

## ***Public Procurement in Zambia: A Commentary on the Law and Practice***

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### ***Abstract***

*Since the enactment of The Public Procurement Act No. 12 of 2008, scholarly analyses and evaluations of its contents, institutional mechanisms and underlying policy objectives are conspicuously absent. This seminal article on the subject seeks to outline and discuss the institutional and legal framework for the public procurement system and practice in Zambia. Thus, government agencies, procurement officers, anti-corruption institutions, policy-makers, scholars, students, judges and lawyers in Zambia will find this article most invaluable for practice.*

### **1. Introduction**

Public procurement is an indispensable function of any government in the world for a myriad of reasons.<sup>1</sup> One of which, and perhaps the most important one, is that it is a key component of expenditure management, which along with revenue management comprises the financial management function.<sup>2</sup> Other than being a financial management function, public procurement is also interwoven with key development issues such as economic growth, poverty reduction, decentralization, and private sector development. Globally, it is estimated that the public procurement accounts for 10% – 30 % of GNP.<sup>3</sup> Certainly, public procurement is at the center

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<sup>1</sup> Amemba et al. 2013. *Challenges Affecting Public Procurement Performance Process in Kenya*. International Journal of Research in Management. Issue 3, Vol. 4

<sup>2</sup> Ibid

<sup>3</sup> Callender, G and Mathews, D. 2000. "Government Purchasing: An Evolving Profession?" Journal of Public Budgeting, Accounting and Financial Management, 12(2): 272 – 279

of governance. As such, any weakness in the public procurement system adversely affects welfare and prospects for growth.<sup>4</sup>

In terms of definition, the concept of public procurement, also known as government procurement, has defied any attempts at developing a universal definition. It is defined differently by different authors and organisations. Be that as it may, public procurement is generally understood to mean the purchasing by government of the goods and services it requires to function and maximize public welfare.<sup>5</sup> According to Roux, such goods and services can be provided “in house”<sup>6</sup> or by purchasing them from outside entities.<sup>7</sup> Public procurement is therefore a core function of public financial management and service delivery. This is because national budgets get translated into services through government’s purchase of goods and services.<sup>8</sup> It is no wonder that Tsabora posits that public procurement is a convergence point of public administration and public financial management.<sup>9</sup>

Given the critical role of public procurement, it is important that a country establishes a procurement system that institutionalises transparency, accountability, probity and zero-corruption in public procurement system.<sup>10</sup>

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<sup>4</sup> Rothery, R. 2003. *China’s Legal Framework for Public Procurement*. Journal of Public Procurement, Vol. 3, Issue 3, pp. 370 – 388.

<sup>5</sup> Arrowsmith, S and Trybus, M 2003. *Public Procurement: The continuing revolution*. Kluwer Law International

<sup>6</sup> What this means is that government can source services it requires internally. For instance, legal services can be sourced from the Attorney General’s Chambers whereas some State Owned Enterprises such as Kalonga Milling can provide mealie-meal.

<sup>7</sup> Roux, S. P. (2009) *Public Procurement: Comparative Analysis*. Unpublished Doctoral Thesis.

<sup>8</sup> Ibid

<sup>9</sup> Tsabora, J, 2014. *Public Procurement in Zimbabwe: Law, Policy and Practice*. African Public Procurement Law Journal, pp. 1 – 22.

<sup>10</sup> Adewole, A. 2015. *Governance Reform and Public Procurement Law Regime in Nigerian Federating States: A Case Study of Oyo State*. International Journal of Development and Economic Sustainability, Vol.3, No. 1, pp. 18 – 29.

Against that background, the World Bank, working together with the Government of the Republic of Zambia, championed public procurement reform in Zambia. In the year 2002, the World Bank conducted a study of the Zambian public procurement system. This culminated in the publication of what is known as a Country Procurement Assessment Report (CPAR) of the Zambian public procurement system. The purpose of the study was stated as follows: “...to study and analyze the existing public procurement system in Zambia and to recommend suitable actions to improve the economy, efficiency, predictability and transparency of the procurement processes.”<sup>11</sup>

The study found a number of material deficiencies with the system. Among others, the study found that the legal framework lacked robustness and featured structural, and content inadequacies.<sup>12</sup> It was, thus, recommended that a new procurement law, modelled after the UNCITRAL Model Law and international best practices, be enacted.<sup>13</sup>

In response to the recommendations in the CPAR, the Zambian government enacted the Public Procurement Act No. 12 of 2008. The objective of this piece of legislation is to, *inter alia*, regulate and control practices relating to public procurement in order to promote the integrity of, fairness and public confidence in, the procurement process.<sup>14</sup>

This paper, therefore, examines the regulatory frame work for public procurement system and practice in Zambia. It covers, in the main, the purpose, nature and scope of the procurement

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<sup>11</sup> Country Procurement Assessment Report for Zambia, 2002, Vol. 1, page 1

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> See the preamble to the Public Procurement Act No. 12 of 2008

system from both legal and institutional perspectives, with particular emphasis on those provisions that have profound impact on the integrity of the procurement system.

## 2. The Legal framework for Public Procurement

As a point of departure, the term legal framework refers to laws and rules that are enacted to regulate an organization and the manner in which it conducts its affairs.<sup>15</sup> In the context of public procurement, the legal framework should clearly cover the whole spectrum of activities ranging from procurement processes and procedures, methods of procurement to ethics and transparency.<sup>16</sup> It is generally accepted that a good public procurement legal framework must be based on principles of openness and transparency, fair competition, impartiality, and integrity.

### 2.1 The Constitution of Zambia

The Constitution of Zambia<sup>17</sup> prescribes what one would call the public procurement objectives which should inform and characterise the public procurement system in Zambia. Article 210(1) provides: “210. (1) A State organ, State institution and other public office shall procure goods or services, in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, as prescribed.”

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<sup>15</sup> Awino, Z.B. and Getuno, P.N.M. 2014. *Public Procurement Legal Framework Implementation Challenges and Organisational Performance*. DBA management Review, Vol. 4, No. 2, pp. 103 – 117.

<sup>16</sup> Thai, K. 2009. *International Handbook of Public Procurement* CRC. Pross, Taylor and Francis Group.

<sup>17</sup> Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016

The above quoted provision can, at best, be described as a mandatory constitutional call for the government to conduct and practice public procurement in a manner that is fair, equitable, transparent, competitive and cost effective. To say the least, this article embodies some of the most important policy objectives of a good public procurement system. It necessarily follows, therefore, that any government procurement policies and legislation that stifle a competitive and robust regime, which fail to promote financial probity, fairness or accountability, are unconstitutional and therefore void.<sup>18</sup> By the same token, legislation and procurement policy approaches that discriminate suppliers of goods and services on the basis of their nationality, origin or race, or that encourage corrupt practices are unconstitutional and therefore void.

Additionally, Article 11 as read with article 23 of the bill of rights in the Zambian Constitution<sup>19</sup> guarantees fairness and equal treatment of every person in Zambia. Article 23 prohibits unfair discrimination on grounds of nationality, race, colour, place of birth, ethnic and social origin, economic or social status among other categories. It is worth noting that the fact that article 11 states that '*every person*' means that the extent of protection guaranteed in the Constitution generally and in the equality clause in particular is not restricted to Zambian citizens only. It applies with equal measure to foreign citizens doing business in, or with Zambia.

Accordingly, under article 23, legislation and policy practices that unfairly discriminate against a certain category of foreign or domestic suppliers and contractors in favour of others are unconstitutional. It is interesting to note that the equality clause in the Constitution also features

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<sup>18</sup> See Article 1 of the Constitution as amended by Act No. 2 of 2016

<sup>19</sup> As amended by Act No. 2 of 2016

in section 37 of the Public Procurement Act.<sup>20</sup> The section provides: *A bidder shall not be excluded from participating in public procurement on the basis of nationality, race, religion, gender or any other criterion not related to its eligibility or qualifications, except to the extent provided for in this Act.*

While the law outlaws discrimination, it is not oblivious to the need for some form of positive discrimination aimed at advancing particular social and economic goals. There is no doubt that the above quoted provision allows government to achieve other social and economic goals through implementation of preferential procurement policy. In fact, the Authority is empowered, in consultation with government bodies responsible for economic and social policy, to formulate preferential or reservation schemes for certain social groups with a view to enhancing economic opportunity and attaining particular social and economic objectives.<sup>21</sup>

The above notwithstanding, it can, thus, be argued that the above discussed legal framework engenders transparency and integrity in government procurement to the extent that aggrieved bidders and suppliers can invoke the legal provisions discussed above and challenge the award of tenders on the basis of unfairness or some other illegal or unconstitutional grounds. No doubt, the Constitution and the Public Procurement Act, if they are adhered to, can safeguard the integrity of public procurement system in Zambia.

The Constitution, it should however be admitted, provides a very skeletal framework that is important albeit as a starting point. Detailed provisions that establish and pronounce a workable

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<sup>20</sup> No. 12 of 2008

<sup>21</sup> Section 63 of the Public Procurement Act makes particular reference preferential and reservation schemes. In the Regulations, regulations 159 and 169 provide for preferential and reservation schemes.

legal framework are found in the Public Procurement Act that was enacted to give effect to the Constitutional imperatives discussed above.

## **2.2 The Public Procurement Act No. 12 of 2008**

The Public Procurement Act No. 12 of 2008 and the Public Procurement Regulations of 2011 provide a comprehensive regulatory framework for public procurement in Zambia.<sup>22</sup> Although the Act predates the Constitution in its amended form, having been enacted in 2008, its underlying objectives relate to the objectives mentioned in the Constitutional provisions discussed above. Thus, a review of the salient features of this Act certainly sheds light on public procurement regulation in Zambia.

## **2.3 Application of the Act**

In terms of application, the Act applies to all procurement carried out by procuring entities using public funds.<sup>23</sup> A procuring entity is defined in section 2 to mean a Government agency, parastatal body or any other body or unit established and mandated by Government to carry out procurement using public funds. It is clear from this definition that the Act applies to, and affects procurement by all arms or organs or institutions of government that carry out procurement using public funds. In essence, the Public Procurement Act regulates procurement of both central and local government.

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<sup>22</sup> However, it must be noted that public procurement involving the Public-Private Partnership (PPP) model is regulated by the Public-Private Partnership Act No. 14 of 2009. A perusal of section 20 of the Public-Private Partnership Act No. 14 of 2009 suggests that the Public Procurement Act No. 12 of 2008 only applies to procurement under the former when there is a lacuna thereunder. It is therefore the view of this author that the applicability of the Public Procurement Act to Public-Private Partnership procurement is quite limited. Suffice to state that the focus of this paper is the Public Procurement Act No. 12 of 2008.

<sup>23</sup> See section 3(1)

## 2.4 Zambia Public Procurement Authority

Part II of the Public Procurement Act No. 12 of 2008 establishes the Zambia Public Procurement Authority (ZPPA) as a body corporate, and thus capable of suing and being sued in its own name. The role of the Authority is regulatory, responsible for policy, regulation, standard setting, compliance and performance monitoring, professional development and information management and dissemination among others.<sup>24</sup> This means that in discharging its statutory mandate, it shall act as any other corporate institution, albeit with the duty of regulating public procurement. In essence, the Authority is responsible for the administration of the Act.

## 2.5 Composition of the ZPPA Board

The Board consists of the Minister responsible for Finance who is also the Chairperson of the Board, four (4) Ministers appointed by the President, the Secretary to the Cabinet, the Attorney General, the Governor of the Bank of Zambia, Permanent Secretary in the Ministry responsible for financial management, Permanent Secretary in the Ministry responsible for Commerce, Permanent Secretary in the Ministry responsible for works and supply and two other persons appointed by the President from among persons in private sector.<sup>25</sup>

A close scrutiny of the composition of the ZPPA Board reveals that it has a number of politicians and political appointees. Undoubtedly, executive political appointments as is the case with the ZPPA Board ignores the importance of professional technocrats and creates a real possibility that ZPPA Board members would be more politically aligned and thus amenable to political

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<sup>24</sup> See section 6 of the Public Procurement Act No. 12 of 2008

<sup>25</sup> See regulation 1(2) of the First Schedule

manipulation. Once this becomes the case, its decision makers could fail to tie bureaucratic rules, thus compromising the integrity of the institution.

The challenge with this state of affairs is that the operations of the institution are bound to be directly affected by mainstream politics. There is also a possibility that the institution is bound to be perceived, or perceive itself, as being part of the Executive. The composition of the Board also creates an impression that the institution is not necessarily corporate, but political and is at liberty to overlook or ignore critical corporate governance principles and measures in order to pursue or satisfy political objectives.

Moreover, executive control over the ordinary operations of the ZPPA is manifest throughout the Act. For instance, the first schedule to the Act empowers the President to four Ministers to sit on the ZPPA Board.<sup>26</sup> The President is further empowered to appoint two other persons to sit on the Board.<sup>27</sup> Under section 7, the President is also responsible for appointing and fixing remuneration of Chief Executive Officer of ZPPA. In light of the foregoing, it is inconceivable that the executive maybe said to have no control or influence over the ordinary operations of ZPPA.

However, it should be commended that the Act goes some way, at least on paper, towards promoting integrity of ZPPA. For instance, the Public Procurement Act insists on the integrity

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<sup>26</sup> Regulation 1(2) (b) of the First Schedule

<sup>27</sup> Regulation 1(2) (i) of the First Schedule

of the ZPPA Board through disclosure of interest.<sup>28</sup> To some extent, these standard measures seek to prevent instances of conflicts of interest that would endanger the integrity of ZPPA.

## 2.6 Procedures and processes

Procurement procedures and process should as a matter of necessity ensure the achievement of the constitutional imperatives of establishing a procurement system that is fair, equitable, transparent, competitive and cost-effective. Parts IV and VI of the Public Procurement Act provide for methods and processes of public procurement.

The Public Procurement Act is clear on a number of issues relating to procurement services. For instance, under the Act, a Procuring Entity is responsible for the management of all procurement activities within its jurisdiction<sup>29</sup> while the controlling officer or Chief Executive Officer is responsible and accountable for ensuring that all the procurements of the procuring entity are undertaken in accordance with the Act.<sup>30</sup> The Act requires a procuring entity to appoint a procurement committee which is the highest approvals authority in the procuring entity and responsible for ensuring that all procurement is undertaken in accordance with the provisions of the Act.<sup>31</sup> The procurement committee is required to have not more than two members from the private sector. The Act further requires the establishment of procurement units within the procuring entity to be responsible for managing all procurement activities.<sup>32</sup>

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<sup>28</sup> Regulation 7(1) of the First Schedule

<sup>29</sup> Section 12(1)

<sup>30</sup> Section 13(1) and 15(1)

<sup>31</sup> Sections 14 and 15(2)

<sup>32</sup> Section 20

The Act also clearly provides for the nature and manner of publication of invitation to tenders, standard form requirements for bids and proposals, criteria for evaluation of bids and proposals, access to relevant information and official documents, description of goods, services and work being put to tender, provisions for security deposit and other matters.<sup>33</sup> The actual tendering and bidding procedures and final evaluation are the subject of Procurement Regulations, which are made by the Minister, on recommendation by the ZPPA. On paper, in the least, the procurement regulations provide clear rules of conduct for procurement personnel in the government and in the private sector. These rules, if complied with, and actively enforced, can guard against bribery, favouritism, unethical behaviour, preferential treatment and, can ensure fair, impartial evaluation of contract proposals.

## 2.7 Suspension and Debarment

It is not unusual for Procurement legislation to contain provisions for suspension and debarment of contractors and suppliers from public procurement. The exclusion of contractors may be for a stated period of time or even a permanent one.

The Public Procurement Act makes provisions for suspension and debarment measures under sections 65 and 67. In terms of section 65, ZPPA may suspend a bidder or supplier from participating in public procurement for reasons stated in section 66 of the same Act. These include falsification of information in a bid, connivance to interfere with the participation of other bidders and failure to comply with a bid securing declaration among others. On the other hand, ZPPA can permanently bar a bidder or supplier from participating in public procurement for reasons stated in section 67. These include misconduct relating to the submission of bids,

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<sup>33</sup> See Part VI of the Act

including corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of underpricing of bids and breach of confidentiality, substantial non-performance or underperformance of contractual obligations among others.

The inclusion of suspension and debarment provisions in the Public Procurement Act is a laudable legislative intervention which is indicative of government's commitment to maintain system integrity and guard against corruption. It further demonstrates government commitment at punishing unethical behaviour that can denigrate the public procurement framework. As indicated earlier, public procurement involves huge sums of money. Consequently, there is a propensity, on the part of bidders and suppliers to commit misconduct or flout applicable rules in order to obtain government contracts. Thus, denying bidders and suppliers access to governmental contracts by way of suspension and debarment goes some way in deterring misconduct whilst simultaneously maintaining public trust and confidence in the procurement system.

Despite making provision for suspension and debarment measures, it can be argued that excessive executive control of the ZPPA, outlined above, means it might not be easy to blacklist or debar politically connected private contractors. Consequently, the executive is likely to have the final say on who to contract with at any given time and such decisions will have to be implemented by the ZPPA.

## **2.8 Dispute Resolution Mechanisms under the Public Procurement Act**

Part VIII of the Public Procurement Act provides for mechanisms of resolving disputes arising from decisions made by either the Procuring Entity or ZPPA. It is, however, worth noting that although disputes arising from decisions by ZPPA to either suspend or bar a bidder or supplier are amenable to arbitration, they are provided for under section 69 which is outside Part VIII.

Be that as it may, a bidder or supplier who is aggrieved by a decision of the Procuring Entity under the Act is at liberty to appeal against such a decision to ZPPA within the prescribed time frame, manner and upon payment of the prescribe fee.<sup>34</sup> On receipt of the application, ZPPA is required, *inter alia*, to institute investigation into a matter that has given rise to the application.

Interestingly, the law requires ZPPA to render its written decision on the application within 10 working days after the submission of the application. By necessary implication, the investigations by ZPPA have to be conducted within a period of under 10 days from date of receipt of the application. This is because ZPPA is required to render its decision within 10 working days from receipt of the application. Whether quality and thorough investigations can be conducted within the prescribed time frame is highly doubted considering the bureaucratic inefficiencies that characterize most if not all government institutions. It is therefore proposed that the law should prescribe realistic time lines which will enable ZPPA have ample time to deal with applications thoroughly but also expeditiously.

It is, however, interesting to note that in terms of section 71 of the Act, any dispute arising from or under the Act has to be resolved through arbitration. That provision raises very important procedural questions such as whether an aggrieved bidder or supplier can gloss over section 70(1), which provides for an appeal to the Authority against the decision of a procuring entity,

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<sup>34</sup> See section 70(1) and (2)

and have recourse to arbitration. Secondly, whether dispute resolution, under the Act, is limited or confined to arbitration only. Conversely, whether a bidder or supplier aggrieved by any decision under the Act is at liberty to impugn or challenge such a decision in court.

In order to resolve the first question, recourse must be had to the wording of both sections 70(1) and 71. Section 70(1) states: “*A bidder or supplier who is aggrieved with a decision made by a procuring entity under this Act may appeal against the decision to the Authority.*” Section 71 states: “*Any dispute over a matter or decision made under this Act shall be determined by arbitration in accordance with the provision of the Arbitration Act.*”

A close examination of section 70(1) reveals two things; firstly, that it is not mandatory for an aggrieved bidder or supplier to appeal against the decision of a procuring entity to the Authority. This proposition finds support in the use of the permissive word ‘*may*’ in subsection 1 of section 70. Secondly, that it is not mandatory for an aggrieved bidder or supplier to first appeal against the decision of a procuring entity to the Authority before having recourse to arbitration. This is because sections 70(1) and 71 of the Public Procurement Act are independent of each other. For avoidance of doubt, a reading of section 71 does not suggest that it can only be invoked after an aggrieved party has exhausted the appellate procedure provided for under section 70(1). It can be argued that if the intention of the legislature was to require an aggrieved bidder or supplier to first exhaust the appellate procedure provided for under section 70, the law should have stated that in no uncertain terms.

As regards the second issue or question, a close examination of section 71 reveals that the provision imports a mandatory word “*shall*” which means that it is mandatory that disputes

arising under the Act must be referred to arbitration. It would appear that the intention of the legislature is to have any dispute arising from or under the Public Procurement Act resolved through arbitration. One of the reasons which could have informed this position is that arbitration, when compared to litigation in courts, is quicker and therefore good for business. Because it does not take much time, it follows that is also less costly in terms of both time and money.

Be that as it may, it is important to appreciate the fact not all disputes are arbitrable. The Arbitration Act<sup>35</sup>, and section 6 in particular, circumscribes the scope of arbitration. The section provides as follows:

*6. (1) Subject to subsections (2) and (3), any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.*

*2) Disputes in respect of the following matters shall not be capable of determination by arbitration:*

*(a) an agreement that is contrary to public policy;*

*(b) a dispute which, in terms of any law, may not be determined by arbitration;*

*(c) a criminal matter or proceeding except insofar as permitted by written law or unless the court grants leave for the matter or proceeding to be determined by arbitration;*

*(d) a matrimonial cause;*

*(e) a matter incidental to a matrimonial cause, unless the court grants leave for the matter to be determined by arbitration;*

*(f) the determination of paternity, maternity or parentage of person; or*

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<sup>35</sup> No. 19 of 2000

*(g) a matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.*

*(3) The fact that a law confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration.*

The above quoted section is very clear on what matters are arbitrable and those that are not. For instance, if a person alleges violation of the Constitution, such a matter is arguably outside the ambit of arbitration. This is clear from article 128(1) of the Constitution. The said article provides: **128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to**

*hear—*

*(a) .....*

*(b) a matter relating to a violation or contravention of this Constitution;*

It can be argued that the use of the words “*original*” and “*final jurisdiction*” in the above article, implies that the Constitutional Court has exclusive jurisdiction to hear matters relating to the Constitution. Admittedly, the article does not import the word “*exclusive*”. However, by saying that the Court has original and final jurisdiction, the article implies that this is the only forum where such matters are to start and end thereby implying exclusivity in terms of jurisdiction.

It is also important to note that public procurement process, including the conduct of the process, the evaluation of the tender and the award of the contract, is a form of administrative action. The term “administrative action” was defined by Nugent JA, as he then was, in the South African

case of *Grey's Marine Hout Bay (Pty) Ltd and Others v. Minister of Public Works and Others*.<sup>36</sup>

He opined:

*“Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.”*

It is not in dispute that organs of the State act through their officials and as such their actions and decisions must be duly authorised by law. This entails that the statutory requirements and legal preconditions attached to any action, decision or the exercise of discretion, must be complied with by such an official when contracting. This raises the question whether, under the Public Procurement Act, an administrative action which is illegal, procedurally improper and unreasonable is amenable to judicial review. In other words, the question is whether an aggrieved bidder or supplier can gloss over section 71 of the Public Procurement Act which provides for arbitration as a mode of dispute resolution and opt for judicial review.

It must be noted that in terms of Order 53 of the Rules of Supreme Court (RSC) 1965<sup>37</sup> which is part of the Zambian law, the High Court for Zambia has exclusive supervisory jurisdiction by way of judicial review over persons and bodies which perform public duties or functions.<sup>38</sup>

Interestingly, Order 53 of the RSC was made or issued pursuant to Statutory Instrument (S.I) 1977 No. 1955. This is clear from the explanatory notes at Order 53/14/1. The foregoing raises

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<sup>36</sup> 2005 6 SA 313 (SCA)

<sup>37</sup> 1999 Edition, Vol. 1

<sup>38</sup> The reader is invited to examine the case of *Mung'omba and Others v. Machungwa and Others (2003) ZR 17* wherein the Supreme Court for Zambia discussed, in greater detail, the basis for applying Order 53 of the Rules of the Supreme Court 1965 to Zambia.

the question whether or not a provision of an Act of Parliament ( in this case section 71 of the Public Procurement Act ) can be ignored or let alone overridden by a mere Statutory Instrument ( in this case S.I 1977 No. 1955).

In the context of the subject under consideration, the question begging an answer is whether Order 53 of the Rules of the Supreme Court, can override section 71 of the Public Procurement Act to the extent it confers, exclusive supervisory jurisdiction, by way of judicial review, over persons and bodies which perform public duties or functions.

The Supreme Court for Zambia has had occasion to pronounce itself on the question whether or not an Act of Parliament can be ignored or let alone overridden by a mere Statutory Instrument in the case of *Shimonde and Another v. Meridian BIAO Bank*.<sup>39</sup> In that case, the Court held: “*The decisions of this court, such as Bank Of Zambia v Anderson S.C.Z. Judgment No.13 of 1993, Attorney-General v Mooka Mubiana Appeal No. 38 of 1993 made it very clear that the provisions of an Act of parliament could not be ignored nor overridden by a mere Statutory Instrument.*”

It is clear from the foregoing that Order 53 of the Rules of the Supreme Court, being a product of a Statutory Instrument, cannot override section 71 of the Public Procurement as doing so would militate against the principle of legislative supremacy as espoused in the above quoted case. The foregoing is notwithstanding the fact that it (Order 53 of the Rules of the Supreme Court) conferring, on the High Court for Zambia, exclusive supervisory jurisdiction by way of judicial review over persons and bodies which perform public duties or functions. On the basis of the

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<sup>39</sup> (1999) ZR 47

foregoing, it is submitted that an aggrieved bidder or supplier cannot gloss over section 71 of the Public Procurement Act which provides for arbitration as a mode of dispute resolution and opt for judicial review.

### **3. Conclusion**

This article has outlined and discussed the legal and institutional frame works for public procurement system and practice in Zambia. The paper has shown that the Public Procurement Act No. 12 of 2008 decentralised public procurement system so that procuring entities in the various State organs are able to undertake their own procurement by themselves. That notwithstanding, the Public Procurement Act made provision for the establishment of the Zambia Public Procurement Authority as the central policy and regulatory body responsible for ensuring the effective implementation of the law. Further, the article has highlighted some provisions of the Act which are aimed at maintaining the integrity of public procurement system. No doubt, the Public Procurement Act has been in operation for some time now. It is now time to begin to question empirically what impact its implementation has had in terms of achieving its underlying policy objectives.

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