the potential benefits of adopting procurement methods of the UNCITRAL Model Law of Public Procurement?

Key Takeaways:

- UNCITRAL Model Law has procurement methods (see Table I for comparison between procurement methods of **Malaysia** and that of UNCITRAL Law) that Malaysia can adopt and modify to suit the needs and challenges of our procurement system
- Traditional procurement methods cannot cope with large infrastructure projects such as ECRL, MRT, and highways that mostly use the public private partnership model. Discussion about procurement legislation opens the opportunity to discuss how Malaysia should regulate such procurement.

¹²3rd Roundtable was held on Wednesday, 30 September 2020

Table I: Procurement Methods in Malaysia’s Procurement System and UNCITRAL Model Law of Public Procurement

Malaysia	UNCITRAL
<ul style="list-style-type: none"> • Direct Purchase • Direct Appointment • Quotation • Open Tender • Pre-Qualification Tender • Limited Tender • Direct Negotiation 	<ul style="list-style-type: none"> • Open Tendering • Restricted Tendering • Request for quotations • Request for proposal without negotiation • Two-stage tendering • Request for proposals with dialogue • Request for proposals with consecutive negotiations • Competitive Negotiation • Electronic Reverse Auction • Single Source procurement

- The government lacks internal expertise to conduct procurement of large and complicated projects such as the ECRL that may need specific technical expertise. It relies either on third parties to advise them on the conduct or allows non-technical experts to carry out the procurement exercises. The latter practice may result in the government not achieving the value for its money.
- Simpler procurement methods such as direct quotation and direct purchase are more attractive for procuring staff as it takes less time to execute (and hence they can deliver the output faster), even though they risk violating the rules (i.e. by splitting the contract). On the other hand, open tender is the standard procurement method but takes longer to execute, while the allocated money must be spent within the budget year. The approval process was another factor that was identified to be a contributing factor to lengthen the tender process. However, further research needs to be conducted to understand what other factors contribute to unnecessarily lengthen the tender process.
- The government’s decision to outsource maintenance works does not bode well with labour welfare and the quality of maintenance works. Maintenance works in the past are done internally by government staff. However, privatisation programs have led to government agencies outsourcing maintenance to private companies. In trying to make margins, maintenance companies, which are mostly SMEs, use different techniques to cut costs including reducing labour benefit and ignoring minor maintenance issues.¹³ This situation is made worse by the fact that some of the contracts are given for many years but with fixed price.
- Value for money in procurement should not be measured by price alone. It should also consider the impact on development of local expertise. In fact, procurement exercise needs to be taken seriously to ensure the achievement of this objective.¹⁴
- Procurement methods and rules must strive to balance between strict rules and the need for innovation.
- Monitoring and regulations must also focus on the supply side as contractors often skirt regulations with minimal penalties.

¹³ Such as changing fuses every 4 years instead of 3. In some cases, such cutting cost measures have resulted in disaster such as fire breakout.

¹⁴ Participant uses the example of ICT procurement

- Procurement legislation can help with improving compliance with the rules (including rules on transparency) and accountability by subjecting procuring authorities to legally binding rules, which can be contested by interested stakeholders in the court system. As of now, the court does not have jurisdiction over the government procurement process because it is regulated by circulars. In other words, having procurement legislation will provide opportunity for more judicial scrutiny. This in turn will force all stakeholders, including procuring authorities and suppliers/contractors, to be more diligent in complying with procurement rules.
- UNCITRAL Model Law of Public Procurement should not be the only resource to refer to in drafting the legislation. Other model laws such European Union Directives on Procurement, best procurement practices such as the those issued by the World Bank, OECD and Transparency International should also be referred to (See **Note 5** for comparison between international models of comparison between international models of procurement laws).
- Mid-term audit of projects, especially those involving large infrastructure is crucial to enhance accountability and ensure value for money.
- Needs analysis is paramount to reduce leakages and wastage via bad procurement practices. This can be further improved by having external independent technical experts who can help review these papers for large projects. This helps to provide a counter check to studies and recommendations done by the government. It also helps alleviate the government's challenge in having sufficiently qualified resources within government service who can perform this task.

Note 5: An overview of the three international procurement models and how countries adopt them

5.1 The three international models

UNCITRAL Model Law on Procurement

Below is a useful overview of the UNCITRAL model law in the Guidebook on anti-corruption in public procurement and the management of public finances published by the United National Office on Drugs and Crimes (UNODC).

“The UNCITRAL Model Law is, internationally speaking, one of the most recognized public procurement codes. One of the main purposes of the UNCITRAL Model Law is to serve as a template available to national governments seeking to introduce or reform national public procurement legislation. It reflects best practice in public procurement from around the world and allows governments to adapt it to local circumstances. For these reasons, many countries have based their public procurement legislation on the UNCITRAL Model Law. The UNCITRAL Model Law is supplemented by a comprehensive tool—the Guide to Enactment. The Guide provides background and explanatory information on policies in the UNCITRAL Model Law, to discuss objectives and to advise on options in the UNCITRAL Model Law. The Model Law was revised in 2011 and is intended to conform to the requirements of UNCAC. The UNCITRAL Model Law is predicated on the familiar principles of: (a) achieving economy and efficiency; (b) widespread participation by suppliers and contractors, with procurement open to international participation as a general rule; (c) maximizing competition; (d) ensuring fair, equal and equitable treatment; (e) assuring integrity, fairness and public confidence in the procurement process; and (f) promoting transparency.”

World Trade Organisation-Government Procurement Act

Below is the explanation on the GPA taken from the WTO page:

“The GPA is a plurilateral agreement within the framework of the WTO, meaning that not all WTO members are parties to the Agreement. The fundamental aim of the GPA is to mutually open government procurement markets among its parties. The GPA is composed mainly of two parts: the text of the Agreement and parties’ market access schedules of commitments. The text of the Agreement establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement. As a binding international treaty, the GPA is administered by the Committee on Government Procurement which is composed of representatives of all its parties. The enforcement of the Agreement is realized through two mechanisms: the domestic review mechanism at the national level and the WTO dispute settlement mechanism at the international level.”

European Union Directives on Procurement

European prides itself as a single market. Rules on procurement are meant to remove barriers, provide equal access for all suppliers and contractors in member states and foster fair competition. EU rules on procurement has been developed since 1971. However, the rules that are currently enforced and implemented in all member states are the following:

1. Directive 2014/24/EU on public procurement,
2. Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors
3. Directive 2014/23/EU on the award of concession contracts (More information).

These directives are required to be implemented by member countries in 2016. Each country however adopted them differently in their jurisdiction.

5.2 How countries adopt international procurement laws

In this section we will use one example to illustrate the implementation of each model.

GPA-Model: Singapore

The main legislation for procurement in Singapore is the Government Procurement Act (Chapter 120). The Act is to implement the WTO Agreement of Government Procurement that Singapore signed in 1994 and other relevant international procurement obligations.

To implement the Act, Singapore produced three separate legislations:

1. Government Procurement Regulation 2014 which regulates procurement that are subject to the Act. It determines the type of procurement procedures that should be used by procuring entities as well as outlines the principles and procedures in the evaluation and award.
2. Government Procurement (Challenge Proceeding) Regulations regulates
3. Entities (ministry/department/statutory board) covered by the Act is specified by the Singapore government in published as an order published in the Gazette known as Government Procurement (Application) Order. The Order also specify the means and methods of procurement. The order amended from time to time. Exemption from the Act can also be made by certification by minister.

Singapore government issued Guidelines to simplify rules and regulations set out in the above regulations and issued a Handbook on PPP. The Self Assessment Report for Singapore published by the OECD document mentions about Government Instruction Manuals (IM) 3B - Contracts and Purchasing Procedures, but the document is not mentioned in the above law nor in the document A Guide for Suppliers.

EU-Model: United Kingdom

UK has five main procurement legislations to implement the EU Directives and the GPA

1. Public Contracts Regulations 2015
2. Defence and Security Public Contracts Regulations (DSPCR) 2011
3. Utilities Contracts Regulations 2016
4. Concession Contracts Regulations 2016
5. The Public Procurement (Amendments, Repeals and Revocations) Regulations 2016

To explain the regulations, the UK produces **Handbook** and **Guidance** for all regulations including guidance for training.

Additionally, the UK produces **Procurement Policy Framework** that help the procuring entities to achieve procurement objectives

To address immediate concerns on procurement practices and temporary modifications or exemptions to the regulations, the UK produces **procurement policy notes** <https://www.gov.uk/government/collections/procurement-policy-notes>

UNCITRAL

India is listed in the UNCITRAL website as one of the countries that has adopted the 2011 UNCITRAL Model Law on Procurement. The adoption however is not carried out by national government, but by state governments. Until 2019, at least three states in India namely Rajasthan, Assam and Punjab have adopted, in various degree, the 2011 UNCITRAL Model Law. The central government of India drafted a procurement bill in 2012 based on the UNCITRAL law, but it was lapsed before it was passed by parliament.

The main procurement legislation for Rajasthan is Rajasthan Transparency in Public Procurement Act 2012 (Rajasthan Act No. 21 of 2012). To support the implementation of the Act, the Rajasthan government issued Public Procurement Rules. The rules outline the organisational structure of procurement, methods of procurement and their processes, stages of procurement, the documentation of procurement process, code of integrity, procedures to address suppliers/bidders' grievances. Both the Rajasthan procurement regulation and the Indian procurement bill incorporate best practices from the international procurement laws.¹⁵ However, the adoption has been criticised for not considering local needs and contexts.¹⁶

5. Improving Direct negotiation process

The interests of roundtable's participants in compliance problem in procurement system has led us not only to focus the 2nd roundtable discussion on this subject, but also encouraged us to pursue a research exercise on direct negotiation. Direct negotiation has been frequently associated with abuse despite it being a useful method of procurement during emergency situations. The research focuses on understanding how procurement by direct negotiation should be carried out according to the rules, whether the rules are adequate to prevent such abuse and how these rules are being implemented in practice. For this purpose, we unpacked the two circulars issued by the Treasury to guide the direct negotiation procurement process (PK 7.15 and PK 7.16), went through the Auditor General Reports from 2014-2018 and list of direct negotiation contracts published in MyPROCUREMENT Portal. From the Auditor General reports, we extracted almost 80 direct negotiation cases and we used these cases to understand how the rules are being implemented in practice. The result of this research is documented in a separate policy paper which will be published along side this report.

The paper argues that the current rules provide mechanisms to ensure accountability and value for money in direct negotiation process. However, these **mechanisms can be improved** by the following:

- Adding rules that will require the Ministry of Finance to provide written justification to the procuring agencies on why it makes different decision that the procuring agencies and direct negotiation committees (both Jawatankuasa Penilaian and Jawatankuasa Rundingan Harga) recommend.
- Empower the controlling officers by providing them a platform to be accountable for any decisions on procurement such as appearing in the Public Account Committee's sessions.

¹⁵ See Anirudh Shingal. *Internalization of Government Procurement Regulation: The Case of India*. In Aris Georgepoulos et.al. *The Internalization of Government Procurement Regulation*. United Kingdom: Oxford University Express, 2017

¹⁶ Sandeep Verma. *Procurement Reform: Jugaad legislation in India*. *Financial Express*, 24 March 2020. <https://www.financialexpress.com/opinion/procurement-reform-jugaad-legislation-in-india/1907196/>

- Clear requirements of disclosure of notice before and after direct negotiation exercises
- Establishing a domestic review mechanism that will allow greater scrutiny over procurement exercises, including direct negotiation

We presented this paper in the 4th roundtable¹⁷ to gather inputs from the participants. We received **insightful inputs on recommendations** of the paper. Among them are:

- Beneficial ownership disclosure¹⁸
- Audit during the implementation of the project (instead after)
- The importance of providing institutional protection to officers who do their jobs in ensuring integrity of procurement process
- Using Infrastructure Transparency Index to encourage increased adoption of transparency measures
- Using outcome of contracts as specification instead of technical specification to avoid single-source justification
- The need for recommendation to be presented in a concrete, rather than abstract, statements.
- Sanctions and penalties have to more clearly stated to encourage compliance

¹⁷. 4th Roundtable was held online on Tuesday, 20 September 2020

¹⁸. The disclosure of Ultimate Beneficial Ownership will help procuring authorities to implement this rule (Since March 1, 2020 the Company Commission of Malaysia (SSM) has required all companies to identify their Ultimate Beneficial Owners (UBOs), record key information on the UBOs, enable access to this information to law enforcement and notify authorities of any changes to this information). Additionally, the publication of notice of direct negotiation will facilitate the public to monitor the observance of this rule

6. Conclusion and Recommendation

IDEAS 2020 Procurement roundtable series aim to understand the potential of procurement legislation to improve transparency and accountability in Malaysia’s procurement system. The four roundtable sessions, as discussed earlier, focused on different topics. However, the discussions point to the following conclusion. First, procurement legislation has the potential to create greater accountability and combat corruption in government procurement. However, the discussion in the first and second roundtables suggests that there is a concern over the implementation of this legislation especially on whether the legislation will be complied. Most of the participants view that rules and regulations in the current Malaysia’s procurement system were quite adequate to ensure value for money and reduce wastages and corruption. However, many saw that these rules are not fully complied with and for that reason, the Auditor General Reports highlight similar issues every year.

However, at the third roundtable, the need for legislation was discussed more deeply. The focus of the discussion was on UNCITRAL Model Law of Public Procurement, especially on its procurement methods and their potential to complement currently available methods in the Malaysia’s procurement system. Malaysia’s currently enforced procurement rules and regulations maybe adequate to deliver value for money. But **procurement legislation will further strengthen the current system by:**

First, legally require procuring authorities to publish information related to procurement process more judiciously including procurement process of non-competitive method such as direct negotiation.

Second, procurement legislation can help improving compliance with the rules (including rules on transparency) and accountability by subjecting procuring authorities to legally binding rules, which can be contested by interested stakeholders in court system. This in turn will force all stakeholders, including procuring authorities and suppliers/contractors, to be more diligent in complying with procurement rules. Countries with procurement legislation typically have review system which will allow complaint over procurement process being heard in court or tribune.

This potential can be realised **if the next procurement legislation adopts at least the following elements and practices of international model laws**

- Standard of transparency,
- Wide-ranging procurement methods that cater to the complexities of procurement exercises
- Domestic Review system that will provide legal certainty not only to contractors/suppliers, but also to procuring officers

At the same time the legislation should take into account the needs of local stakeholders, understand the context in which they operate and being clear about the objective of the legislation. Having these considerations will help reducing the acts of non-compliance in the future. As such we recommend the government to undertake an evaluation exercise to understand how the knowledge and understanding of the regulations, the willingness to comply and the ability to comply affect non-compliance problems in the system. Priority should be given to understand non-compliance acts that have caused significant loss of taxpayers’ money and delay or failure of service delivery. This exercise is pertinent to ensure the future legislation does not suffer the same fate with the current procurement rules and regulations.

Secondly, legislation alone will not fully solve compliance problem. The discussion in the three roundtables points to **the need for supporting policy levers that will address compliance problems**. Table 2 shows suggestions that were mentioned during the discussion. Again, in developing these policy levers, policymakers need to take into account the context of the stakeholders and the policy objectives.

The **future procurement legislation also needs supporting mechanisms** that will encourage transparency and accountability. Below are mechanisms that are discussed in the roundtables:

- Adoption of technology to ease and better track procurement process,
- Adoption of open data contracting standards,
- A legislation that will facilitate greater data sharing by the government such as Freedom of Information Act,
- Public participation in monitoring procurement process and implementation; and
- Free and responsible press.

Table 2: Potential Policy Levers for Compliance

Three Conditions for Compliance	Potential Policy Levers
Knowledge and awareness of the rules	<ul style="list-style-type: none"> • A structured career development program for procurement officers • Attract technical expertise from private sectors • Clear Guidelines
Willingness to comply	<ul style="list-style-type: none"> • Revise Index of Accountability • Value for Money Standard • Improve Integrity Pact to be consistent with international standards
Ability to comply	<ul style="list-style-type: none"> • Regulatory Review • Review/Complaints/Remedies System • Clear division of responsibilities in procurement between minister (policy makers) and bureaucrats

Procurement legislation should not be an additional burden of compliance by all stakeholders involved. In fact, it should be an opportunity to reevaluate the objective of procurement policy and exercises and how this legislation will encourage maximum compliance by all stakeholders involve.

“The traditional regulatory approach of establishing standards of behaviour and legal enforcement mechanisms is not the sole means for governments to influence the behaviour of citizens and enterprises and may not be the most effective. In order to achieve regulatory objectives, regulatory policymakers need a clear understanding of the nature of different policy instruments, of the habits of the regulated target group, and of the regulatory context, to achieve regulatory objectives”

- Reducing the risk of policy failure: challenges for regulatory compliance, OECD, 2000



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