



Policy Brief

Value for money calls for more transparency and accountability in how public funds are spent in an effort to obtain the maximum benefit from the available resources.

Transparency in Public Procurement: Beneficial Ownership Registers

Introduction

The COVID-19 pandemic continues to expose fragile governance processes characterised by limited checks and balances in Zimbabwe. The pandemic has further amplified the extent and effects of public finance leakages due to corruption in public procurement. The main piece of legislation regulating public procurement in Zimbabwe, the Public Procurement and Disposal of Public Assets Act [Chapter 22:23] defines public procurement as the acquisition by any means of goods, construction works or services. Public sector procurement is one of the most significant economic activity by the government, with the World Trade Organisation (WTO) positing that on average government procurement accounts for at least 10-15% of the Gross Domestic Product (GDP) of the global economy. In the context of Zimbabwe, the media has been awash with exposes of opaque public procurement contracts that have been entered into between State Owned Enterprises/ the government, and private players. Public procurement processes remain at the center of political debate and are characterized by complex dynamics of political/state capture, failure to adhere to procurement processes, weak accountability and enforcement institutions, and a continued culture of impunity. This has allowed for the continued leakages of public funds through skewed processes, despite having progressive legislative frameworks guiding public procurement. Due to the huge sums of money involved in public procurement there are often several interested parties with vested interests in ascertaining that the outcomes of public tenders are in their favor, and in most instances, these are politically exposed/connected persons. Transparency International Zimbabwe (TI Z) is of the view that transparency in public procurement in Zimbabwe can be enhanced by adopting principles of beneficial ownership disclosure and beneficial ownership transparency. In this policy brief we unpack these two concepts as they relate to public procurement.

Value for money in public procurement

The concept of value for money is of paramount importance in public procurement and refers not only to obtaining the lowest cost possible when procuring goods or services but encompasses the notion of obtaining better quality of goods or services in more suitable quantities, just in time when needed, from better suppliers at prices that continue to improve. Value for money calls for more transparency and accountability in how public funds are spent in an effort to obtain the maximum benefit from the available resources. The Public Procurement and Disposal of Public Assets Act recognises this and places an obligation upon procuring entities to

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acquire goods and services, with the aim of achieving maximum value for public expenditure, so that procurement is carried out within available financial resources and other applicable limitations and at the most favourable time (section 21(1)). Further, the constitution requires public procurement to be carried out in a manner that is transparent, fair, honest, cost-effective, and competitive (section 315(1)). However, the number of public procurement scandals in Zimbabwe has cast doubt on the effective implementation of these and other provisions.

Transparency in public procurement

Article 9 of the United Nations Convention Against Corruption (UNCAC) to which Zimbabwe is a State Party to, makes reference to systems of procurement based on inter-alia transparency as a tool to prevent corruption. There is no single definition of the word transparency, however it is generally defined as “a situation in which business and financial activities are done in an open way without secrets, so that people can trust that they are fair and honest.” (Cambridge Dictionary). Transparency in the context of public procurement therefore entails guaranteeing principles of openness and publicity during all stages of the public procurement cycle (pre-tendering, tendering and the post tendering stage) so as to ensure a competitive environment and the ability to monitor the execution of the procurement processes. In this regard, transparency is viewed as an anti-corruption tool that has the potential to enhance confidence in public procurement processes by eliminating corruption risks such as awarding public tenders to politically exposed/connected persons and awarding public contracts to briefcase companies that have no capacity to carry out the work. However, the effectiveness of transparency as an anti-corruption tool is hinged on all stakeholders respecting provisions of access to information and availing the necessary information in a manner that is relevant, accurate, understandable, and clear to facilitate monitoring, verification, and assessment of the process. In Zimbabwe information asymmetry regarding ownership of companies applying for and being awarded government tenders has often been cited as one of the causes of corruption in the public procurement process. This is why the amendment of the Companies and Other Business Entities Act [Chapter 24:31] in 2019 was met with great expectation by stakeholders as it introduced the aspect of beneficial ownership disclosure.

Beneficial ownership

Information relating to company beneficial ownership is important in public procurement. The government utilises tax payer's money and public resources to procure goods and services, hence it is crucial to know who is being awarded government tenders, at what cost and whether contractual obligations, especially as they relate to deliverables are being adhered to.

A beneficial owner is generally defined as the real person who ultimately owns, controls, or benefits from a company or trust fund and the income it generates. The ownership threshold for one to be classified as a beneficial owner differs according to national legislation. It is important to highlight that the principle of beneficial ownership is not necessarily premised on ownership in the ordinary sense of the word but rather control of the company. In Zimbabwe, a beneficial owner is defined in the Companies and Other Business Entities Act as a natural person who ultimately owns or controls the rights to or benefits from property or a person who exercises ultimate effective control over a legal person, and, more specifically, refers to a natural person who —

- ☉ directly or indirectly holds more than twenty per centum of the company's shares; or
- ☉ directly or indirectly holds more than twenty per centum of the company's voting rights;

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- ☉ directly or indirectly holds the right to appoint or remove a majority of the company's directors; or
- ☉ otherwise exercises or has the right to exercise significant influence or control.

Whilst most literature does not make a distinction between beneficial ownership disclosure and beneficial ownership transparency; TI Z believes it is important to draw a distinction between the two terms as they can potentially result in two different outcomes as they relate to anti-corruption. This has proven to be the case for TI Z as it seeks to find out who the beneficial owners of certain companies that were awarded public contracts are:

<https://www.theindependent.co.zw/2020/09/11/zupco-bus-scam-independent-partners-tiz-engages-lawyers/>

Beneficial ownership disclosure and beneficial ownership transparency

Adam Smith International (2019) defines beneficial ownership disclosure as the provision of beneficial ownership information to certain users, such as law enforcement agencies. This information is not publicly available. Beneficial ownership transparency on the other hand, requires that information pertaining to beneficial ownership be accurate, reliable and be made accessible to the public, preferably in an open data format.

A look at the Companies and Other Business Entities Act with regards to beneficial ownership

Section 72 (1) of the Act places an obligation on every company to maintain an accurate and up-to-date beneficial ownership register. Further, in terms of section 72(2) every company is obligated to file with the Registrar of Companies accurate and up-to-date beneficial ownership information, and he/she must be notified of any material changes or updates regarding the same within seven days of the changes taking place. These provisions are plausible as they ensure that the beneficial ownership register is kept accurate and up to date. Failure to adhere to these provisions is deemed a criminal offence (section 72(10)). Company information held by the Registrar, including beneficial ownership information is deemed public information and therefore available for inspection electronically or physical by members of the public and financial institutions or designated institutions/professions as defined in section 2 and 13 of the Money Laundering and Proceeds of Crime Act [Chapter 9:24] (Section 72(6)). Whilst prima facie, this appears to be a progressive provision which promotes transparency, in reality this is not entirely the case. The Act contains provisions that limit ordinary persons, including civil society organisations and the media from accessing such information with ease. The Act provides that members of the public can only access such information upon the nominee of the beneficial owner consenting to the disclosure of such information or upon an order of the court. This is a cumbersome and expensive process that makes it difficult for interested members of the public to ascertain who the beneficial owners being awarded government tenders are thus undermining anti-corruption efforts.

Conclusion

Public registers of beneficial ownership are a crucial aspect in the fight against corruption in public procurement. Availing beneficial ownership information in the public domain facilitates the private sector to be able to conduct due diligence on companies they intend to do business with, thus placing them in a position to make better informed decisions. Crucial to the Zimbabwean context, where there is rampant corruption and high levels of impunity, publicly availing information on beneficial ownership will allow stakeholders such as civil society and the media to detect cases of conflict of interests and other forms of corruption. This will contribute to transparency and accountability in the public sector as a whole. Therefore, whilst it is plausible that the Companies and Other Business Entities Act places Zimbabwe as compliant with beneficial ownership disclosure it falls short of beneficial ownership transparency. Beneficial ownership disclosure on its own without the transparency element is therefore not sufficient to tackle corruption in public procurement.

References

Adam Smith International (2019) Towards a Global Norm of Beneficial Ownership Transparency: A scoping study on a strategic approach to achieving a global norm Towards a Global Norm of Beneficial Ownership Transparency Phase 2 Paper March 2019 reduced size (adamsmithinternational.com)

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