

Improving Direct Negotiation Rules in Malaysia: Learning from Current Practices and International Laws

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EXECUTIVE SUMMARY

1. This paper evaluates the limitations of current rules on direct negotiation, how they are being practiced and presents recommendations for improvement.
2. Current rules of direct negotiation (Circulars PK 7.15 & PK 7.16) outline measures to ensure direct negotiation contracts are delivered with some accountability, achieve value for money, and foster fair competition. However, they do not have adequate transparency measures and contain measures that may negatively impact accountability and value for money.
3. Our analysis on direct negotiation projects in the Auditor General Reports from 2014-2018 shows that the rules are not implemented well. The paper outlines violations of rules in the approval process, qualification of contractors, and negotiation process.
4. The paper presents recommendations to address weaknesses in rules and practices of direct negotiation. They are:
 - The circulars should require the MoF and the relevant Procurement Board to provide written explanations to the procuring entities for not taking recommendations made by the assessment and price negotiation committees.
 - The circular should clearly state the obligation for the MoF and Procurement Board to carry out due diligence before making a decision about the appointment of contractors for direct negotiation and limit the time for such process.
 - Ministers/deputy ministers and any other politicians should be prevented from deciding methods of procurement and companies that will be awarded the contracts.
 - The Secretary General of the Ministry should be provided with the platform to be more accountable on procurement outcomes and process of their ministries and department, such as appearing before the Public Accounts Committee.
 - Procuring authorities should be required to publish information about direct negotiation before and after the procurement exercise.
 - In recognition of the fact that direct negotiation is sometimes necessary, the government should adopt the competitive negotiations method that will require procuring authorities to invite more than one company to bid for non-catastrophic emergency procurement.
 - Finally, the government should establish domestic review mechanisms that will allow greater legal scrutiny on procurement process.

I. INTRODUCTION

The National Anti-Corruption Plan (NACP) 2020 targets the introduction of procurement legislation by the end 2023. The legislation aims to improve efficiency in procurement, safeguard public and national interest and protect the rights of contracting parties. Procurement legislation reforms typically involve modifications or additions to current procurement rules including procurement methods.

Procuring authorities in Malaysia use various procurement methods to procure goods, services and works. Among them are tender, limited tender, quotation, direct purchase, and direct negotiation. Direct negotiation, by far, is the most recognised method of procurement partly because it has created multiple controversies. Due to its uncompetitive nature, direct negotiation has been construed as a procurement method that can be easily abused by politicians to grant projects to their cronies. Disclosures of direct negotiation have been used by politicians as an opportunity to attack the credibility of others.

Direct negotiation is not the most prevalent method used in Malaysia's procurement activities. In 2018 for example, contracts awarded through direct negotiation only make up for about 8.2% of total budgeted procurement.¹ However, as a non-competitive procurement method, direct negotiation is prone to abuse. In direct negotiation, a procuring entity can appoint a contractor/supplier to deliver goods, services or works without calling for bids from other contractors/suppliers. With no formal requirements for notices and disclosure, direct negotiation is subject to less scrutiny by industry players hence provide opportunities for those who want to take advantage to abuse them. Nevertheless, direct negotiation is also a valid procurement method for certain situations such as to tackle natural disaster and emergency situations as well as to procure goods/services/works that are strategic for national security and defence.



Recognising the value and risks of direct negotiation, the Treasury has issued at least two specific circulars on Direct Negotiation (the recent ones are PK 7.15 and PK 7.16). The circulars outline conditions that allow for direct negotiation, the process of approval and the execution of direct negotiation. These circulars put in place measures that will ensure accountability and value for money in direct negotiation contracts. But these measures have some limitations and lack important transparency and accountability features that are present in international procurement legislation. Additionally, these rules have not been fully complied with and, as a result, many of direct negotiation projects have not been delivered well.

This paper will explore the limitations of the current rules, how they are being practiced and present recommendations for improvement. The plan to introduce procurement legislation by 2023 provides an opportunity to improve transparency and accountability mechanisms to the current procurement methods, including direct negotiations, and address weaknesses in the current circulars.

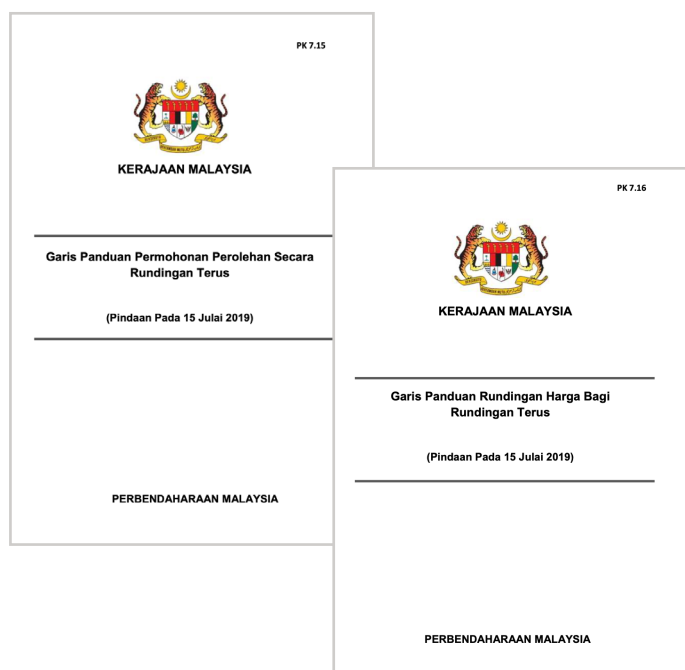
¹ The percentage is calculated from the disclosure of 101 direct negotiation contracts by the MoF on 26 August 2020 (RM 6.6 Bllion) divided by total procurement budget. The total procurement budget is calculated by adding supplies and services and asset acquisition in operating expenditures and total development expenditures. In 2018, the total of expenditures for these items is RM80 billion.

2. CURRENT RULES OF DIRECT NEGOTIATION: STRENGTHS AND WEAKNESSES

As of July 2019, the Treasury has provided two circulars on direct negotiation practices:

1. PK 7.15 which regulates the process of direct negotiation application to the Ministry of Finance
2. PK7.16 which provides guidelines on how the negotiation process with selected contractors/suppliers should be conducted.

These circulars outline measures to ensure direct negotiation contracts are delivered with some accountability, achieve value for money, and foster fair competition. However, they do not have adequate transparency measures and contain measures that may negatively impact accountability and value for money.



To ensure accountability, the circulars treat direct negotiation as a special procurement method that can only be used under specific conditions. Government agencies and departments are also discouraged from using the method. Circular PK 7.15 outlines the conditions that allow procuring authorities to use direct negotiation.

These conditions are:

1. Urgency. The circular defines it as conditions that require procurement process to be expedited otherwise service delivery will be negatively impacted,
2. Standardisation. This condition applies when agencies have been using certain goods, equipment, technology or services from a supplier and determine that additional supplies must be procured from the same supplier for reasons of standardization or compatibility with existing goods, equipment, technology or services.
3. Projects that involve security interests of the state.
4. Single source or expertise.
5. Single bumiputra manufacturer.

² Article 15A of the Financial Procedures Act (Act 61) lays out provision for Controlling Officer. Paragraph 5 of the article states that “the officer appointed under subsection (1) to be controlling officer in respect of each purpose of expenditure provided for any financial year shall be designated by the title of his office in the estimates of expenditure in respect of that year laid before the Legislature pursuant to Article 99 of the Federal Constitution or pursuant to the Constitution of the State, and such designation in the estimates shall constitute sufficient notification of the appointment”. The estimates of expenditures are annually laid out to Parliament in “Anggaran Perbelanjaan Kerajaan Persekutuan”. For each purpose of the expenditure, the names of the controlling officers are named. They are either the secretary general of the ministry or head of agencies. For Education purpose (Ministry of Education), the controlling officer is the Secretary General of the Ministry of Education, while for Jabatan Audit Negara, the controlling officer is Auditor General. See for example Anggaran Perbelanjaan Kerajaan Persekutuan 2020

Procuring authorities and agencies are not authorised to carry out direct negotiation without the Ministry of Finance’s approval. All agencies that intend to use direct negotiation to procure goods, services and works must submit a formal application to the Ministry of Finance. The application should be signed by the procuring officer and controlling officer (*pegawai pengawal*) of the ministry/agencies.² Only with the approval of the Finance Ministry, procuring agencies can issue a Letter of Intent which will authorise them to negotiate with the company. For high value contracts, the final decision for direct negotiation, including the price (*harga muktamad*), rests with the Ministry of Finance.³

To ensure value for money, the application to the Ministry of Finance should be accompanied by documents that show procuring agencies have outlined the scope of the project and chosen a qualified company to deliver the project. The agencies should also explain the process and method of assessing the company. Ideally the assessment is carried out by a committee, whose members are qualified to assess technical and financial capacities of the company. The committee should provide an assessment report that outlines whether the company is qualified to deliver the job and whether they recommend the agency to appoint it. This report should be submitted as part of the application to the Ministry of Finance.

Additionally, **the circulars require procuring agency to negotiate the price with the appointed company** after the application for direct negotiation is approved by the Ministry of Finance.⁴ The negotiation with the company should be carried out by a committee (*Jawatankuasa Rundingan Harga*) of three officers who are qualified to carry out the negotiation and have technical expertise on the procured subjects. The negotiation process should not be more than two weeks. The procuring agency should provide information about the negotiation period to the appointed company at the beginning of the negotiation process.

As part of ensuring value of money, Circular PK 7.16 requires procuring agencies and the price negotiation committee to carry out market research before the negotiation process to ensure the price offered by the appointed company is competitive. The agencies should know the price trend of the procured goods, services, and works by looking at procurement records of other agencies. Additionally, the committee should obtain approval from ICT Technical Committee, MAMPU and even hold a Value Management exercise (*Makmal Pengurusan Nilai*)⁵ to ensure the projects and contractors will provide the best value for money. Since direct negotiation is relatively uncompetitive, these measures are also useful to ensure direct negotiations are carried out fairly and the prices agreed between agencies and companies are consistent with the market price.

It should be mentioned that the circulars have additional measures to ensure accountability and transparency, which is requiring **agencies to record the negotiation process in writing.** Minutes of negotiation meetings including agreed terms and points should be signed by all attendees including the representatives of the company. Three days after the negotiation, the committee (*Jawatankuasa Rundingan Harga*) should provide a written report and attach all relevant documents including the market research to the report. The circular clearly says that the controlling officer and the committee are responsible to ensure the agreed final price is competitive and offers the best value for money. This report should be submitted to the Ministry of Finance for final approval. In the event that the committee and the company fail to reach an agreement on the

³ The decision on the final price of the contract can also be made by Lembaga Perolehan Agensi. The circular however does not mention the threshold value for the LP and the MoF.

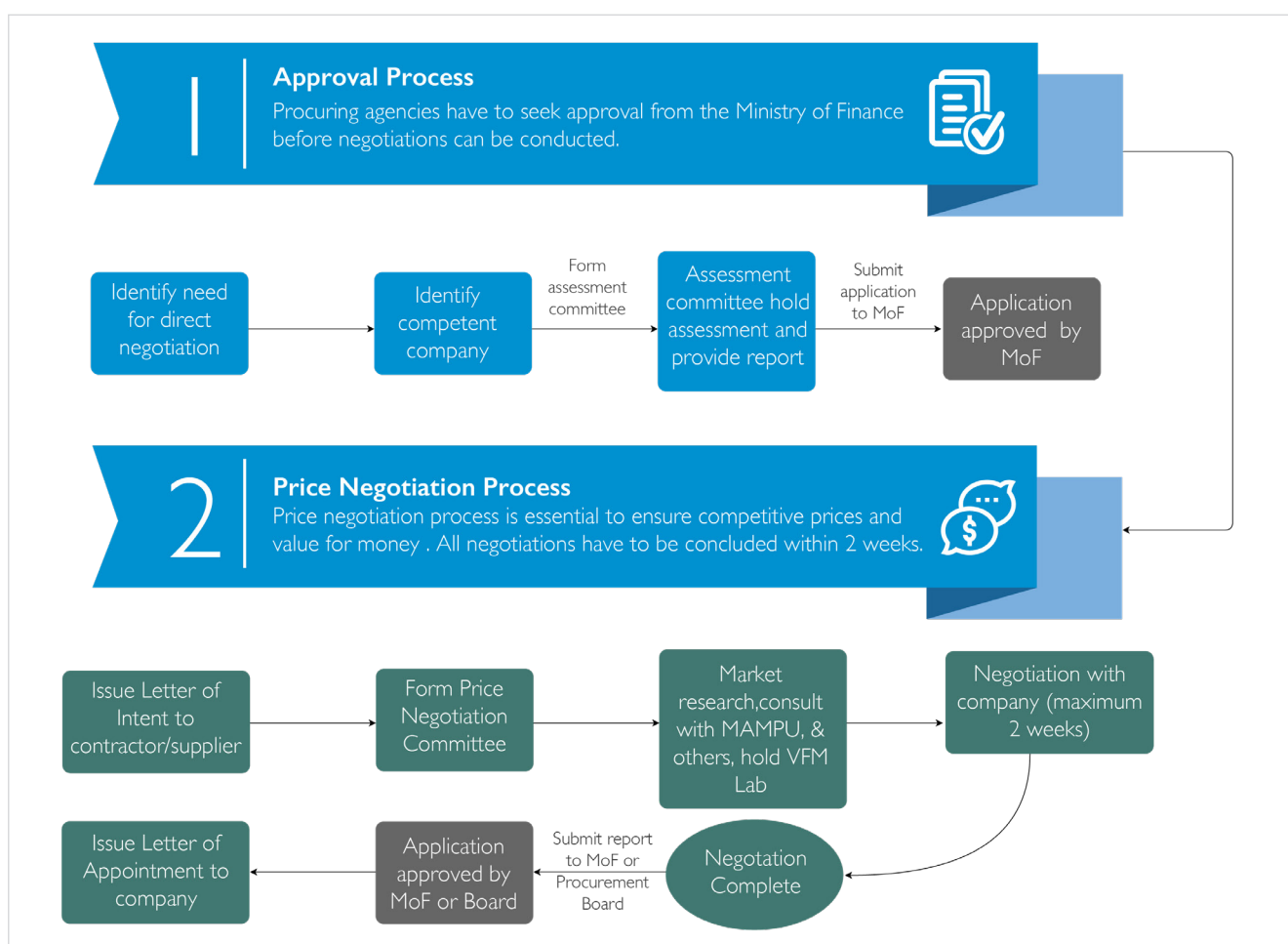
⁴ For this purpose, the agency will issue a Letter of Intent (LoI) to the appointed company

⁵ On Value Management exercise, the Economic Planning Unit issued a circular in 2015 detailing how the Value Management exercise (*Pengurusan Nilai*) should be carried out.

price, the committee is still required to submit a report to the controlling officer and this report should be submitted to the Ministry of Finance.

Lastly, **the circulars attempt to ensure procurement by direct negotiation is carried out swiftly**. The circulars rule that the price negotiation process should be completed in two weeks and the report of this negotiation should be submitted to the MoF within three days after the negotiation ends. If the result is positive, procurement contracts should be ready for signing within three weeks after the start of the negotiation.

Diagram 1: The process of direct negotiation that agencies should follow according to the circulars



The above measures are relatively comprehensive to ensure direct negotiation contracts achieve value for money and, in turn, achieve their intended outputs and outcome. However, as mentioned earlier, there are several weaknesses within the process which, as we will see in the next section, affect the implementation of these rules.

First, the “urgency” test is weak. Conditions for urgency in the circular are more general than the “urgency” conditions laid out in non-competitive procurement methods in international procurement laws such as the UNCITRAL Model Law for Procurement (Single-Source Procurement and Competitive Negotiations methods). Urgency in Malaysia covers any situations in which public service delivery and public interests will be jeopardised if procurement exercises are not expedited. For Single-Source Procurement, which allows procuring authorities to negotiate with single supplier/contractor such as in the case of direct negotiation, the UNCITRAL Model

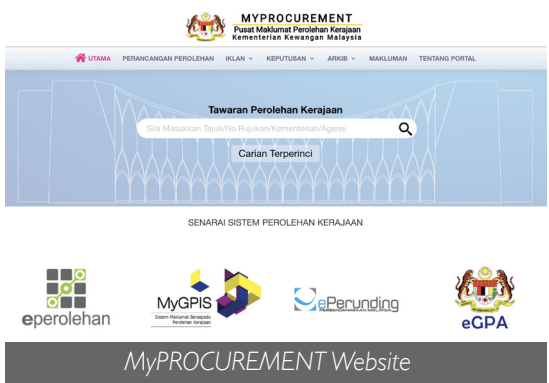
Law limits urgency to catastrophic events. For unforeseeable circumstances types of urgency, the UNCITRAL Model Law for Procurement requires procuring authorities to use Competitive Negotiations method where the negotiations should be carried out with “sufficient number of suppliers/contractors to ensure effective competition”.

The circular’s broad definition of urgency opens opportunities for direct negotiation for any procurement exercises. In fact, out of 314 disclosed direct negotiation in the MyPerolehan website, 103 of them were justified because of urgency (*mendesak*) or “urgency because of public interest” (*kesegeeraan atas kepentingan awam*). The nature of urgency varies. Some projects have clear cut urgency justification such as responding to disaster such as flood (two projects) and possible life-threatening situation (3-4 projects). But other urgency justifications seem to be less convincing such as fulfilling certain needs for organisations of national events or ministry/agency’s participation in local or international events (about 20 projects), procurement of electronic devices, cleaning services, and construction of PPR flats (*Program Perumahan Rakyat*).

Secondly, measures for accountability does not explicitly cover the Ministry of Finance. The circulars for example do not require the MoF to follow the recommendations made by assessment committee and price negotiation committee, nor do they require the MoF to explain if the decisions that they make are different with the recommendations of these committees. These committees are created to ensure value for money in direct negotiation. The absence of such requirements to explain decisions made against their recommendations undermine the effectiveness of these measures in achieving their objectives. The circular also does not discuss the possibility of the MoF rejecting the application from the procuring authorities and provide guidelines of actions for such a possibility.

Thirdly, direct negotiation lacks transparency. Compared to international procurement law, the current circulars do not have adequate measures of transparency such as requiring agencies to provide notice of procurement before embarking on direct negotiation and publish the awarded contractors/suppliers after the procurement process is completed. The UNCITRAL model law of public procurement, for example, requires procuring authorities to publish notices before they carry out single-source procurement and competitive negotiations, except for procurement in urgency and emergency situations. The notice should carry information about the contract (including “the nature, quantity and place of delivery of the goods to be supplied, the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods, the completion of the construction or the provision of the service”). Like in other procurement methods, the law also requires authorities to publish information after contracts under single-source and competitive negotiations have been signed. The public notice should include information on the name of the supplier (or suppliers) or contractor (or contractors) and the contract price.

Since 2012, the government has published a list of direct negotiation. But the disclosure is not mandated clearly in the circulars. The latest list disclosed in MyPROCUREMENT portal only lists contracts between 2013-2017. A total of 314 projects were listed. We compared this list with the list of directly negotiated projects that we extracted from the Auditor General reports from 2014-2018, only 3 of the projects listed in MyPROCUREMENT were discussed in the Auditor General Report. This suggests that the number of direct negotiation projects is higher than what is disclosed in this portal.



3. THE IMPLEMENTATION OF THE CURRENT RULES

We have reviewed the current rules of direct negotiation in the previous section, this section aims to understand how these rules are carried out in practice. For this purpose, this section uses cases of direct negotiation discussed in the Auditor General Report from 2014-2018. We will focus on how rules on justification, approval process, contractor assessment and price negotiation process are carried out in practice. Our analysis shows that the current rules are not fully complied with. The data indicate that many directly-negotiated contracts are not fully justified; the decisions of direct negotiation are not made by those who are supposed to make them; most of the appointed contractors/suppliers are not qualified; and the price negotiation process is not fully complied with.

3.1 The data set

Auditor General Reports, which are published two to three times annually, present the National Audit Department's evaluation of completed government financial statement and activities. These reports present an evaluation of whether the financial statements of government entities show a true and fair view of government financial situation (attestation audit), whether financial management of government entities is in accordance with relevant laws and financial regulations (compliance audit) and whether activities implemented by government entities are efficient and effective (performance audit). This research benefit mostly from information presented in the performance audit.

Between 2014-2018, the Auditor General published 36 reports, 12 of them focusing on the performance of government activities. These reports evaluated 206 activities in total. Each activity may contain more than one project. For example, Temasya Sukan KL 2017 activity has 116 projects. Each project has a different number of contracts. For example, a project to provide Sports Management System Services under Temasya Sukan KL has 2 contracts.

We extracted 93 direct negotiation projects from these reports. In total, these 93 projects consist of 392 contracts. The level of details for these 93 projects is different. The report discusses some of them in detail and evaluates the performance of the contracts and the appointed companies. But in some cases, the report only mentions it in passing. Out of 93 mentioned projects, only 76 projects have all the information that we need for this research. This research therefore relies on these 76 projects to understand the implementation of direct negotiation rules.

Below are some general observations on the direct negotiations contracts that we extracted from the reports:

- The total value of 392 projects mentioned in the report is around RM22 billion.
- The value for each project is different, ranging between RM600,000 to RM 4 billion. The biggest awarded contract is the MoE's the Pagoh Higher Education Hub project in 2011 which cost a total of RM4.054 billion. The lowest contract analysed by the AG report was RM684,760 which is the procurement for the upgrade and maintenance of Permata PINTAR UKM Talent Management System.
- Three out of five conditions for direct negotiation would only apply for procurement of goods and services (single source, standardisation and Bumiputera manufacturer). However, despite of that, 60% of the total directly negotiated projects are procurement for works.

- Based on our analysis, most directly negotiated contracts suffer from either delay, incompleteness, or are below specifications as compared to what has been agreed upon in the contract. Out of 76 projects that we have analysed, only 24 (32%) were found to be satisfactory (*memuaskan*) by the AG standard.

Table 1: Direct Negotiation Projects in AG Reports 2014-2018 by ministry

Ministry	< RM5 million	RM 5 million - RM50 million	RM50 million - RM 250 million	> RM250 million	N/A	Total Number of Projects	Total Value
Prime Minister's Department	0	1	1	0	0	2	RM114.19 million
Ministry of Natural Resources and Environment	0	0	1	4	0	5	RM1423.21 million
Ministry of Youth and Sports	1	4	1	0	51	57	RM438.39 million
Ministry of Home Affairs	2	2	3	1	0	8	RM963.36 million
Ministry of Economic Affairs	1	3	3	0	0	7	RM321.62 million
Ministry of Rural Development	1	1	2	0	0	4	RM264.84 million
Ministry of Public Works	0	1	2	2	3	8	RM2376.53 million
Ministry of Health	0	1	5	1	0	7	RM1524.08 million
Ministry of Finance	0	1	0	0	0	1	RM23.89 million
Ministry of Communications and Multimedia	0	0	2	1	77	80	RM839.64 million
Ministry of Education	1	8	4	6	118	137	RM7791.8 million
Ministry of Higher Education	0	0	0	0	24	24	RM7.4 million
Ministry of Transport	1	3	4	2	0	10	RM2399.9 million
Ministry of Defence	1	1	3	1	11	17	RM884.62 million
Ministry of Agriculture and Food Industries	1	2	0	0	0	3	RM18.09 million
Ministry of Housing and Local Government	0	1	14	0	0	15	RM1557.73 million
Ministry of Energy, Green Technology and Water	3	3	0	1	0	7	RM1057.64 million
TOTAL	12	32	45	19	284	392	RM22 billion

3.2 Justification

The information released in MyPROCUREMENT website suggest that all direct negotiation contracts have justifications. The website disclosed 314 direct negotiation projects that were carried out in between 2013-2017.⁶ In the cases of direct negotiation which were listed, it was justified on various grounds: the product or service was of specialist nature (98 procurements), a product was required which was compatible with that of a previous supplier (in IT procurements) (71 procurements), only one company was able to supply the product or undertake the works (150 procurements), the products or works was needed in an urgent situation (103 procurements). In some cases, more than one reason was given for a negotiated procurement.

However, analysis of the Auditor General Reports suggests that direct negotiation methods are also used in non-justified conditions. Out of total 76 direct negotiation cases discussed in the Auditor General Report of 2014-2018, more than half of them are unlikely to fall into the five justification categories. Most of them are projects to build road or government facilities such as hospitals and housing (Table 2). These projects do not require specialisation nor single source and can be procured in advance (hence urgency justification should not apply). Our assessment is that only 18 out of 76 cases are fully justified.

Table 2: Examples of unjustified direct negotiation

Project	Ministry	Contract Value
Completion of Projek Perumahan Rakyat in Siliau Jaya, Port Dickson (AG Report 2018 Siri 3)	Ministry of Local Government and Housing	RM 1.354 billion
Construction of Kolej Permata Insan-Universiti Sains Islam Malaysia (AG Report 2018 Siri 2)	Ministry of Education	RM58.89 million
Construction of Alor Gajah Hospital in Melaka (AG Report 2017 Siri 1)	Ministry of Works and Ministry of Health	RM110 million
Construction of Institut Kemahiran Belia Negara (IKBN) in Tanah Merah Kelantan (AG Report 2016 Siri 2)	Ministry of Youth and Sports	RM72 million
Construction of Bridge in Bukit Mertajam Penang (AG Report 2016 Siri 1)	Ministry of Works	RM114.76 million
Construction of Supply Base Dock and related works in the Second Basin of Bintulu Port (AG Report 2016 Siri 2)	Ministry of Transport	RM 1,247.39 million
Construction of Police Academy in Bentong Pahang	Ministry of Home Affairs	RM 138.40 million
Construction of Bera Hospital in Pahang (AG Report 2016 Siri 1)	Ministry of Works and Ministry of Health	RM 88 million
Upgrading of Hospital Sultanah Nora Ismail Batu Pahat Johor	Ministry of Health	RM200.70 million

⁶ Before 2012, information on direct negotiation contracts were extremely limited. The formal disclosure of direct negotiation contracts began under Najib Razak's government as part of the Government Transformation Programme (GTP).

Diagram 2: Approval in The Direct Negotiation Process - Main Patterns



3.3 Approval in The Direct Negotiation Process

As discussed earlier, procuring agencies are required to apply to the Ministry of Finance and obtain approval before they can conduct negotiations with a specific company. The circular identifies the controlling officer (*pegawai pengawal*) as the person who should submit the application and the MoF as an agency that is responsible to authorise it. However, our analysis of the 76 cases in the Auditor General's report 2014-2018 points to a different conclusion. Our findings suggest that there is no clear and consistent process. From our analysis, we have identified four variations:

The first variation is direct appointment by the Ministry of Finance without application from relevant procuring entity. Such appointments essentially override the prerogative given to the procuring agency to decide whether procurement exercise should be carried out through negotiation. An example of this pattern is the second package of the Bera Hospital Construction Project in which this RM88 million project was given to Maju Jaya Pasarana Sdn. Bhd. (MJPSB) through direct negotiations by the MoF in 2012 (National Audit Department 2016). Not only is this against existing procedures in the application for procurement, this project also did not meet any of the required criteria that allows direct negotiation to take place. According to the report, the hospital was not built according to specification with poor construction work and suffered severe delays which led to the termination of the contract.

In other projects, the MoF has also interfered with the procuring agency's decision in violation of its own rules for incomplete or unfinished projects (*projek sakit*). In Phase I of the construction of Sekolah Sukan Malaysia Perlis, the same contractor was reappointed by the MoF following the earlier termination of its contract due to critical delays in its progress. This authorisation was made against the decision made in *Mesyuarat Jawatankuasa Projek Sakit* and the existing guidelines for sick projects as detailed in the circular (PK 4.5) which mandates the use of open tender to continue the unfinished projects once the initial contract is terminated. This points to the question of whether the discretionary powers of the MoF is absolute, essentially overriding all decisions made by procuring entities and existing guidelines set by the MoF itself.

The second variation is when procuring entities themselves decide to procure through direct negotiations without any prior approval from the MoF. This is clearly against the existing guidelines for direct negotiation as outlined previously. In the procurement of laboratory equipment by the Crops for the Future Research Center, Interscience Sdn. Bhd. was appointed through direct negotiations as they were the sole supplier for Conviron lab equipment (National Audit Department 2016). This occurred without prior approval from MoF despite a high likelihood of that happening as the decision is justifiable under the criteria for direct negotiation. This case demonstrates the negligence of agencies in the procurement process, perhaps due to low enforcement or lack of consequences for such action, as well as possibly perceived gains from bypassing the red tape.

In the Construction of Supply Base Pier and Related Works in the Second Basin of Bintulu Port in 2016, not only was the project approved by the Minister of Transport instead of MoF, the minutes that were sent by the General Manager to the Minister was also falsified in opposition to the decision made by the Board of Directors (National Audit Department 2016). There were four such projects awarded in total, including consultants which amounted to RM1.467 billion. In these projects, approval was not granted by the MoF but instead by the Minister of Transport, thereby raising questions on 'special' authorization powers granted to ministers in government.

In the projects examined by the National Audit Department from 2016 to 2018, 11 projects were found to receive either delayed or no approval from the MoF but were allowed to continue without any repercussions. These acts of bypassing the authorization powers of the MoF are concerning as they represent a lack of fiscal discipline on part of the ministries involved.

The third variation that we have found is the request for direct negotiation approval to Ministry of Finance is made by minister instead of the controlling officer of the ministry. In certain cases, ministers personally request for a certain project to be procured through direct negotiation with a specific company. This pattern can be further divided into two categories, one in which the decision to procure through direct negotiation is made prior to any bidding process, and another where decision is made after bidding has already been conducted. An example of the first category can be seen in the Road Charges (RC) Collection System Project and Foreign Vehicle Entry Permit (VEP) Record in 2015. In this case, the Minister of Transport personally requested approval from the Prime Minister to appoint the contractor for the project through direct negotiation, citing urgency as a justification and that the company possessed all the required expertise and financial capabilities to perform the project (National Audit Department 2017). It was found that this contradicts the assessment by the Technical and Finance Committee which had concluded that the company neither had the expertise nor the financial capabilities for the project. This breach of procedure may potentially expose the government to substandard contractors as these contractors are not tied to the evaluation by the relevant committees.

The second category is where direct negotiation is decided only after the bidding process has been conducted because a minister requested to do so. This is demonstrated in the procurement for ticket sales management in the Kuala Lumpur SEA Games in 2017 where procurement through direct negotiation was decided only after bids for Request for Proposal (RFP) were submitted, following the decision made by the former Minister of Youth and Sports (National Audit Department 2018). This was done even when the appointed company (Perbadanan Stadium Malaysia) only fulfilled 13/47 of the criteria for RFP compared to its competitor Airasia RedTix which fulfilled all of the said criteria. Such a decision, especially after the chosen company has been proven to be less competent compared to other bidders, goes against the principle of fair competition and highlights favouritism in the awarding of contracts. Most importantly, this may not lead to the most optimal outcome on behalf of the government and may significantly impact the success of government programmes.



Some contracts for organising KL SEA Games 2017 were given through direct negotiation

A similar pattern that can be identified involves a personal request from a Minister to the Cabinet to authorise the use of direct negotiation. In this case the decision for direct negotiation is neither made by the MoF nor the procuring entity, but by the Cabinet. The RM1.066 billion Pagoh Higher Education Hub Project (HPTP) in 2011 stemmed from a proposal by the then Deputy Prime Minister to the Cabinet, and was awarded to special purpose vehicle companies set up by I5631-P through direct negotiations without any formal proposal (National Audit Department 2018). The long period of concession of 20 years with charges such as availability charges, maintenance service charges, and maintenance reserve fund further increase the total commitment made by the government to RM 4.054 billion.

3.3 Contractor Qualifications

The most recent Treasury Circular (PK 7.16) requires agencies to assess proposed contractors/suppliers before submitting an application to the Ministry of Finance to ensure their financial and technical capacity meet the minimum requirements to implement the projects.⁷ Treasury circulars require contractors and suppliers who want to be considered for a government project to first meet all prerequisites in terms of registration. Depending on the location of the contractor, a contractor must first be registered with either the Construction Industry Development Board (CIDB), Unit Pendaftaran Kontraktor dan Juruperunding Sarawak (UPKJ), or Pusat Pendaftaran Kontraktor-Kontraktor Kerja, Bekalan dan Perkhidmatan Negeri Sabah (PUKONSA). All contractors must also have a Contractor Registration Certificate (PPK) from the relevant agencies. Then, for contractors registered with CIDB, Certificate for Government Procurement (SPKK) must also be acquired to fully qualify for government projects. For all projects, the proposed contractor must have the appropriate

⁷ Assessment was not clearly outlined in the procedures for direct negotiation in previous circular (See PK 7.13 2013). Thus, it can be argued that the appointments of unqualified contractors happened because of this reason. However, capability assessment is a requirement in the pre-existing form for the application for direct negotiation to the MoF. Furthermore, even without such clearly mandated rules in place, the appointed contractor should at least possess the capability to finish the given project.

grade, category and field code based on the value and type of projects involved. In certain projects, Bumiputera Status Certificate (STB) may also be a requirement in line with the government's policy to prioritise Bumiputera contractors. Based on the Treasury Circular (PK2.1), the government agency involved is also required to set at least three specific criteria for the pre-qualification of procurement which involve the company's financial capabilities, experience in similar projects, and satisfactory performance in projects managed within the past five years.

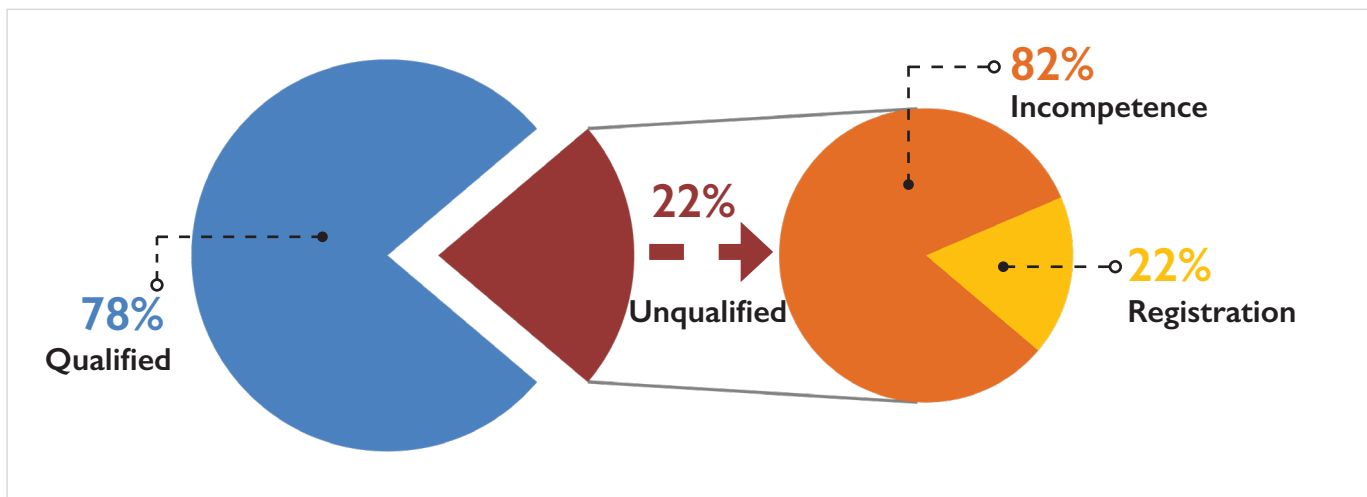
Table 3: Prerequisites for Government Contracts

Region		
Peninsular Malaysia	Sarawak	Sabah
<ul style="list-style-type: none"> Registered with Construction Industry Development Board (CIDB) Contractor Registration Certificate (PPK) Certificate for Government Procurement (SPKK) Appropriate grade, field, and category code Bumiputera Status Certificate (STB) - where relevant 	<ul style="list-style-type: none"> Registered with <i>Unit Pendaftaran Kontraktor dan Juruperunding Sarawak (UPKJ)</i> Contractor Registration Certificate (PPK) Appropriate grade, field, and category code Bumiputera Status Certificate (STB) - where relevant 	<ul style="list-style-type: none"> Registered with <i>Pusat Pendaftaran Kontraktor-Kontraktor Kerja, Bekalan dan Perkhidmatan Negeri Sabah (PUKONSA)</i> Contractor Registration Certificate (PPK) Appropriate grade, field, and category code Bumiputera Status Certificate (STB) - where relevant

In theory, the rules and procedures in place would ensure the appointment of only qualified contractors in government projects. However, deeper analysis on projects approved under direct negotiations would indicate that the existing rules and procedures are sometimes not adhered to by the procurement officer, and some appointments were made under dubious circumstances. Based on our analysis of direct negotiation projects audited between 2014 and 2018, out of 76 cases that we looked at, 17 of them are found to be unqualified contractors.⁸ These 17 projects make up a value of almost RM3 billion. These contractors/suppliers are considered to be unqualified for two reasons: (1) they do not have the capacity, experience or financial capability to implement the given project (incompetent) or (2) they do not meet valid registration requirements (registration problem).

14 out of 17 appointments that we have analysed fall into the category of incompetence. An example of this is the contractor for Bera Hospital Construction Project (Maju Jaya Prasarana Sdn. Bhd). The company was appointed directly by the MoF. The total value of the project is RM88 million (National Audit Department 2016). In this project, the National Audit Department reported that the contractor was incompetent and did not have the capacity to finish the project even after it was given a several extensions with a total of 690 days. The contractor was given warnings on 20 separate occasions and 3 termination notices before its contract was finally terminated. The remaining 3 contractors were unqualified due to issues with registration where some of these companies were either not registered with relevant bodies or did not possess a proper license to conduct such projects. This includes contractors who did not fulfil all requirements mandated by the government but were still appointed through direct negotiations.

Diagram 3: Contractor Qualifications for Directly-Negotiated Contracts in AG Report 2014-18



The capacity of contractors/suppliers is key to reducing the risk of incompleteness, delays, or substandard finishing of the projects. The 17 projects that were given project to unqualified contractors suffer either delays or are substandard to the terms agreed under the contract. In certain cases, contractors were found to lack expertise and capacity to complete a given project, leading to the termination of their contracts. The impacts of the appointment of unqualified contractors are not only costly to the government in terms of finances, but also affects the objective to provide services to the people due to time extensions and poor execution or finishing. Dubious appointments of contractors may even potentially determine the success or failure of government programmes. The list of 17 unqualified contractors and the outcome of the projects can be seen in Table 4.

⁸ It should be noted here that the 17 cases are based on Auditor General's description of the contractors' qualification. The Reports do not always discuss the qualification of the contractors. We cannot ascertain the qualification of the remaining contractors in our cases.

Table 4: Unqualified contractors/suppliers and outcome of the projects

No.	Project	Contractor	Value	Reason for Unqualification	Outcome
1.	Slope Management, Data Collection and Rock Slope Mapping (RSM) and Quantitative Risk Assessment Study and Establishment of New Formula for Hazard and Risk Map (QRA)	301524-V	RM900 million	Incompetence - Audit found a lack of capacity to execute the scope of the project	Low levels of slope prevention work due to incompetence of contractor; only 497 (50.3%) out of 988 collapsed slopes repaired.
2.	Completion of PPR Taman Siliau Jaya	001317249-U	RM17.63 million	Incompetence - Appointed by failed initial contractor	Below specification - some parts were missing or of lower quality
3.	Construction of the New Generation FELDA Housing Project (Perintis 1 & 2)	987467-D	RM 321.62 million	Registration - Company not registered with CIDB and no approval from MoF	Delayed - only 1 out of 8 projects finished
4.	Kuala Lumpur Games Ticket Sales Management 2017	Perbadanan Stadium Malaysia, 499473-V (Appointed by PSM:advisor), MA0122978-K (Appointed by PSM:Ticket Sales)	RM6.57 million (Total sales)	Incompetence - fulfilled only 15/47 (31.9%) of RFP criteria before chosen for direct negotiations	Reported profits cannot be authenticated as no supporting documents were submitted
5.	Construction of Sungai Baru Diversion (CH0 - CHI 2600) and Sungai Anak Bukit Upgrades (CH0 - CHI 750) as well as works related to Kedah River Flood Mitigation Plan / Anak Bukit, Kedah (Package 2)	195332-K	RM132 million	Incompetence - Failed in the first stage of tender assessment as balance sheet was not submitted	Severely delayed and terminated
6.	Public Cellular Blocking System Project	689575-W	RM270 million	Incompetence - company not in full control of server	Data leak detected involving 46 million consumer mobile phone data. Contract not extended.
7.	Completion of Abandoned Phase I of the Malaysian Sports School Perlis Project	205536-U	RM30.20 million	Incompetence - Same contractor that failed initial project	Severely delayed and terminated.
8.	Road Charges (RC) Collection System Project and Foreign Vehicle Entry Permit (VEP) Record	Not Mentioned	RM45.15 million (CAPEX) RM104.30 million (OPEX) RM149.45 million (Total)	Incompetence - Audit found lack of experience and financial capability	Maintenance cost exceeds committee estimates by 7.5% a year of CAPEX cost. 199% increase in OPEX cost from the approved rate. Payment for technical support services approved for 80 people when only 41 were employed.

9.	IKBN Tanah Merah, Kelantan Construction Project	Seraya Resources Sdn. Bhd	RM72 million	Incompetence - Lack capacity to execute project	Severely delayed and terminated
10.	Procurement of eKadaster Development Project	Not Mentioned	RM287.62 million	Incompetence - Subpar delivery	Below specification and delayed - weaknesses found in control of application, Liquidated and Ascertained Damages (LAD) worth RM14.38 million not imposed on contractor due to delay
11.	Bera Hospital Construction Project Package 2	Maju Jaya Pasarana Sdn. Bhd. (MJPSB)	RM88 million	Incompetence - Incapable of completing project	Severely delayed and terminated. Mechanical and Electrical (M&E) coordinator for Industrialised Building System (IBS) not appointed. Independent Inspection Authority not appointed for 45.3% of contract duration. 9.7% to 83% understaffed compared to set norms.
12.	Construction of Police Training Center In Mukim Pelangai, Bentong, Pahang	Syarikat Malgran Resources Sdn. Bhd. (MRSB)	RM138.40 million	Incompetence - Public Works Department found that contractor lacked capacity to complete the project	Severely delayed and terminated.
13.	Construction of New Road from the Seremban-PD-FR5 Highway In Pasir Panjang and Upgrading FR5 from Pasir Panjang to Linggi, Negeri Sembilan (Section 1)	Hartajaya-Benteng Timur-AMR Jeli JV Sdn. Bhd. (HBA-JV)	RM72.81 million (Contract 1) RM45.99 million (Contract 2)	Incompetence - Same contractor that failed initial project	Severely delayed and terminated. Same contractor reappointed to finish the project and in total took 10 years in comparison with 2.5 years as specified in the contract
14.	Upgrading of the Sultanah Nora Ismail Hospital, Batu Pahat, Johor	Sejagat Bakti Sdn. Bhd. (Sejagat Bakti)	RM200.70 million	Incompetence - Audit found a lack of experience in hospital construction works	Delayed, below specifications and of poor quality
15.	Construction of Ambulatory Care Center Raja Perempuan Zainab II	Syarikat Menang Intan Sdn. Bhd.	RM186.78 million	Incompetence - Audit found a lack of experience in hospital construction works	Delayed, below specifications and of poor quality
16.	Broadband to General Population (BBGP) project in Sabah and Sarawak	Esajadi Sdn. Bhd.	RM 25.64 million	Registration - Company lacked NSP license to operate and maintain infrastructure	Finished on time
17.	Operation of Wisma Perwira Angkatan Tentera Malaysia	Virgin Properties Sdn. Bhd. (VPSB)	RM39.30 million (3 years)	Registration - lacked appropriate code to operate security services	At the point of audit, VPSB has not registered under the security code as instructed by MoF

3.4 Price Negotiation Process

The application submitted by the procuring authorities to the Ministry of Finance is not to authorise them to award the contract to the appointed company. Instead, it is to authorise them to negotiate the price with the appointed company. For this purpose, after the agency obtains the approval from the Ministry of Finance, the company will be issued a Letter of Intent (LoI). The procuring authorities must form a Price Negotiation Committee (*Jawatankuasa Rundingan Harga*). This committee is chaired by the Controlling Officer with at least three other officers that possess sufficient experience and technical expertise on said procurement. The negotiation should take no more than two weeks and market research must be carried out for procurement involving supply or services. For works-related procurement, the price standard of the department must be taken into consideration, along with the cost index for building materials from the Department of Statistics Malaysia. Report on the result of the price negotiation should be finalised within three days after negotiation is concluded and sent to the relevant authorities set by the MoF for approval. Following the final approval from the MoF or the Agency Procurement Board, a Letter of Acceptance (LOA) must be issued within seven days and the Controlling Officer must ensure that the LoA is signed by the authorised officer (See Diagram 1).

Auditor General Reports that we examined show that there are instances where agencies fail to adhere to existing guidelines on price negotiations.

One of the major violations of the rule is that in certain instances, the **price negotiation committee was not formed at all**. As such the negotiation process did not take place properly. This is evident in the ERL Connection Project from KLIA to klia2. The agency involved, Express Rail Link Sdn. Bhd. (ERLSB) simply proposed RM100 million as a rough estimate for the project without adequate evidence. This estimate was used to obtain approval from the Economic Council. The Ministry of Transport in a response to the National Audit Department mentioned that the proposed price is much lower than the estimation by the appointed company and after Value Management exercise which was at RM117 million. The ministry affirms that the project achieved the best value for money for the government as any excess cost above RM100 million will be borne by ERLSB.

In other cases, the price negotiation committee was formed, but other key important process such as **market research, approval by MAMPU for ICT-related procurements, and value management lab were skipped**. Procurement of Emergency Medical Rescue Services (EMRS) equipment for example was carried out without market research. The procurement of Road Charges (RC) and Vehicle Entry Permit (VEP) system by Ministry of Transport was carried out without MAMPU's approval and Value Management (VM) exercises. Interestingly, absence of MAMPU's approval was possible because the MoT requested for an exemption from such process from the MoF. The MoT also requested to be exempted from holding a value management lab. However, this request was not approved. Until the contract was awarded, the VM lab did not take place because the MoT did not make adequate preparation for the lab to happen.

One of the most interesting cases that we have found that demonstrates a complete disregard of procedures is in the contracts procured by the Bintulu Port Authority in 2015-2016 through direct negotiations. In the 2016 Auditor-General's Report Series 2, there were 4 such projects which involved a value of RM1.472 billion. These are (1) the project to Build a Supply Base Dock and Related Works in the Second Basin of the Bintulu port, (2) the appointment of consultant to the project, (3) the appointment of contractor for Environmental Monitoring, Compliance Reporting and Coastal Erosion Monitoring in Bintulu Port, and (4) Consultancy, Management and Monitoring Services for Compliance of the Terms and Conditions of the EIA Report Approval for LNG4 Jetty Project. All of them either did not issue the LOI to the appointed company

or issued them without prior approval from MoF. In all 4 of these projects, both Price Negotiation Committee and department cost estimates were not produced. Market research was also entirely skipped by the procuring entity. These deviances from the guidelines prevent the government from monitoring the cost of the procured projects, thus making them vulnerable to the abuse of power and exposing them to elements of corruption. The absence of market research also makes it hard to estimate the true cost of the project. It is essential to understand that these are integral parts to government procurement - the absence of which may lead to inefficient outcomes to the government which indicates a wastage in public funds.

Another breach of rules in this phase of direct negotiation is the timing. The circular specifically says that the negotiation process should not be more than two weeks. However, the Auditor General reports show that the **negotiations for some project took more than the allocated time**. In fact, in certain cases price negotiation takes a significant amount of time to conclude, even though urgency was cited to be the justification for direct negotiation. The delay in this decision can sometimes take up more than a year. For example, price negotiation for the RM130 million UniKL Malaysian Institute of Aviation Technology (MIAT) Subang Campus Construction Project in Subang, Selangor in 2013 took 229 days to materialise.

4. CONCLUSION & RECOMMENDATIONS⁹

Direct negotiation is a valid and necessary procurement method despite its risks for abuse. Treasury circulars have provided rules to minimise the risks and ensure value for money. However, the comparison that we make between the rules in Treasury circulars and the international procurement law as well as the way these rules are being implemented show that there is significant room for improvement.

Below are recommendations that we propose to improve the governance of direct negotiation that can be included either in the upcoming procurement legislation or in other relevant legislation:

I. **Strengthen accountability mechanisms for the Ministry of Finance and relevant Procurement Board in direct negotiation process**

The involvement of Ministry of Finance in approving direct negotiation contracts provides a mechanism of accountability and check and balance in the direct negotiation process. However, the current circular does not have accountability mechanisms for the MoF itself. The MoF, as mentioned earlier, is not required to provide justification for rejection or approval for the direct negotiation and for making decisions that contradict with the recommendations made by assessment and price negotiation committees. Section 3 of the paper also provides examples of the MoF's failure to follow direct negotiation rules itself.

Procurement legislation may not be the best way to address this limitation, but circulars can be used for this purpose. Circulars will remain relevant after the introduction of procurement legislation. They will provide detailed guidelines on the procurement process. To improve accountability in the direct negotiation process, the circulars should include the following:

- ***The circulars should require the MoF and relevant Procurement Board to provide written explanations to the procuring entities for not taking recommendations made by the assessment and price negotiation committees.*** Ideally, the MoF and the ministries should take the recommendation of these committees and act accordingly. But there may be some justifiable reasons for ignoring the recommendations such as responding to natural disasters. But the reasons for not heeding the recommendations of these committees should be recorded properly. If the reason for rejection is the qualification of the contractors/suppliers, the MoF should furnish evidence to support such rejection and ask the procuring entities to propose a more qualified company. However, if the MoF decides to appoint contractor/suppliers that are not proposed by the procuring entities, the circular should require the MoF to provide supporting evidence of the qualification of the contractors/suppliers.
- ***The circular should clearly state the obligation for the MoF and Procurement Board to carry out due diligence before making a decision about the appointment of contractors for direct negotiation and limit the time for such process.*** As of now the circular only provides time limits for the negotiation process and the submission of price to the MOF, but it does not provide time limits for other important process such as MoF and procurement Board decision making. This recommendation will close this gap.

⁹ Authors thank the participants of the 4th IDEAS Procurement Roundtable for suggestions on the recommendations.

- **The circular should categorically state that if the companies appointed for direct negotiation contracts are found to be blacklisted or have relationship with any individuals involved in the procurement process, including politicians,¹⁰ they should be automatically barred from being appointed as project contractors**

2. Clarify the role of ministers in the procurement process

Treasury circulars on direct negotiation do not mention the involvement of ministers in the application and decision of direct negotiation at the line ministry level. The PK 17.5 (The Guidelines for the Application for Direct Negotiations) states that the official application can only be signed by the controlling officers, which according to Financial Procedures Act, are the secretary general of the ministries or head of the agencies. However, the Auditor General Reports disclosed numbers of occasions in which ministers proposed the direct negotiation contracts to the MoF and the Cabinet and identified the companies that should be awarded the contracts. In certain cases, ministers ignored assessments made by the agencies and went ahead with the appointment of unqualified companies. As shown in the previous section, the appointment of unqualified companies negatively impacts the outcome of the projects: some experienced delay, others are incomplete and below required standards.

Ministers are responsible for the policy directions of the ministry. Their involvement in procurement should be based on ensuring the achievement of policy direction. As such, they should allow the civil servants to follow procurement rules and process, which are designed to ensure best value for money, and provide a due diligence to the process and final outcomes. However, **ministers/deputy ministers and any politicians sitting in policy-making decision positions should not decide methods of procurement and companies that will be awarded the contracts.**

The National Anti-Corruption Plan (NACP) has identified the need for clarification of minister's role in procurement and made it as one of the initiatives that it should be delivered by December 2023 (Initiative 3.1.6: To create accountability and transparency in defining the exercise of power of Minister as stipulated in legal provisions especially in procurement and financial system). This research provides more evidence on the need of this initiative.

PRIORITY AREA: PUBLIC PROCUREMENT **STRATEGY 3 - Increasing the Efficiency and Transparency in Public Procurement**

STRATEGIC OBJECTIVE 3.1: Strengthening Public Procurement Framework

NO.	INITIATIVE	LEAD AGENCY	MILESTONE
3.1.1	To introduce a comprehensive procurement policy on disclosure of conflict of interest during procurement process	Ministry of Finance (MOF)	Within 1 year (Jan 2019-Dec 2019)
3.1.2	To ensure all client departments and regulators to carry out projects based on the advice and recommendation provided by Technical Department such as the Public Works Department and related technical agency	i) Ministry of Finance (MOF) ii) Prime Minister's Department (PMD) iii) Public Works Department (PWD) iv) Related Technical Agency	Within 1 year (Jan 2019-Dec 2019)
3.1.3	To strengthen the current Integrity Pact to be in line with international standards	i) Ministry of Finance (MOF) ii) Ministry of Economic Affairs (MEA) iii) Malaysian Anti-Corruption Commission (MACC)	Within 2 years (Jan 2019-Dec 2020)
3.1.4	To enhance the Project Monitoring System II in monitoring the project management cycle for better effective and efficient in all government projects	Prime Minister's Department (PMD)	Within 5 years (Jan 2019-Dec 2023)
3.1.5	To introduce legislation on public procurement in regulating the procurement activities, improving efficiency resource utilisation, safeguarding public and national interest as well as protecting the rights of contracting parties	Ministry of Finance (MOF)	Within 5 years (Jan 2019-Dec 2023)
3.1.6	To create accountability and transparency in defining the exercise of power of Minister as stipulated in legal provisions especially in procurement and financial system	i) Ministry of Finance (MOF) ii) Ministry of Economic Affairs (MEA)	Within 5 years (Jan 2019-Dec 2023)

Extracted from National Anti Corruption Plan 2019-2023 p.26

¹⁰The 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

3. Empower the controlling officers in the procurement process

Another avenue that should be taken to reduce political intervention in direct negotiation process is empowering the controlling officers. The current legal provision gives authority to the controlling officers to control the expenditures and public money and, by extension, the procurement process. In fact, in direct negotiation, the circular categorically states that the application of direct negotiation should be made by the controlling officer. In practice, as we have seen in Section 3, the authority of controlling officers to decide is less evident. To address this gap, **we recommend providing the controlling officers platforms to be made accountable of procurement decisions, including decisions on direct negotiation.** Two platforms can be considered to provide an opportunity to the controlling officers to be accountable on procurement decisions made in their departments or ministries. The first is Public Account Committee sessions where the PAC members will question the controlling officers of the process and outcome of procurement process including those by direct negotiation. The second is a special forum organised to allow members of the public to questions the controlling officers of procurement process in their departments.¹¹ This type of forum has been conducted in the past from 2014 to 2017 following the release of the Auditor-General Reports, where secretary–generals of ministries (KSU) were made available to answer questions about procurements and expenditure from invited participants from the media, non-governmental organisations, think tanks and the private sector. The forum has also been televised for the public.¹²



Session with the media following the release of the Auditor-General Report 2016 Series 1
Source: Ministry of Communications and Multimedia

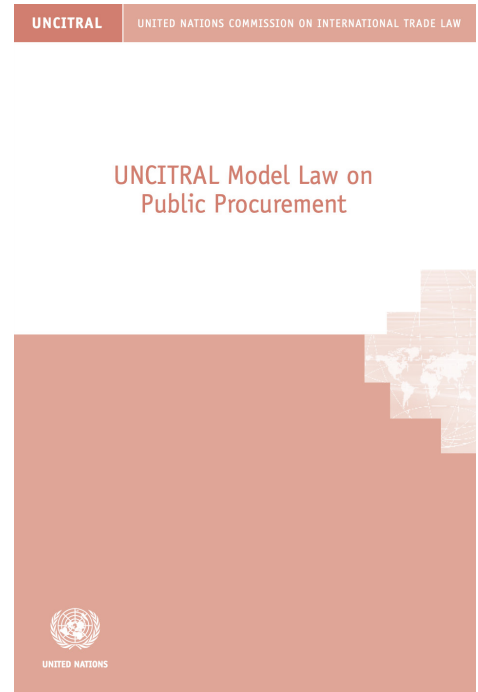
¹¹The forum can either be organized by the Auditor General or, as suggested in the 4th IDEAS Roundtable on Procurement Legislation, by the GIACC (Governance, Integrity, and Anti-Corruption Center)

¹²The forum however was criticized for not allotting sufficient time for Q&A (More speeches, fewer questions, *The Edge*, 13 June 2014) and for asking two opposition MPs to leave the forum (Pakatan MPs asked to leave the forum, *The Edge*, 18 June 2014).

4. Adopt “competitive negotiations”¹³ of the UNCITRAL Model Law for non-catastrophe-related urgencies

In the current format, direct negotiation involves only one company in the process, and it is used in any situations that require procurement activities to be delivered urgently either to respond to catastrophe or not. As seen in the previous section, this rule can create the possibility of direct negotiation being used for practically any procurement exercises that need to be delivered promptly. The fact that the rule allows for a negotiation with only one company does not bode well with the principle of competitive and fair procurement process espoused in the circular.

While we recognise that there are certain urgent situations that are not related to natural disasters and may impact service delivery if procurement exercises are delayed. These situations do not affect lives directly and as such a certain competitive measure in such procurement can be introduced. UNCITRAL Model Law of Public Procurement’s competitive negotiations is a potential method to be adopted for this type of urgent situation. This method requires procuring authorities to negotiate with more than one company, instead of one. Having more than one company to negotiate allows more possibilities for procuring authorities to choose a company that offers the best value for money. This method, if adopted, and the current direct negotiation are ideally listed as one of the procurement methods in the upcoming procurement legislation.



5. Require agencies to publish notices before the procurement exercise starts and after the contract is awarded to the selected company/companies.

The government has made an effort to publish direct negotiation contracts. However, as of 2020, the disclosure is inconsistent and irregular. Such disclosure strengthens the negative perception of direct negotiation and raises public suspicion of the method. As such, disclosure should be required explicitly in the rule. The requirements for disclosure should be included in the procurement legislation, to require procuring authorities to issue notice before direct negotiation takes place and when they finally award the contract to the appointed contractors/suppliers. The disclosure should apply to all direct negotiation exercises including those that are carried out to address catastrophes.

¹³ Complete text of article 30 of the UNCITRAL Model Law of Public Procurement where conditions for competitive negotiations are laid out: “A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 51 of this Law, in the following circumstances:

- (a) There is an urgent need for the subject matter of the procurement, and engaging in open-tendering proceedings or any other competitive method of procurement, because of the time involved in using those methods, would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;
- (b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open-tendering proceedings or any other competitive method of procurement because of the time involved in using those methods;
- Or (c) The procuring entity determines that the use of any other competitive method of procurement is not appropriate for the protection of essential security interests of the State.

6. **Adopt a review system that will provide additional check and balance mechanisms for compliance with procurement rules**

International procurement laws typically require countries to have a system that allows contactors/suppliers to challenge decisions and actions of the procuring authorities that in their opinion are not in compliance with procurement legislations and rules. In the European Union, such system is called the Remedies System; in the UNCITRAL Model Law of Public Procurement a system is encapsulated in Chapter VIII on the Challenge Proceedings; and in the Government Procurement Act it is known as Domestic Review Mechanisms. The establishment of an effective review mechanism is also mandated by the United National Convention of Anti-Corruption (UNCAC) because such system will allow the public and stakeholders to monitor compliance with the procurement rules.

The review mechanism provides an additional mechanism of accountability in the procurement process because it allows contractors/suppliers, who are naturally interested in monitoring the process, to challenge decisions and actions of procuring entities that are deemed to be inconsistent with procurement legislation. In other words, the mechanism allows greater scrutiny on the procurement process and in turn can encourage any actors involved in the procurement process to abide by procurement rules. Above mentioned issues in direct negotiation such as failure to establish price negotiation committees, carry out market research and value management, and appointing incompetent companies can be minimised because they can be challenged and subject to review mechanisms. As such, the review mechanism will complement the currently available accountability mechanisms such as the audit, disciplinary actions, and prosecution on related criminal offences such as corruption and fraud. The upcoming procurement legislation should have provisions on this matter.

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