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ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

BUSINESS LAW STREAM

Applicability of Competition law and Principles in Ethiopia's Public Procurement Law and Practice

A Thesis Submitted in Partial fulfillment for
the Awards of Master's Degree of Law (LL.M) in Business Law.

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Advisor: Solomon Abay (Ph.D., Associate Professor of Law)

Addis Ababa, Ethiopia

December 2021

ADDIS ABABA UNIVERSITY

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Approval Sheet

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Declaration

The researcher declares that this thesis is original work, it has not been presented for a degree in any other university, and that all sources of materials used in the thesis have been dully acknowledged.

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December 2021

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List of abbreviations

ACP	Anti-Competitive Practice
AMA	American Marketing Association
COMESA	Market for Eastern and Southern Africa
CUTS	Consumer Unity and Trust Society
ESPEs	Enhancing Shared Prosperity Through Equitable Services
ETCCPA	Ethiopian Trade Competition and Consumer Protection Authority
EU	European Union
FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
FPPAA	Federal Public Procurement and Property Administration Agency
GDP	Gross Domestic Product
ICB	International Competitive Bidding
ICN	International Competition Network
MOFEC	Ministry of Finance and Economic Cooperation
NCB	National Competitive Biddings
ITB	Invitation to Bid
ODA	Official Development Assistance
OECD	The Organization for Economic Co-operation and Development
PP	Public Procurement
PPAU	Procurement and Property Administration Unit
PPPDS	Public Procurement and Property Disposal Service
SBD	Standard Bidding Document
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law.
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
US/USD	United States/United States Dollar

Abstract

The objective of PP is value for money which is procuring quality goods and services at a lower price at the right time. Thus, this study aims to examine the competitiveness of Ethiopian public procurement and contribute some recommendations. The study uses the ideal Perfectly Competitive Market structure of Economics and International Competition and Public Procurement Models to scrutinize the applicability of competition principles and laws on the Ethiopian public procurement; particularly, focused on Bidders' entry, number of Bidders, dominance, collusion, and the organization of authorities. Moreover, the findings reveal a lack of awareness of PP and competition principles and laws, even though Ethiopia developed standard competition and procurement laws from effective International Models. Furthermore, it exposes the preparations of ambiguous specifications, inappropriate selection of pp method, bid-rigging, lengthy PP, corruption, weak institutional framework, lack of coordination between relevant public bodies, dependency of the authorities or political influence, and other challenges and anti-competition practices. Furthermore, it is recommended; creating competitive Public Procurement by widening the participation of bidders, implementation of performance audit, awareness of bid-rigging indications, Coordination, and cooperation between relevant public authorities, enhancing workforce capacity, improving the salary scale, developing independence, political, and budgetary free authority, developing a fast procurement payment system and including E-procurement, Facilitation of self-regulation mechanism, the participation of different stakeholders including media and other relevant recommendations.

Chapter one

Introduction

“Jurisprudence started to move from legal formalism and logical reasoning to legal realism and instrumentalism of law (and from the use of traditional legal concepts such as fairness and justice to the use of economic concepts and principles such as efficiency in the analysis and evaluation of the law, legal institution, and processes).”¹

1.1 Background of the Study

PP² covers the lion's share of the Government's³ annual budget. It constitutes about 70%⁴ of public expenditure and represents 18.42% of the world GDP.⁵ Governments purchase durable and non-durable goods, works, and services following the purposes and functions of the Government Bodies; the six economic functions of the Governments are, maintain the legal and social framework, maintaining competition, providing public goods and services, correcting for externalities, stabilizing the economy, and redistributing income.⁶ In OECD countries, 1% saving

¹ Solomon Abay, “Designing the Regulatory Roles of Government in Business: The Lesson from Theory, International Practice, and Ethiopian’s Policy Path” Journal of Ethiopian Law, Vol XXIII, No 2, (Dec 2009) p. 727

² According to “The Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009,” Federal Negarit Gazeta, Year 15 No 60 Addis Ababa, 9th September 2009 (hereinafter the public procurement Proclamation) Article 2 (5) and 2(8) «Procurement » mean obtaining goods, works, consultancy or other services through purchasing, hiring, or obtaining by any other contractual means; and «PP » mean procurement by a public body using public fund.

³ Government is an organization with legal and political power to control households, firms, and markets. it also provides some goods and services known as public goods and services for the society. See at “What are the economic functions of government?” © council for economic education, New York, Ny< [Cover \(uttyler.edu\)](#) > last accessed September 2, 2021

⁴ OECD, “Recommendation of the Council on Public Procurement,” (2008) p 6

⁵ Sinfonias Engida, “The Impact of Organizational Structure on The Implementation of PPs Policy” (MA Thesis, School of Commerce Addis Ababa University, Unpublished,2016) p. 4

⁶ Government, supra note 3

PP represents 43 billion EUR per year.⁷ Guaranteeing free and fair competition⁸ is one of the pillars to save the scarce public resources and efficient PP. Enhancing competitive PP is the critical aim of different international and national PP treaties, models, and laws. For instance, one of the objectives of UNCITRAL⁹ is maximizing competition in PP.

The imaginary Perfectly Competitive Market Structure standardizes the market structures. The Perfectly competitive market structure is an entirely efficient market situation characterized by numerous buyers and sellers, a homogeneous product, perfect information for all parties, complete freedom to enter and exit the market, and perfect competition rarely, if ever, exist.¹⁰ Nevertheless, the researcher uses the theory as a standard for measuring the performance of PP.

However, even the Government pursues a market economy, the Government intervenes in four ways on justifiable grounds¹¹ through private laws (For instance, the repealed commercial code of Ethiopia provided rules governing unfair competition under Art 133 regarding misleading information and false statement about the products and competitors. Likewise, according to Art, 2057 of the Civil Code of Ethiopia, committing false publication or compromising a competitor's reputation constitutes an offense of unfair competition. In addition, Art 719 of the Criminal Code of Ethiopia criminalized unfair competition.), competition laws, regulations¹², and administrative laws.¹³

⁷ OCED, supra note 4, at p.3

⁸ In Black's law dictionary, Competition is defined as 'the struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the business from third parties' Bryan A. Garner (ed), "Black's law dictionary", (ninth edition, Thomson Reuters, 2004) p.322

⁹ UNCITRAL Model Law on Public Procurement (2014) at the preamble

¹⁰ Black's law, supra note 8, at p. 323. See Federal Democratic Republic of Ethiopia Ministry of Science and Higher Education Module for Introduction to Economics, (2019) p 74

¹¹ Abay, supra note 1, at p. 101-103 states the rationale for regulation that constitutes, for instance, externalities or the disadvantage of competition on the third party like air pollution including extreme monopoly, scarcity, destructive competition... and the need for economic coordination, macroeconomic and social policy consideration protecting existing regulations.

¹² Abay, supra note 1, at p. 87

¹³ Ibid

However, in intervention through competition, the Government does not ‘prescribe positive command.’¹⁴ It is instead prohibiting market actors from engaging in Vertical and Horizontal anti-competitive behavior.¹⁵ Vertical agreements are agreements between two or more parties operating at different production, supply, and distribution levels, for instance, between a manufacturer and a supplier or between a supplier and a retailer. Horizontal agreements are agreements made between two or more parties operating at the same production, supply, and distribution chain level, for example, between two suppliers or two retailers. Considering PP Bid-rigging is a good example of horizontal ACP.¹⁶ Bid-rigging, including cover bidding, bid allocation, bid suppression, and market allocation, involves a horizontal conspiracy between Bidders in PP they plot to remove the component of competition from the PP.¹⁷ In addition, the Competition Proclamation of Ethiopia¹⁸ prohibited “directly or indirectly, fixing a purchase or selling price or any other trading condition, collusive tendering, or dividing markets by allocating customers, Bidders, territories or specific types of goods or services.”¹⁹ The following table summarizes the four mechanisms of Government intervention in the market.

¹⁴ Ibid

¹⁵ Ibid

¹⁶

See at, New York law school, European union competition law, <
<https://www.eucomplaw.com/https://www.eucomplaw.com/horizontal-and-vertical-cooperation/-and-vertical-cooperation/>> last accessed September 1, 2021

¹⁷ Ibid

¹⁸ Trade Competition and Consumers Protection Proclamation, Proclamation No. 813/2013,” Federal Negarit Gazeta, Year 20, No 28, Addis Ababa, March, 2014 (hereinafter the competition Proclamation) Article 7(3)(c)

¹⁹ Ibid, Article 7(1)(b)

Table 1; The Mechanisms of Government Interventions²⁰

Value for money²¹ is the primary aim of PP. Value for money in PP is achieved²² by procuring the right quality at the right time with the best price. Developing competition, transparency, and accountability during the procurement process are necessary conditions for achieving value for money.²³ As mentioned above, PP legislation includes enhancing competition under their objectives. Moreover, even the study found some research concerning PP in the school of commerce²⁴, but no research is founded in the law faculty²⁵, particularly regarding the relation of competition law and principle with PP. Therefore, effective PP requires a profound study of PP and Competition law and principles incorporation with other schools. Consequently, the applicability of the competition law and principle in Ethiopian's PP law and practice calls for more study. Thus, this study attempts to determine the competitiveness of the Ethiopians' PP practice in line with perfect competition standards.

1.2 Statement of the Problem

PP is a substantial pillar for the Government in pursuing its objectives and services delivery. Competitive PP can play a critical role in advancing public sector efficiency and establishing citizens' trust. In addition, competitive PP practice also contributes to essential Governments goals such as sustainable development, innovation, the growth of small and medium enterprises, and job

²⁰ Dr. Solomon Abay (PhD), "Theories and Principles of Economic Law: Unit 1 - Theories of Government and Business Relationship" (LLM lecture, power point, Addis Ababa University School of Law – LLM Program in Business Law, unpublished 2019) p 17

²¹ Measures of Ensuring Value for Money in Public Procurement: A Case of Selected Polytechnics in Ghana < [Measures of Ensuring Value for Money in PP: A Case of Selected Polytechnics in Ghana \(sapub.org\)](http://www.sapub.org) > last accessed September 2, 2021

²² Measures of Ensuring Value for Money in Public Procurement <<http://article.sapub.org/>> last accessed September 9 2021

²³ Prevention of corruption at workplace – GRIN < <https://www.grin.com/document/>> last accessed September 9 2021

²⁴ Addis Ababa University School of Commerce

²⁵ Addis Ababa University College of Law and Governance Studies, School of Law

creation.²⁶ As stated above, PP administrates a massive number of scarce resources. Nevertheless, the enforcement of competition theories and principles in Ethiopian PP practice is problematic.²⁷ Anti-competition practices in PP practitioners and Bidders result in the waste of scarce public resources and loss of citizens' trust in the Government and the PP system.²⁸ The anti-competition practice is noticed in the PP process, starting from planning the project, preparing a PP plane and a technical specification, selecting the PP method, and administrating the PP contracts. Moreover, the practice of anti-competition agreements between Bidders like bid ragging and collusion in a tender exaggerate the problem. Thus, ACP in PP calls for further study.

1.3 Research Question

The research question focused on whether there is an anti-competition practice in PP of Ethiopia. In addition, it focused on whether there is a gap between the International PP models and the PP laws of Ethiopia. Thus, primarily the research questions include;

- ❖ Is Ethiopian PP competitive?
- ❖ Are there any gaps between international PP models and PP legislations of Ethiopia?

1.4 The Objective of the study

The study aims to give a better insight into the competitive PP and its challenges; it also pursuits to assess the nature and structure of the competitive PP system and the underlying factors that hinder the competitiveness of the Ethiopian PP.

The specific objectives of the research are the following;

- ❖ To evaluate Ethiopian PP legislation using international PP and Competition models.
- ❖ To appraise the applicability of competition standards in the Ethiopian PP practice.
- ❖ To study the ACP of PP personnel and Bidders in the Ethiopian PP.

²⁶ OECD, supra note 4

²⁷ Roman Legesse W/Giorgis, “Public Procurement Practices and Challenges in Ethiopia: Evidence from Selected Public Organizations” (MA Thesis, Addis Ababa University College of Business and Economics, Unpublished, 2017) p. 16

²⁸ Ibid

1.5 Significance of the Study

Competitive PP plays key importance for economic development, and it affects the population, infrastructure, public health, international competitiveness, and investment climate; Therefore, applying competition principles is essential for effective procurement, and competition is the pillar stone for efficient PP. Thus, this study reveals the anti-competition practice inside Ethiopian PP. Moreover, it tries to determine the ACP within PP personnel and Bidders. Furthermore, it contributes knowledge of some economics principles of competition to the law academics since it is advised to develop the principles of economics for law instruments ²⁹. In addition, the study contributes to essential Governments goals such as sustainable development, innovation, the growth of small and medium enterprises, and the creation of jobs.³⁰ Thus, this research adds some knowledge for academics on PP and competition law and practice. Moreover, it helps the Government to determine the legal and practical challenges of Ethiopian PP.

1.6 The Scope of the Study and Limitations

Since the regional states and the city administrations,' PP laws are like FDRE PP laws, the study scope is limited to federal Government PP law and entities. Moreover, due to time and access constraints, including the page limitation, the study focuses on some sampled Public Bodies and Bidders located in Addis Ababa, and the research focused on some relevant concepts. In addition, there is a lack of previous research, particularly within law academics concerning PP, unwillingness to be interviewed in fear of exposing the ACP that might lead them to be liable, the spreading of Coronavirus COVID 19 pandemics bounded study.

1.7 Research Method

The study employed a mixed research methodology or both doctrinal³¹ and empirical³² research methods. Significant primary sources concerning competition and PP, including various international models and national laws, Proclamations, directives, rules, and SBD, have been examined. In addition, the researcher reviewed different scholars' books, commentaries, journals,

²⁹ Abay, supra note 1, p. 5

³⁰ 2020 Annual Conference Evidence to enhance inclusive growth. <https://igmozambique.wider.unu.edu/> last accessed September 9 2021

³¹ Mike Conville and Wing Hong (eds), "Research Methods for Law", (University Press 2007) 18

³² Ibid

and articles that address the laws and principles of competition and PP regarding the Doctrinal research method. Moreover, the researcher instrumented interviews to gather data from the selected samples using the purposive sampling³³ method for the empirical research method.

1.8 Target Population and Sampling Method

The target population includes both Procuring Entities and Bidders. However, examining all the target populations in PP is time-consuming and challenging. Therefore, the study applied the purposive sampling method to select the relevant representative out of the target population. The study presents the data gathered from various sources. It includes interviews with Public Bodies' Officials and Bidders PP department heads concerning the competitiveness of the Ethiopian PP and its challenges. The data is gathered mainly from the FPPPAA, and Addis Ababa City Government Food Security and Productive Safety Net Office, referring to the whole county in general, the world bank law and practice, respectively. Addis Ababa city Government food security and productive safety net office is one of the offices funded by the World Bank and ruled according to the World Bank's PP laws and procedures. Moreover, the practices of TCCPA are also reviewed. In addition, the researcher interviewed Bidders' PP department heads' who are participated in Ethiopian PP for several years.

1.10 Organization of the Research

This study is designed into four chapters. The first chapter, Chapter One, introduces competitive PP, including the study's background, the objective, significance, scope and limitations, research questions, and methodologies. Next, Chapter Two reviewed the relevant competition and PP legislation, principles, models, theories, and other literature in the research area. Then, Chapter three examined the practical survey on the applicability of competition law and principles in Ethiopian's PP law and practice. Finally, the last chapter provided the conclusion and recommendations.

³³What is Purposive Sampling?< <https://www.alchemer.com/resources/blog/purposive-sampling-101/#:~:text=Purposive%20sampling%2C%20also%20known%20as,to%20participate%20in%20their%20surveys>

.> last accessed September 9, 2021

Chapter Two

Literature Review

“Public procurement refers to the process of identifying what is needed; determining who the best person or organization is to supply this need; and ensuring what is needed is delivered to the right place, at the right time, for the best price and that all this is done in a fair and open manner.”³⁴

2.1 Introduction to Competition Principles

The definition of the term "Competition Law" differs across jurisdictions and literature. However, it can be defined as the set of ordinances prohibiting ACP that likely limit or eliminate competition in a market. It is also called anti-trust law in some jurisdictions, prominently in the USA and Canada.³⁵ It can also refer to the rule against acts pointed at eliminating a competitor from the market by attacking its goodwill. These laws are also called unfair competition laws.³⁶ However, in this thesis, unless expressly stated, the term competition law is applied concerning PP, referring to the law and principles prohibiting acts obstructive for competitive PP.

Competition ensures that firms compete to afford their goods, Works, and services at lower prices. Besides, firms strive to innovate and generate new knowledge that conserves resources and produces new or higher-quality goods, works, and services. Particularly, competition in PP saves public funds.³⁷ Therefore, Bidders compete to offer a more refined choice of goods, works, and services at lower prices with higher-quality and fast delivery in a competitive PP.³⁸

³⁴ OECD, “Recommendation of the Council on Public Procurement”, (2008) p 6

³⁵ Anu Bradford, “Antitrust Law in Global Markets”, Columbia Law School, Faculty Scholarship Faculty Publications (2012) p 284

³⁶ Ibid at p 285

³⁷ Cherroun Reguia, “Product Innovation and The Competitive Advantage”, European Scientific Journal (June 2014) p 140

³⁸ Ibid

However, Bidders' motives are maximizing profits. Therefore, to get the highest profit, they may engage in unfair competition practices.³⁹ As a result, Bidders may agree to eliminate competition among them. Although perfect competition is impracticable to achieve, Governments attempt to keep the markets as competitive as possible. Thus, the Governments strive to maintain the market's competitiveness by prohibiting ACP, regulating, or administrating the market.

2.1.1 Economic System

Based on the Government's role in answering the three fundamental economic questions; what to produce, how to produce, for whom to produce, the Economic system is classified into the Capitalist Economic System⁴⁰ (Free-Market, Economy System, Market System, or Laissez-Faire), Command Economic System, and Mixed Economic System. In a Capitalist System, Government intervention in the market is minimal; contrary to the Capitalist System in a Command Market System, there is total or complete control of the market by the Government, and a Mixed Economy System is the hybrid of the two market systems.⁴¹

2.1.2 Types of Market Structure

Markets⁴² are classified into four major types of markets based on; the number of buyers and sellers, the price determination mechanism, freedom of entry into the market and exit out of the market, the types of the products, or based on the degree of competition in the markets; those are; Perfectly Competitive Market, Monopolistically Competitive Market, Oligopolistic Market, and Pure Monopoly Markets. Monopolistic Competition and Oligopoly Markets comprise the middle

³⁹ Hassan Qaqaya, George Lipimile, "The Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects", UNCTAD, (2008) p 10

⁴⁰ The Capitalist System is also called the Free Market economy, Market System, or Laissez-Faire.

⁴¹ Economy – Its Meaning and Type, < nios.ac.in > last accessed September 13, 2021 p 27

⁴² According to AMA. Market is the process of planning and executing the conception, pricing, promotion, and distribution of goods, services, and ideas to create exchanges that satisfy individual and organizational objectives. < [American Marketing Association | AMA](#) > last accessed September 4, 2021

position between the two extreme market structures of Monopoly and Perfectly Competitive Market structure.⁴³

2.1.2.1 Perfectly Competitive Market

A Perfectly Competitive Model is a market structure characterized by a complete absence of rivalry⁴⁴ among individual firms.⁴⁵ A Perfectly Competitive Model, also called the Hypothetical Perfectly Competitive Model, is the foundation of a utopian market against which markets' performance is evaluated based on unrealistic assumptions.⁴⁶ However, the standard renders valuable insights to guide the markets and formulate competition policies. The Perfectly Competitive Model considers a market as resources are fully allocated and accessible. The major characteristics of a Competitive Market are the following⁴⁷

2.1.2.1.1 Characteristics of Competitive Market

- ❖ **There are many sellers and buyers;** there are plenty of sellers and plenty of buyers. Many independent buyers act to maximize utility, and many independent sellers act to maximize profit.
- ❖ **Free entry and exit to/from markets;** it is easy to open a business in a perfectly competitive market, or it is straightforward to leave the market at any time, which means there is the freedom to enter or exit from the market.

⁴³ Federal Democratic Republic of Ethiopia Ministry of Science and Higher Education Module for Introduction to Economics, (2019) p 74

⁴⁴ The absence of rivalry means even though they compete, they did not see each other as enemies or there is no sense of war among the competitors.

⁴⁵ Study Notes on Perfect Competition: Meaning and Its Features.< <https://www.economicdiscussion.net/perfect-competition/study-notes-on-perfect-competition-meaning-and-its-features/16964>> last accessed September 13 2021

⁴⁶ Perfectly competitive markets are unlikely in a real-world, or it does not exist in real-world. but it is the ideal the best one, so what is on the ground shall be developed or improved toward the Perfectly Competitive Market structure

⁴⁷ Federal, supra note 42

- ❖ **Perfect mobility of factors of production;** there is no barrier for factors of production to move from one center or one producer to another producer. Thus, for example, labor and land are free to move from one producer or seller to another seller or producer.
- ❖ **Perfect knowledge about market conditions;** Both sellers and buyers know complete information about the product's quality, quantity, and price.
- ❖ **A homogeneous product:** many sellers are selling identical products in a perfectly competitive market. It is not similar but precisely the same product or exact copy and paste.
- ❖ **Buyers and sellers cannot dominate the market price;** buyer and seller are price takers; They are not price makers and do not have the power to determine the price. No producer or consumer can be strong enough to exercise market power. The market determines the price, and the equilibrium prices⁴⁸ are the same for any amount of quantity. In a perfect market, many independent buyers and sellers hinder them from exercising market power. Market competitive actors take market circumstances as given and cannot control prices or total output because all are small relative to the market. Moreover, the absence of entry barriers limits the individual actors' market power.

2.1.2.2 Monopoly Market

As the name indicates, Mono means one or a single. Thus, a Pure Monopoly exists when a single firm is the only product producer with no close substitutes⁴⁹. Electricity, water, airline, and telecom providing services can be examples of Monopoly markets in most developing countries. A Monopoly Market Structure is controlled by a single firm bestowing a specific good or service. Barriers to entry in monopoly markets reduce the number of firms to one.⁵⁰

⁴⁸ The equilibrium price is the point where the supply of goods and demand meets or it can be said that the forces of supply and demand are relatively equal and the market is in a state of equilibrium. < [Equilibrium Definition \(investopedia.com\)](#) > last accessed September 4, 2021

⁴⁹ Federal, supra note, 46 at p 83

⁵⁰ Introduction to Monopolistic Competition and Oligopoly, < [Introduction to Monopolistic Competition and Oligopoly – Principles of Economics \(opentextbc.ca\)](#),> last accessed September 13, 2021

2.1.2.2.1 Characteristics of Monopoly Market

Some significant characteristics of a monopoly market are.

- ❖ Single sellers,
- ❖ No close substitutes or only one firm sells a unique product.
- ❖ Price maker, the Monopoly, or a single firm determines the price, contrary to the Perfectly Competitive Model, a price taker.
- ❖ Blocked entry: there is a barrier to entry, and exit from the market is also complicated in a monopoly market. For example, selling Ethio telecom is complex compared with closing other firms.

2.1.2.2.2 Sources of Monopoly

The sources that empower a single company to control the market or allow monopoly are following;⁵¹

- ❖ **Legal restriction**, producing and selling goods, works, and services, may legally restricted ether than a single firm. For example, in Ethiopia, telecom service was restricted to telecommunication corporations only until recent times.⁵²
- ❖ **Patent rights**, the patent rights holders have boosted the monopoly right over their innovations.⁵³
- ❖ **Control over crucial raw materials** because a firm incorporated in the naturally prospered area with the specific raw materials may monopolize the market. Oil companies can be assumed in this instance.
- ❖ **Efficiency**: The single firm that produces the maximum output more than its competitors for a long time can control the market while others fail to compete with it.
- ❖ **Conspiracy**, firms using a predatory practice may get monopoly power. The firm may embed up barriers to entry by preventing potential competitors from entering the

⁵¹ Federal, supra note 42 p 3

⁵² Phone monopoly is big prize in Ethiopia sell-off, < [Phone monopoly is big prize in Ethiopia sell-off | Reuters](#),> last accessed September 13, 2021

⁵³ OCED, "[Competition Policy and Intellectual Property Rights](#)," (1997) p 7

market. By plotting with one another, they bypass the need to compete.⁵⁴ Competition law mainly prohibits monopolies driven by conspiracy. In addition, different kinds of conspiracy concerning PP are discussed in detail under the following sections.

2.1.2.3 Monopolistically Competitive Market

A Monopolistically Competitive Market is a market composition that bestows some of the above characters under a Perfectly Competitive Model and a Monopoly Market Structure. Like the Perfectly Competitive Model, this market structure assumes many firms and free entry into markets.⁵⁵ Nevertheless, firms in such markets do not provide the same products. Instead, they produce different goods that empower them to employ a degree of market power over their products exclusively. By effectively modifying the goods of its competitors, the firm shifts a small monopoly over its trademark or goods, works, and services. In addition, firms compete to produce more suitable and innovative products than their competitors do. Thus, it instead competes on product innovation or using advertisements than price competition. The followings are the main characteristics of the Monopolistic Competitive Market⁵⁶

2.1.2.3.1 Characteristics of Monopolistically Competitive Market

- ❖ Differentiated product
- ❖ Many sellers and buyer
- ❖ Easy entry and exist
- ❖ The existence of non-price competition

2.1.2.4 Oligopoly

In oligopolies, market structure, the entry barriers are distinctive futures that limit the number of firms in that market.⁵⁷ An additional distinctive hallmark of oligopolies is the interdependent

⁵⁴ William C. Holmes, "Conspiracies to Monopolize: A Decisional Model." Stanford University, Vol 42 (1969) p 732

⁵⁵ Federal, supra note 42, at 84

⁵⁶ Ibid

⁵⁷ Ibid at p 85

character of the firms' operations. The competing firms' decision affects each other. The firm decision affects its competitor, and the competitor affects vice versa.

2.1.2.4.1 Characteristics of Oligopoly

It is generally characterized by;

- ❖ Few dominant firms, e.g., Gasoline market and Automobile market
- ❖ Entry barrier, because of the power of the dominant company, it is challenging to compete with them.
- ❖ Product may be homogeneous or differentiated; If the product is homogeneous, it is called Pure Oligopoly; if the product is differentiated, it is called a Differentiated Oligopoly. If there are only two firms in the market, it is known as a Duopoly.⁵⁸

Firms may prefer to conspire or collude to maximize their gains mutually. Alternatively, they may choose to compete and gain fair profit. Therefore, competitors collude or compete depends on the market structure. For instance, Oligopoly Markets are structurally likely for firms to collude since a few firms may prefer to collude and maximize their profit by raising the price. Thus, in other than Perfectly Competitive Market Structures with the difference in market power, the price system may fail due to the ACP of firms.

2.1.3 Bid-Rigging

Competitive PP achieves better value for money, with lower prices, better quality at the right time only when Bidders genuinely compete. However, Bidders may secretly conspire to increase or decrease the price and quality of goods or services they supply for PP, who are expected to compete. Thus, Competition law prohibits bid-rigging conspiracies⁵⁹ when Bidders agree on who will win the bid, increase the winning bid price, and apportion the gain among the conspirators.⁶⁰ In addition, other than monetary payments, the conspires may agree in advance to receive subcontracts from the designated winning bidder, and even more, despite no such work takes place,

⁵⁸ Elements that is essential to the market economy < <https://www.coursehero.com/file/ppj3q bq/Another-element-that-is-essential-to-the-market-economy-is-supply-Supply/> > last accessed September 13, 2021

⁵⁹ Prof Albert Sanchez-Graells, “Competition Law and Public Procurement”, JA Moreno Molina & E Diaz Bravo (eds), (2020) p 2

⁶⁰ OECD, “Guidelines for Fighting Bid Rigging in Public Procurement”, (2007) p 1

they may use a fraudulent invoice for subcontracting works. Moreover, long-standing bid-rigging they may assign winners and apportion the bid-rigging gains for months or years. Thus, ACP is devastating, mainly when it affects PP. Such bid-rigging conspiracies waste taxpayers' money diminished public confidence in PP, and undermined society's benefits or supply of public service. The plotters implement a variety of bid-rigging strategies common of them are;

2.1.3.1 Cover Bidding

Cover bidding⁶¹ (also called Cover or symbolic, Courtesy, Complimentary, Token) is planned to impress a real competition. It occurs when;

- ❖ The plotters agree to submit a bid that is higher than the bid of the nominated winner,
- ❖ The plotters offer a bid that is understood to be too high to be accepted.
- ❖ The plotters submit a bid carrying special terms known to be unacceptable to the procuring entity.

2.1.3.2 Bid Suppression

Bid-suppression (Boycotting) plots occur when plotters conspire that one or more Bidders consent to abstain from bidding or withdraw from the bid. Therefore, the Bidders or the conspirators do not submit a bid for final consideration.⁶² As a result, the assigned winner's bid will be admitted. Then they share the plotted gain among them.

2.1.3.3 Bid Rotation

In bid-rotation schemes, plotting Bidders planned to take turns to be the winning bidder or to be routinely awarded. For instance, one bidder submits the lowest price to win a specific bid. At the same time, others agreed to inflate their price. Then, the other bidder, in turn, wins the future bids.⁶³

⁶¹ Ibid

⁶² Ibid p 2

⁶³ Ibid

2.1.3.4 Market Allocation

Market allocation occurs when Plotters apportion the PP and agree not to compete in specific PP or certain goods and services in a particular procurement.⁶⁴ Plotter firms may, for example, allocate specific PP entities to different plotters and agree not to compete in a bid that is allocated to other firms or plotters in the agreement. So that they will not bid or submit only a cover bid.

2.1.4 Features of Market that Support Collusion

Plotter may attempt collusion in any market or PP; however, the following grounds play as an incentive for them.⁶⁵

- ❖ **A small number of firms or Bidders**, when a few firms supply the good or service, it is more suitable for firms to rig bids. Also, the fewer Bidders, the easier it is for them to conspire and agree on how to collude.
- ❖ **Little or no entry**, the barriers to entry encourage bid-rigging or collusion. In addition, the participation of many Bidders may be limited because of; irrelevant high requirements, complicated processes, bureaucracy, vague specification, and high cost (Bid Security) to participate. Thus, potential Bidders and new entrants are barred from competing in the PP.
- ❖ **Market conditions**, During the economic crises, Bidders may attempt to return their loss with bid-rigging gains. When the demand of public entities increased while Bidders decreased, the remaining Bidders initiated to conspire and gain unfair gain or profit. In addition, a steady or foreseen demand flow of the public entities, while few Bidders increase the risk of collusion.
- ❖ **Despite trade unions**, trade unions are established legally to support their members, promote standards, innovation, competition, and protect their rights. However, they may use the unions' meeting to plot or conclude a bid-rigging agreement on fixing prices and distributing goods and services. The US anti-trust results from anti-competition practices of different giant Oil and Steel trusts are some instances.

⁶⁴ Ibid

⁶⁵ OECD, "Recommendation of the Council on OECD Legal Instruments Fighting Bid Rigging in Public Procurement", (2021) p 8

- ❖ **Repetitive bidding.** Repetitive PP boosts the risks of collusion. The bidding repetition encourages collusion and to allocates bids among the plotters.
- ❖ **Identical Bidders.** When the goods and services required have no substitutes, and a few Bidders provide identical goods and services, it is easier for the firms to collude on price-fixing, knowing that the Bidders are few.

2.1.5 Detecting Bid-Rigging

Detecting Bid-rigging is very difficult as they have conspired in secret. However, it is necessary to look at some of the following clues that indicate bid-rigging,⁶⁶ such as;

- ❖ When price increases without the cost increase,
- ❖ When the losing bids prices are very high than the winning bid,
- ❖ When the winning bidder is rejected but subsequently found to be a subcontractor,
- ❖ When the winning supplier repeatedly subcontracts work to lose Bidders,
- ❖ When competitors regularly hold meetings together,
- ❖ When supplier seems to take a turn being the winning bidder, certain Bidders always submit bids but never win,
- ❖ When the same bidder frequently wins the same PP,
- ❖ When Bidders failed to bid on a tend which expected to bid, unexpected withdrawal from the bid;
- ❖ When different Bidders exhibit similar; type format, error, handwriting, use identical forms, identical miscalculations, use same stationery, Bidders submit competitors' contact or fax number,
- ❖ When Bidders purchase a bid document for a competitor, the bidder submits both its own and a competitor's bid documents.

2.1.6 Competition with other Policies and Laws

Competition policy and law have many relationships with other policies and laws. For example, competition policy may be supported by or conflicted with other policies, including trade policy, industrial policy, investment policy, consumer protection policy, regional development policy,

⁶⁶ OECD, "Guidelines for Fighting Bid Rigging in Public Procurement", (2009) p 12-16

intellectual property policy, privatization and regulatory reforms, labor policy, science and technology policy, and tax policies.⁶⁷ In addition, other national economic policies can influence competition policy, including; investment policy, privatization policies, Intellectual Property Rights. For instance, some sectors of the economy may only be opened to domestic investors. The requirements for foreign investment may affect competitiveness in markets. The monopoly rights assigned to the owners of intellectual property rights can influence competition policy and law.

Moreover, Competition law and the law of unfair competition are used conversely. However, they possess different purposes. For example, competition law prohibits business practices that limit the competitiveness of markets through misusing market power, concluding agreements that exclude competition amongst firms, monitoring mergers. Instead, unfair competition law regulates firms to avoid misleading consumers and embarrassing competitors' goodwill. In addition to intellectual property rights, the law of unfair competition and consumer protection laws, competition law correlates with contracts in general, public enterprises, unfair competition, the law of business organizations, labor law, and many other regulatory laws, including PP law which is analyzed in the next sections in detail.

2.1.7 Competition Law

Competition law is aimed at preventing the abuse of market power. Competition law monitors market competition by prohibiting certain unilateral or joint acts of firms that threaten market competitiveness.⁶⁸ Thus, competition law is expressed as a negative instrument as it regulates ACP. In addition, competition law restricts or banning Bidders from carrying out certain APCs, particularly bid-rigging concerning PP.

2.1.7.1 The Scope of Competition Law

Market power emanating from Government policy and laws typically does not fall under the scope of competition laws.⁶⁹ Likewise, market power or dominance rising from firms' entrepreneurial

⁶⁷ UNCTAD, “[A Review of Competition Policy in Ethiopia](#)”, UNCTAD/DITC/CLP/2017/3, (2018) P IX

⁶⁸ Jonathan B. Baker, “Competition Policy as a Political Bargain”, *Antitrust Law Journal*, Vol. 73, No. 2 (2006), p. 483

⁶⁹ Micael Takie, “[Review of the Rules and Enforcement Framework of Competition Law in Ethiopia](#)”, (LLM Thesis, Addis Ababa University College of Law and Governance Studies School of Law, Unpublished February 2015) p14

skills is not covered by competition laws. However, even market power or dominance emerging from these is tolerated, but market power resulting from collusion or plot is ordinarily under the scope of competition policy and law.

2.1.8 Development of Competition Law

Competition law is developed in western countries.⁷⁰ Particularly, United States Anti-Trust Law is well-known for its influence on the developed and developing countries' domestic competition law. In addition, EU competition law also regulates the EU members regarding anti-competition practices in the EU. Following these developments, almost all developed and developing countries have enacted domestic antitrust laws or anti-competition laws.

2.1.8.1 United States and Canada

In 1989, 100 years after the first antitrust law was enacted in Canada, the Sherman Act was adopted in the United States one year later.⁷¹ Competition law, known as anti-trust in the US, developed in North America around the 19th century because giant firms, notably the railway, iron, steel, and fuel industries, established unions to fix prices and limit their customers.⁷² The Government prohibited monopolies and broke them up or restricted mergers. The Sherman Antitrust Act of 1890 in the United States developed into a distinct area of law preceded by the Combines Act of 1889 in Canada. The Sherman Act prohibited transactions, which imprudently limit competition, and strives to monopolize a market. Also, the Government regulates and controls the market entry and exit, price, and product standards on remarkable areas of the economy that necessitate monopolies and mergers. For example, Clayton Act in 1914 stipulated prohibited acts and enforcement schemes, privileges or exemptions, and remedial means.⁷³

2.1.8.2 European Union

⁷⁰ Competition Law and Development, <https://www.jstor.org/> last accessed September 9, 2021

⁷¹ Anu Bradford, "Antitrust Law in Global Markets, Columbia Law School", Faculty Scholarship Faculty Publications (2012) p 284

⁷² Obscure SF: There's something strange about this gas <https://www.sfgate.com/local/article/Obscure-SF-There-s-something-strange-about-this-15922569.php> last accessed September 13, 2021

⁷³ Dr. Eda Sahin, "Global Antitrust Review, Interdisciplinary Centre for Competition Law and Policy" (2017) p 13

The 1991 collapse of the Soviet Union became a radial moment for the adoption of antitrust laws. After the fall of the Berlin Wall, former communist countries began to embrace free markets, adopting domestic antitrust laws in the process.⁷⁴ After World War II, competition law spread to other parts of the world, including Europe, where competition law is most developed. The initiation of the European competition law emerged from European aims for creating a common economic union or common market. Thus, the European competition regulation is based on treaties and regulations of the European Commission, unlike the American competition law, which is case-based. Articles 101 to 106 of the treaty on the functioning of the European Union are the principal source of European competition law.⁷⁵ Article 101 and 102 prohibited anti-competition practices within the internal market and between the Member States. Primarily that prohibited;⁷⁶

- ❖ Directly or indirectly fix purchase or selling prices
- ❖ Limit or control production, markets, technical development, or investment;
- ❖ Applying dissimilar conditions to equivalent transactions
- ❖ Conclude contracts subject to acceptance supplementary obligations which have no connection with the subject of such contract

2.2 Public Procurement

The general chore of PP is to buy goods and services with the right quality, quantity, and time from the suitable Bidders with the best price to achieve the public bodies' objectives. Effective PP requires effective procurement laws and regulations. Therefore, procurement laws and regulations influence procurement efficiency.⁷⁷ In addition, PP laws and regulations should be clear, consistent, comprehensive, and flexible. This section reviewed the principal principle, theory, procedure, process, methods, frameworks, and institutions of PP.

2.2.1 PP Principles

⁷⁴ Anu Bradford, “Antitrust Law in Global Markets”, Columbia Law School, Faculty Scholarship Faculty Publications (2512) p 284

⁷⁵ EUR-Lex. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:> > last accessed September 13, 2021

⁷⁶ Articles 101 and 102 of the Treaty on the Functioning of the European Union, TFEU, (2009)

⁷⁷ OECD, “OECD Recommendation of the Council on Public procurement”, (2015) p 7

Common PP principles are shared by most of the developed PP systems. Transparency, integrity, economy, openness, fairness, competition, and accountability are the fundamental principles of PP.⁷⁸ The general principles of PP can be summarized as follow;

2.2.1.1 Economy

The principle of the economy can be called Acquisition Efficiency, Competition, Value for Money, or Commercially Reasonable Price.⁷⁹ It indicates the necessity to handle public funds with caution and due diligence so that costs paid for goods, works, and services represent value for money and are acceptable. They should strive to avoid corruption, collusion, and waste, whether due to improper specifications of required goods or paying unreasonably high prices. Acquisition efficiency occurs when the procurement economically achieves better efficiency with value for money than a similar competitor. A vital goal of an effective procurement system is to require the goods and services on the best workable agreement to carry out the Governments' activities.⁸⁰ It requires securing the goods and services fitting the public project, concluding a practical agreement, and assuring supplier capacity to deliver on the agreed times. All qualified Bidders should participate in PP to achieve efficiency. Furthermore, non-competitive procurement methods such as single-source procurement, restrictive procurement Request for Quotations, and Direct Procurement should be kept to a minimum.⁸¹

2.2.1.2 Transparency and Openness

The PP process should be open to all interested parties. Nevertheless, access to PP information is not absolute. For example, confidential and restrictive information about the public entities and Bidders' identities should not be available publicly, and the extent of their disclosure should be mentioned in the bid documents.⁸² In addition, information on how the PP is processed must be

⁷⁸ Basic Principles of Public Procurement < https://leanpub.com/procurement-principles-categories-a_and-methods/read> last accessed September 9, 2021

⁷⁹ United Nations Procurement Manual Ref. No, DOS/2020.9 30 JUNE (2020) p 12

⁸⁰ Ibid

⁸¹ Abebe Aberu, “Factors Affecting Public Procurement Performance in Ethiopia: The Case of Public Procurement and Property Disposal Services”, Addis Ababa University College of Commerce, Unpublished ,2017) p 9

⁸² The United Nations Set of Principles and Rules on Competition (2000) at p12

made open to all PP stakeholders, including Bidders and the public at large, unless there are valid and legal reasons for keeping certain information confidential.

2.2.1.3 Integrity

PP integrity includes the integrity of the procurement process and PP personnel. Bidders and all concerned parties must rely on any information provided by the procuring entity. Therefore, the information they disseminated must be reliable and free of ambiguities or bias, and dependable. Accordingly, evaluation and selection rules must be pronounced in the bid documents. In addition, procurement personnel must demonstrate personal and professional integrity, including being distinguished as honest, dependable, efficient, and trustworthy.⁸³ PP should be carried out in a transparent and fair method of procurement. Furthermore, it should be procured without any corrupt manner.

2.2.1.4 Accountability

Accountability in PP suggests that anyone engaged in the procurement process is responsible for the consequences of their actions and decisions regarding the PP process. Therefore, interested parties should have a mechanism to cross-examine the effectiveness of the procurement.⁸⁴ In addition, the procurement objective, including whether the procurement is free from corrupt practices and reflects value for money, should be reviewed by interesting third parties. Thus, the Government should establish a PP system accountable to interested parties, including the public.

2.2.1.5 Competition and Equal Treatment

The bidder should not be rejected for other grounds other than expressly stated requirements in the bid documents. PP should be open for fair competition to all Bidders equally. Moreover, equal treatment achieves other fair PP system objectives, such as obtaining acquisition efficiency and preventing corruption. Therefore, it is the principal objective of competitive procurement.⁸⁵

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid

2.2.1.6 The Right to Appeal

The Government should establish a system to exert the complaints of the aggravated Bidders or PP entities. It saves the public fund by reviewing the ACP in the relevant complaint reviewing bored or court. Moreover, it enables the supplier to participate in PP and safeguard from being restricted from procurement to provide the best value for money.⁸⁶

2.2.2 Theories on Competitive PP

There are various theories regarding procurement in general. However, the researcher used Auction or Tender Theory, Agency Theory, Transaction Cost Economic Theory, and Contract Theory, linking them with PP.

2.2.2.1 Tender Theory

Tender is the fundamental process through which the value of public assets is gained. This value results from competition between enterprises in PP to provide goods, works, and services for public assets with the lowest price and best quality.⁸⁷ The PP entities regulate auction rules by setting the estimation of goods and services expected to be purchased. The estimated value serves as the maximum market value over which an enterprise may not win the bid. The PP entities establish the estimated value, the specifications, the requirements. The estimated value, meanwhile, cannot be higher than the approved budget allocations.⁸⁸

2.2.2.2 The PP Chain Agency Theory

The taxpayer, financial department, the Government, and the Bidders formed a principal-agent PP chain. In the agency of the PP chain⁸⁹, the taxpayer, the Government, the financial department, the PP unit, and the purchasing official is formed.⁹⁰

⁸⁶ Ibid at p 10

⁸⁷ Petru Filip, Bayes-Nash, "Equilibrium and Game Theory in Public Procurement," University of Oradea, Theoretical and Applied Economics Volume XVIII, No. 5(558), (2011) p 78

⁸⁸Roman, supra note 24, p 7

⁸⁹ Patrick Makau Muteti, and Dr. Makori Moronge, "Influence of Change Management on Performance on Public Procuring Entities in Kenya," (2016) p 300

⁹⁰ Roman, supra note 24, at p 8

- ❖ The taxpayer is the principal financial source of the PP fund for the Government. Thus, the first agency relationship between the taxpayer and the Government is formed.
- ❖ The Government delegates the financial functions to the financial department because its mandate is broad. The second relationship between the Government and the financial department or procuring entity is formed.
- ❖ Financial departments or Procuring Entities prepare PP Policy, SBD, Review, and supervise the implementation. However, the extensive work of PP entities forced the department to delegate some of its power to the PP units. Thus, the third agent relationship between the financial department and PP units is formed.
- ❖ PP officials hold detailed PP activities. The fourth agent relationship between PP unites, and PP official has formed.

Even though the taxpayer is the principal source of PP funds, they do not manage it. So then, the PP official performs a crucial point in the chain. However, the PP official is a reasonable economic person who goes after the maximization of self-interest. Accordingly, it is challenging to realize PP's target while conflicts happen between the PP official and the taxpayer benefit. The principal-agency problem occurs in the agency chain because the conflict of interests happens between the taxpayer and the agent.

2.2.2.3 Transaction Cost Economic Theory

Transaction cost theory asserts that the optimum organizational structure attains economic efficiency by decreasing the transaction expenses. Furthermore, the theory proposes that every transaction creates organizational costs of monitoring and administrating the transaction. Thus, the entity of PP should accomplish the administration of PP cost-effectively.⁹¹ Rational decision-making of public entities depends on the ability to realize the transaction costs associated with implementing the PP.

2.2.2.4 Contract Theory

Contract theory examines how contracts should be in imperfect transactions, where the parties' hidden intentions cannot monitor by the involved parties. The involved party may get confidential

⁹¹ Ibid at p 9

information that is unknown to others. There is also contractual incompleteness when agreements do not deal with all relevant incidents.⁹² Contract theory applies to price discrimination, Governmental contracts, including PP.

2.2.4 Procurement Procedures

The procurement process can be combined into three steps: needed identification, specification of goods or services needed, bidding, including selling of the document and opening of the bid, and at the last contract management.⁹³

2.2.4.1 Need Identification

Procurement starts with identifying⁹⁴ the demand of different departments in a public entity. That is needed to accomplish the definite purpose of the public entity. Thus, each department requests its needs for the budget year or project to the PP unit. The PP unit should identify the best quality, quantity of the goods, works, and services, including the procurement methods.⁹⁵

2.2.4.2 Specifications

PP specification is a detailed description of the goods, works, and or services that enables the procurement entity to communicate with the Bidders about standards and quantities of the goods, works, and services according to the objectives of the public entity. It describes to the Bidders what is required and what should be supplied. Therefore, the specifications must be precise, clear, and equivalent to the need of the public entity. Moreover, it should not be over or under standard, including appropriate quantity and quality. Thus, a professional who has better skill on the essential need or goods, works and services should be prepared the specifications.

2.2.4.3 Selecting the PP Method

⁹² Ibid at p 9

⁹³ Roman supra note 24, at p 10

⁹⁴ Ibid

⁹⁵ The United, supra note 76, at p 41

PP may employ various purchasing methods depend on how urgent the good or the service is needed and the market structure or the Bidders' availability. UNCITRAL Model Law On PP⁹⁶ Article 27 provides the methods of procurement it stated that the procuring entity might conduct procurement using: Open tendering, Restricted tendering, Request for quotations, Request for proposals without negotiation, Two-stage tendering, Request for proposals with dialogue, Request for proposals with consecutive negotiations, competitive negotiations, Electronic reverse auction, Single-source procurement. When the procuring entity uses the PP method other than open tendering, it shall record a statement of the reasons and circumstances that justify the use of that method. In addition, the market system and structure discussed above play a significant role in selecting the proper PP method. Therefore, the public entity should know first the market structure in the goods, works, and services to select an appropriate PP method.

2.2.4.4 Publicizing the Bid

The bid may be advertised or announced depending on the method of the procurement. For example, the bid may be published in different accessible media, including radio, television, internet for Open PP Methods, but the bid may be announced to a particular bidder for Restricted or Request PP methods. Moreover, the advisement that includes the goods and services, including the primary requirements, should be announced clearly for a reasonable time and via accessible media depending on the procurement method.⁹⁷

2.2.4.5 Opening and Evaluating

Depending on the selected PP method of opening, the bid may be held in two different ways. For example, the procuring entity may first open the technical part, then the price. Alternatively, the PP unit may open both the technical part with the price at the same time.⁹⁸ Then, the PP unit

⁹⁶ UNCITRAL, supra note 14, States may choose not to incorporate all the methods of procurement listed in this article.

⁹⁷ Ibid at p 50

⁹⁸ Tsewaye Muluneh, Director General of PPPDS, January 27, 2021

Muluken Yewondwossen, < Service to start direct procurement, <https://www.capitalethiopia.com/capital/service-to-start-direct-procurement/> > Capital -January 27 2020 last accessed September 13, 2021

inspects and evaluates the bids upon specifications, requirements, and they should verify the supplier's capability. Then PP unit presents the analysis to the head of the PP or confirming bodies.

2.2.4.6 Contract Administration

The bid committee should give enough time for the aggravated bidder before they give the order and conclude the contract with the winning bidder. In addition, the goods and services should be delivered according to the specifications and the time frame. The PP technical committee is recommended to verify the goods and the service on delivery time with property management. Furthermore, a fast payment system is very crucial for competitive procurement.⁹⁹ The Bidders want to be ensured that they will be paid as fast as possible after deliveries of the goods, works, and services, including the advance payment. Therefore, granting a fast payment system is very important to attract many participants in the procurement process. Moreover, the relevant body should control the proper delivery and utilization of the goods works and services. Also, all processes and decisions of the procurement shall be recorded. In addition, the records should be kept in a safe place for future review.

2.2.5 The Structures of PP Entities

PP may be administered through Centralization, Decentralization, or Using the hybrid of both administrations. Centralization happens when a central PP body possesses all the rights, duties, power, and authority associated with PP.¹⁰⁰ However, the Central PP entity may delegate certain powers for a specific purpose. Decentralization occurs when PP officials from different Public Bodies decide unilaterally on the PP. The hybrid system of procurement structure employs the hybrid system of centralization and decentralization.

2.2.5.1 Centralized PP Structure

Centralized PP refers to a superior central PP agency, which designates, coordinates, regulates PP. Some benefits of centralized procurement are better service at a lower cost, high purchasing power, high degree of technical standardization, more effective contract management, lower expenses for training officers and easier performance management of workers, efficient recording

⁹⁹ The United, supra note 76, at p 122

¹⁰⁰ Roman, supra note 24, at p 12

and reporting of procurement contracts and transactions, adequate management controls, clearer audit trace. However, despite its benefits, it has some disadvantages like;¹⁰¹ It limits the Public Bodies' decision-making power that arises an opposition from public bodies, and wider distance between the Bidders and the procurement officers. Europe, the United States, and Southern America are some examples that are followed centralization. Despite the difficulty of assessing which framework is prevalent because the system is changed frequently.

2.2.5.2 Decentralized PP Structure

Decentralized PP occurs when procurement units and different divisions designate, coordinate, regulate, and control the main procurement activities and are accountable for their procurement activities.¹⁰² It has some advantages like efficiency in goods, works, and services delivered according to the demand of the public bodies decreased range of mistakes purchasing large volume and unnecessary overspending, reduced bureaucracy, greater possibilities for small-sized enterprises, more opportunities for local Bidders, and accountability on individual officers. However, it has notable disadvantages: scattered procurement quantities, various contract and procurement standards or difficulty of standardization, absence of procurement expertise, the difficulty of controlling the cost and budget implementation, and adapting global opportunities is challenging.

2.2.5.3 Hybrid PP or Federal PP Structure

The challenges of centralization and decentralization may be solved using a hybrid procurement approach because it merges the beneficial features of centralized and decentralized structures.¹⁰³ The hybrid approach involves preparing the SBD, contacting, administration of the PP from the center; meanwhile, the tasks after contracting are decentralized to local units, like confirming the delivery of goods according to the requirements of the bid documents. Thus, the hybrid procurement system may also be called the federal hybrid procurement system. A federal hybrid structure awards the central purchasing office the power to develop policy, and it provides to the unites a specific mandate.

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

2.2.6 PP Contests

The PP office faces several challenges: market, legal, political, procurement entity structure, human resource, bid rigging, and corruption. PP is complained by Bidders for its bureaucracy; the concern of negative publicity may force the procurement officers to emphasize the legal aspects of the tendering process. There are many instances when the procurement budgets are about to expire; ¹⁰⁴however, there are no eternal means to manage the bureaucracy of PP, and it ends with missing the market opportunities and the right season of the goods and services.

2.2.6.1 Market Structure

The market statuses or structures where few Bidders monopolized the PP and hindered the entry significantly impacted PP.¹⁰⁵ The market system and structure that we have discussed above play a significant role in PP. The public entity should be aware of the market structure to select an appropriate PP method. The influence of the market structure increases as the market power increases or when it goes from a perfectly competitive market structure to a pure monopoly market structure. The accomplishment of the PP objectives depends on the market structure.

2.2.6.2 Political Environment

Different interested groups are involved in the PP, from initiating the procurement plan to the contract administration. Those include Bidders, trade associations, media, politicians, and society representatives with different interests. They are involved in the PP system in various ways, by petitioning the parliament to pass or alter the procurement budget, influencing budget authorization, guiding the enactments, or supporting the processes. In addition, the Government may use procurement to implement its political agenda.

2.2.6.3 Legal, Social, and Environmental policies and Laws

Social and environmental factors can influence PP practices. Governments employ PP for economic stabilization or development purposes. For example, the Government may use PP to

¹⁰⁴ Roman, supra note 24, at p 16

¹⁰⁵ Ibid, at p17

encourage the local market, women, minority-owned small businesses, or help economically disadvantaged areas¹⁰⁶. Further, the Government may consider the effect of the procurement on the social and environmental realm or the PP impact on the environment, so it prefers to purchases sustainable procurement. In addition, as discussed above, investment, intellectual property rights policy may affect competition law and practices.

2.2.6.4 The Structures of PP Entities

Scholars of Government organizations have underlined the influence of organizational structures on PP performance. Procurement can be performed more efficiently when PP officers are professional and specialized.¹⁰⁷ The structure of the procurement authority affects not only the productivity and the efficiency of the PP but also the morale and job satisfaction of the public officers. Therefore, the Structure should be designed in such a way as to encourage the efficient performance of PP. The PP entity structure may be simplistic or complicated, depending on the development of the countries.

2.2.6.5 Absence of PP Professional

An effective procurement system should be managed with competent professionals with the proper skills and knowledge of PP. The absence of proper knowledge of the PP principles and rules influences the effectiveness of PP.¹⁰⁸ Moreover, appropriate PP professionals should prepare SBD, determine the specifications, and evaluate the goods, works, and services. However, PP is an abandoned area of study. The college degree program in PP has started in recent years. Developed countries, including the United States and Canada, face the same problem. It is defying for PP authorities to employ appropriate personnel with the proper numbers having the knowledge and skills required to accomplish the PP effectively. Thus, the Government should develop education and training on developing PP professionals.

¹⁰⁶ Ibid, at p18

¹⁰⁷ Ibid

¹⁰⁸ Ibid, at p 13

2.2.6.6 Corruption and Bid-Rigging

PP is one of the Government activities which is mainly exposed to corruption.¹⁰⁹ There are four types of corruption in PP; Corrupt practice, Fraudulent practice, Collusive practice, and Coercive practice.¹¹⁰ Corruption is noted more in PP than in other Government services, such as the judiciary, taxation, and state administration. Corrupted activities in PPs are fundamental challenges in global phenomena in all countries at all stages of development. It has a tremendous negative effect on taxpayers and international funds, including health and safety. PP is especially sensitive to corruption because Governments bestow enormous capital on public goods and services. The Procurement officials and politicians' great discretion in PP and the challenge in investigating corruption cases contribute to the challenge. Corruption in PP involves a complex conspiracy between different individuals. Detecting and preventing corruption in PP requires considering the procurement procedure, the parties involved, and the vast budget funded. Comprehensive preventive measures, specific laws, precise regulation, transparent procedures in PP, education, and public awareness of corruption in PP are needed to fight corruption in PP.

¹⁰⁹ Corruption in Public Procurement < <https://www.studocu.com/row/document/st-joseph-university-in-tanzania/procurement-and-supply-management/12-corruption-in-public-procurement/6371546> > last accessed September 13, 2021

¹¹⁰ Ibid, Corrupt practices refer to “Offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the action of a public official in the selection process or contract execution.” Fraudulent practice is a misrepresentation or omission of facts to influence a selection process or the execution of a contract. Collusive practice refers to a scheme or arrangement between two or more respondents with or without the knowledge of the procuring entity, designed to establish prices at artificial, non-competitive levels. Example of collusive Practice bidders forms a horizontal relationship determining who amongst themselves should be awarded the contract. Finally, coercive, or obstructive practices refer to ‘harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in a procurement process or affect the execution of a contract.’”

Chapter Three

The Competitiveness of Ethiopian Public Procurement

"The inquiry will build upon the general premise that public procurement rules have the promotion of competition—or the opening of public procurement markets to competition, as one of their main goals and that, consequently, they should be designed around a pro-competitive paradigm and implemented in a pro-competitive fashion."¹¹¹

3.1 Introduction

Expenditure on the PP shares 64% of the annual budget of Ethiopia. Competitive PP strengthens the country's economic development by ensuring economy, efficiency, and effectiveness.¹¹² Moreover, it serves as; the Government policy instrument by encouraging local producers, small and micro-enterprises, enhancing the capacity of local producers, contractors, and consultants.¹¹³ According to Article 25 of the Proclamation and Article 16(20) of the Directive, the Preference Rule shall be granted in any procurement to locally manufactured goods, small and micro enterprises, local construction, and consultancy companies. The margin of preference is; for procurement of drugs or pharmaceutical products or medical equipment 25%, for procurement of locally produced goods and other products 15%, for construction and consultancy services 7.5%, depend on as per article 16(20)(2)(a) and (b) shall be effective where it is certified by a competent auditor that no less than 35% of the total value of such products is added in Ethiopia.

¹¹¹ Albert Sánchez, "Competition and The Public Buyer Towards a More Competition-Oriented Procurement—The Principle of Competition Embedded in EC Public Procurement Directives", Nottingham Procurement, (2009) p 1

¹¹² Document Of the World Bank, "International Development Association Program Paper on A Proposed Additional Credit in The Amount of 431 million (Us\$600 million Equivalent) And Additional Grant in The Amount of 72 million (Us\$100 million Equivalent) To the Federal Democratic Republic of Ethiopia for A Program-For-Results (ESPES)", For Official Use Only Report No: 115228-Et, August 22, 2017 p 132

¹¹³ Ibid, at p 95

Furthermore, for small & micro enterprises by a margin of 3%, when such enterprises compete with local Bidders in national competitive bidding when they bid internationally according to Article 16(20)(5) the above calculation per Article 16(20)(2) (a), (b) and (c) of the directive shall apply. In addition, PP attracts FDI, Enhances Good governance, builds trust between Government and donors, and increases ODA flow¹¹⁴. Besides, it creates a conducive environment for various partnership arrangements between the Government and the Private Sector.

The Proclamation provides different principles and objectives like international PP models reviewed in the previous chapter. Thus are¹¹⁵

- ❖ **Value for money**; Enhance value for money in the use of the public fund for PP.
- ❖ **No discrimination**: might not be discrimination among candidates based on nationality or other reasons unrelated to the evaluation criteria, except following the rule of preference provided in the Proclamation. "Non-discrimination among candidates on the grounds of nationality or any other criteria not having to do with their qualification, except in cases of preference specifically provided for in this Proclamation"¹¹⁶
- ❖ **Transparency**: fairness and transparency of the criteria based on which decisions are given in PP.
- ❖ **Accountability**, accountability shall be ensured for decisions made and measures taken concerning PP and property administration.
- ❖ **The proper use of public property**, the last but not the list principle, is the careful and proper handling of public goods.

However, the Procurement Proclamation Article 5, Principles of PP and Property Administration, does not state the principle of integrity¹¹⁷.

All nine regional states and two city administrations have enacted PP Proclamations based on the FPPAA's PP rules. In addition, all of them have established regulatory procurement units, though at various degrees of independence. The regulatory units have, in turn, issued respective

¹¹⁴ Document, supra note 103, at p 96

¹¹⁵ The Procurement Proclamation, supra note 2, at Article 5

¹¹⁶ Ibid at Article 5(2)

¹¹⁷ Ibid

Procurement Directives. These documents govern the procurement implementation at all levels of the regional structure, including Woredas. The regional Proclamations and directives follow the prototype of the federal Proclamations, which are prepared based on the UNICTRAL Model procurement law.¹¹⁸

This section presents the data gathered from various sources. It includes interviews with Public Bodies' Officials and Bidders PP department heads concerning the competitiveness of the Ethiopian PP and its challenges. The data is gathered mainly from the FPPAA, and Addis Ababa City Government Food Security and Productive Safety Net Office, referring to the whole county in general, the world bank law and practice, respectively. Addis Ababa city Government food security and productive safety net office is one of the offices funded by the World Bank and ruled according to the World Bank's PP laws and procedures. Moreover, the practices of TCCPA are also reviewed.

3.2 The Proclamations

Effective competition law is crucial to manipulate the public fund efficiently. However, there was no integrated consumer protection law or competition law in Ethiopia until 2003. Purchaser concerns had been addressed under separate legislation like the Civil Code, Criminal Code, and other distinct regulations that different institutions enforced.¹¹⁹ In 2003 Ethiopia introduced trade practice Proclamation No. 329/2003, which prompted a competitive market by preventing and eliminating anti-competitive and unfair trade practices. The Proclamation was proclaimed to make sure that business was practiced following the free-market economic policy. The Proclamation regulates three kinds of conduct: anti-competitive agreements, unfair competition, and abuse of dominance. The Proclamation was the first step in improving Ethiopian competition law administration. However, the Trade Practice and Consumers' Protection Proclamation 2010 encountered many shortcomings of the repealed Proclamation, such as making provision for merger control and strengthening the competition authority in terms of independence and decision-making autonomy. Then, the Proclamation was repealed and replaced by the Trade Competition

¹¹⁸ Document, supra note 103, at p 146

¹¹⁹ UNCTAD, "[A Review of Competition Policy in Ethiopia](#)", UNCTAD Project for Strengthening Competition and Consumer Protection Law Enforcement Capacities in Ethiopia (2015-2017) P IV

and Consumers Protection Proclamation (No. 813/2013), the current competition legislation in Ethiopia.¹²⁰ The Proclamation is arranged in six sections: General, Prohibition of Anti-Competitive Trade Practices and Regulation of Mergers, Protection of Consumers and Distribution of Goods and Services, Trade Competition and Consumer Protection Authority, Federal Trade Competition and Consumers Protection Appellate Tribunal, and Regional Consumers Protection Judicial Organs and Appellate Tribunals Conducting Investigations, Institution of Action and Adjudication, and Miscellaneous Provisions. The following are analyses concerning the competitive PP of Ethiopia.

It was not until 2005 that there was a comprehensive procurement law in Ethiopia. There were only a few provisions in the Civil Code (1960) regulating the procurement procedure. Chapter 3 of the Code dealt with the contract of public works under articles 3246 and 3247.¹²¹ In 2005, the Federal government enacted a law providing a detailed public procurement procedure (Proclamation No. 430/2005), which also introduced the embracing of the basic principles of transparency, accountability, fairness, and non-discrimination as its guiding principles. Proclamation No. 430/2005 was replaced in 2009 by the current Ethiopian Federal Government Procurement and Property Administration Proclamation No. 649/2009.

3.2.1 Market Dominance

Market dominance is not by itself anti-competitive. Despite this, the previous two Proclamations of 2003 and 2010 made market dominance anti-competitive. The current one, however, made only abuse of market dominance. According to the Competition Proclamation¹²² Article 5(1), No businessperson, either by himself or acting together with others, may carry on commercial activity by openly or dubiously abusing the dominant position in the market. In addition, Article 6 of the same Proclamation provides an Assessment of Dominance. (1) A businessperson, either by himself or acting together with others in a relevant market, is deemed to have a dominant market position if he has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition the relevant market. (2) A dominant position in a particular

¹²⁰ Ibid

¹²¹ UNCTAD, *supra* note 111, p 33

¹²² The Competition Proclamation, *supra* note 17

market may be assessed by considering the business person's share in the market or his capacity to set barriers against the entry of others into the market or other factors as may be appropriate or a combination of these factors. Article 6(1) gives wide discretion to the authority since it provides subjective criteria; however, Article 6 (2) provides objective criteria, which is the possible use of a dominance threshold based on market shares. However, the UNCTAD Model Law on Competition¹²³ does not use market share thresholds. Thus, competition law should not stipulate irrefutably that a company is dominant when it reaches certain market share thresholds.¹²⁴ Article 6 (3) of the Competition Proclamation stipulates that the market is relevant for assessing a dominant position in the market that comprises goods or services that compete or goods or services that can be replaced by one another. This sub-article defines the relevant market. It has included the concept of substitutability. A relevant market is where the two goods compete. Firstly, the two goods must be substitutable. Secondly, they must be sold in a similar market. According to 6(5), the Council of Ministers may determine the numerical expression of the degree of market dominance by regulation.

3.2.2 Anti-Competitive Agreements

ACP and agreements are prohibited according to the Compton Proclamation Article 7. According to article 7 (1) of the competition Proclamation,¹²⁵ An agreement between, or concerted practice by, business persons or a decision by an association of business persons in a horizontal relationship shall be prohibited if: a) it has the effect of preventing or significantly lessening competition, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect. b) it involves, directly or indirectly, fixing a purchase or selling price or any other trading condition, collusive tendering, or dividing markets by allocating customers, Bidders, territories, or specific types of goods or services. According to 7(1)(a), prohibit anti-competitive agreement using the rule of reasons approach if the anti-competitive agreement significantly lessens competition. However, 7(1)(b)

¹²³ UNCTAD, "Model Law on Competition", United Nations, New York, and Geneva, 2010

¹²⁴ Ibid

¹²⁵ Ibid

prohibited bid-rigging or collusion using per se rule approach or collusion is unconditionally prohibited.¹²⁶

3.3 The Scope of Proclamations

Article 4 (2) of the Competition Proclamation provides exemptions for the Council of Ministers to limit the competition law provisions when it deems vital to facilitate economic development. Article 4(3) of the Proclamation also dictates the competition Proclamation to follow other laws on applying regulatory functions and administrative measures. The PP Proclamation Article 3 also provides its scope that except for national security or defense deciding to use a different procurement and property administration and contracts, a public body enters with another public body to provide goods, works, consultancy, or other services cost. The Proclamation applies to all Federal Government procurement and property administration.

3.4 The Centralized Procurement Agency

The FDRE PP and Property Administration Agency (FPPAA). FPPAA is an independent Government body established by the Ethiopian Federal Government PP and Property Administration Proclamation No. 649/2009. FPPAA has the capacity of policy formulations, supervisory role, provision of training, and other relevant PP and property supervisions. The main objectives of PPPAA are; advising the Government on PP and property administration policies, provide technical assistance to the regional Government and city administrations, follow up the compliances of Public Bodies, secure fair and non-discriminatory and transparent PP, and maximize value for money in PP and developing improved property administration¹²⁷. In addition, when the centralized procurement unit structure is strong, it positively impacts decentralized procurement units and PP laws and principles enforcement.

¹²⁶ Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests < <https://www.bonalaw.com/Antitrust%20Standards%20of%20Review:%20The%20Per%20Se,%20Rule%20of%20Reason,%20and%20Quick%20Look%20Tests-standards-of-review-the-per-se-rule-of-reason-and-quick.html> > last accessed September 12, 2021

¹²⁷ The Procurement Proclamation, supra note 2 Article 14 and 15

3.5 PP and Property Disposal Service PPPDS

Property Disposal Service is established by Article 3 of Regulation No. 184/2010 of the Ministry of Finance and Economic Development Council. The principal goals of PPPDS are; to facilitate the timely supply of goods and services, in the required quality and by best with economical of a bulk purchase, to facilitate the rapid clearance by the auction of properties of Public Bodies at reasonable prices and, to support public enterprises in the procurement of goods and services and disposal assets.

3.6 The Decentralized Administration Units

Under the PP Proclamation, the decentralized procurement system consists of three subdivision of PP enforcement structure, which significantly affect PP performance. The Heads of Public Bodies, the Procurement and property administration unit, and Procurement Endorsing Committee. In addition, they are essential factors in the enforcement of PP laws and principles.

3.6.1 The Heads of Public Bodies

The responsibilities of Heads of Public Bodies are provided under Article 8 of the Proclamation¹²⁸. The Heads of Public Bodies are responsible for the PP they carry out and the property they administer. Some of the responsibilities of the Head of Public Bodies are following;

- ❖ Establishes an adequately staffed unit for PP and property administration
- ❖ Set up an Endorsing Procurement Committee that approves PP of higher value; it may also set up an Ad Hoc Evaluation Committee for complex PP
- ❖ Ensure that staff and officials assigned in the PP and property administration and those assigned as members of the Procurement Endorsing Committee receive training.
- ❖ Ensure that the procurement of the public body is preplanned and complies with the PP principles.
- ❖ Ensure the Procurement Department, the Procurement Endorsing Committee, and other sections of the public body involved in the PP achieved their duties properly.
- ❖ Enter a contract with third parties which support the public body in the process of PP

¹²⁸ The Procurement Proclamation, supra note 2 and Article 5 of the Directive

3.6.2 The PP Unit or Department

Article 9 PP Proclamation established the Administrative Unit Structure, which manifests a decentralized system. According to the PP Proclamation and Article 6 of the Procurement Directive, some of the PP department or Unit duties and responsibilities are;

- ❖ Identify the procurement need and prepare the procurement plan of the Public
- ❖ Disclose to the public by posting it on the Agency's website at the same time of publication of its bid advertisement in a newspaper, any procurement the value of which corresponds to or is greater than (For works Ethiopian birr 20,000,000.00, For Goods 6,000,000.00, For consultancy 4,000,000.00, For others 2,000,000.00)¹²⁹ including procurements to be made through ICB. Contrary to this provision, many of the bids are posted on the Agency's websites.
- ❖ It selects candidates for the PP methods other than the open bid method. At that time, ascertain that the price offered by successful Bidders is commensurate compared to the market price.
- ❖ Administer PP in a perfectly ethical and skillful manner
- ❖ Carry out PP following the Proclamation, the Procurement Directives, the procurement manual, the standard bid documents, the forms, and the procurement contract
- ❖ Maintain complete record for each procurement following Article 23 of the Proclamation

3.6.3 Procurement Endorsing Committee

According to, Article 10 of the Proclamation and 7 of the Directive Procurement, Endorsing Committee consists of members no less than three persons, which serves for a maximum period of 3 years. The Officials should have a high position of responsibility in the Public Bodies, have better knowledge and experience, and comprise various professions as far as possible. Where appropriate, the service of members of the Procurement Endorsing Committee may extend for one additional term. The Procurement endorsing committee's duties and responsibilities ensure that PP is executed in compliance with this Proclamation, the Procurement Directives, the procurement manual, the standard bid document, and the forms. Moreover, it reviews and endorses

¹²⁹ Federal Public Procurement Directive Amendment, December /2015 Article 2

procurements within the financial limits set by the directive. In addition, advise the head of the public office on methods of achieving effective procurement.¹³⁰

3.7 Procurement Methods

Ethiopia selected six PP methods from the ten procurement methods provided under the UNCITRAL Model Law on PP legislation¹³¹. In addition, Article 27 of the model stated that “States may choose not to incorporate all the methods of procurement listed in this article into their national legislation.” Consequently, the Proclamation is stated under Article 33 the six methods of PP; Open Bidding, Request for Proposals, Two-stage Tendering, Restricted Tendering, Request for Quotation, and Direct Procurement. As otherwise provided, the Proclamation selects the Open bid PP Method as a default. Thus, Public Bodies shall use open bidding as the preferred procurement procedure. Public Bodies may use a method other than open bidding only where conditions for using such other method stipulated under the PP Proclamation are satisfied. Moreover, Public Bodies shall not split procurement requirements for a given quantity of goods, works, or services to avoid the preferred procurement procedure stated under this Proclamation or in the Procurement Directive.

3.7.1 Open tendering

It is explicitly stated in the Proclamation and Directive that Open Bidding¹³² is a default method in PP. It is required to advertise (exceeds for works Ethiopian birr 20,000,000.00, For Goods 6,000,000.00, For consultancy 4,000,000.00, For others 2,000,000.00)¹³³ the bid opportunities in widely circulated National Newspapers and the Agency's web site at least once is a mandatory requirement. Procuring Entities may advertise more than once using other Media (Television, Radio, Websites) where it finds it significant.¹³⁴ The length of the advertisement and the media

¹³⁰ The PP Proclamation Article 10 and the Procurement directive article 6(5)

¹³¹ UNCITRAL, supra note 14

¹³² The procurement Proclamation, supra note 2, at Article 35 and 48

¹³³ Federal Public Procurement Directive Amendment, December /2015 Article 2

¹³⁴ How to Participate in Government Tender or bid in Ethiopia < <https://www.2merkato.com/articles/general-info/65-how-to-participate-in-government-tender-or-bid-in-ethiopia-regulations-and-procedures> > last accessed 13, 2021

varies for ICB and NCB. The bid that fulfills the technical requirements and is offered the lowest price wins the bid.

3.7.2 Restricted Tendering

Public Bodies may use restricted tendering as a method of procurement only where the following conditions are satisfied: 1) it is ascertained that the required object of procurement is available only with limited Bidders; 2) the cost of procurement does not exceed the threshold (For Procurement of works Birr 6,000,000.00, Goods Birr 1,500,000.00, Consultancy Service Birr 900,000.00, Services Birr 1,200,000.00)¹³⁵(3) or where a repeated advertisement of the invitation to bid fails to attract Bidders in respect of the procurement.¹³⁶ Thus, A public body may use restricted tendering that might not be subjected to an advertisement as a method of procurement only where; the object of procurement is available only with limited Bidders, the cost of procurement does not exceed the above threshold, and a repeated advertisement of the invitation to bid fails to attract Bidders.¹³⁷ In addition, the invitation to bid should be sent to limited Bidders chosen from among those registered in the Bidders' list that it is sufficient to ensure effective competition and shall not as feasible be less than five competitors.

7.3.1 Direct procurement

Direct procurement¹³⁸ may be employed in the absence of competition, or the bid is provided only by one bidder, for the further need of goods by the original supplier, under exceptionally

¹³⁵ Federal Public Procurement Directive Amendment, December /2015 Article 7

¹³⁶ The procurement Proclamation, supra note 2, at Article 49 and 50 and Art 23.4 of Dir must have been published at least twice

¹³⁷ How, supra note 133

¹³⁸ The procurement Proclamation, supra note 2 at Article 51 and 52 and Art 25 of the Dir. called Single source procurement. For the further need of goods by the original supplier, may not exceed 25% 25(2)(a) and for additional works 30% of the total contract and to solve problems encountered during travel the value of which doesn't exceed birr 1500, however, the total value of such small procurements within a fiscal year shall not exceed birr 30,000.00, for Diplomatic missions, emergency requirements does not exceed USD \$300) in a single purchase order. However, the total value of such small procurements within a fiscal year shall not exceed USD \$6000.00 It shall not be necessary to conclude a contract in respect of direct procurements effected in accordance with sub-articles (1) (g) and (2) of this Article for special need and below the threshold Article 51(3) of the Proc.

advantageous situations which only arise in the very short term. The procedure for direct procurement initiates upon arranging the specifications of goods and services needed by the public body. Then, the public body openly negotiates on price and conditions of offer with a single nominee. Next, the agreement must be specified in contracts to which both are parties. Finally, the contracts for direct procurement should be approved by the head of the public body.

3.4.7 Request for Proposals

The request for proposals¹³⁹ method is applied when consultancy services represent more than 50% of the contract amount. Moreover, it should be addressed to three up to seven candidates selected by the public body. Then the candidates will offer their proposals within the specified time frame. The public body may negotiate with the first headed candidate concerning their proposals.¹⁴⁰ Finally, an award is made to the candidate whose most advantageous proposal is determined following the criteria for evaluating proposals outlined in the request for proposals.

3.7.5 Request of Quotation

Request for quotations¹⁴¹ is used to purchase readily available goods or procure works or services for which there is an identified market depended on the maximum trace hold provided under the directive (For Procurement of works Birr 500,000.00, Goods Birr 200,000.00, Consultancy Service Birr 120,000.00, for others Birr 150,000.00).¹⁴² Public Bodies must request prices from at least three or as many candidates as possible, and they shall not repeatedly invite the same Bidders,

¹³⁹ Ibid, at Article 53 and 54 of the Proclamation and Article 24 of the Directives Request for quotations is used to purchase; the need of which can **not be foreseen, for immediate use**, Without having to obtain the approval of the procurement endorsing Art 24.2 of the Dir. For Diplomatic missions, the value of which does not exceed USD \$ 10,000 Per purchase order, Art 24. 5 of the Dir

¹⁴⁰ How, supra note 133

¹⁴¹ The procurement Proclamation, supra notes 2, at Article 55 and 56

¹⁴² Federal Public Procurement Directive Amendment, December /2015 Article 8

shall ensure equal participation opportunity. The request should include a precise specification. In addition, Bidders must comply with Article 28 of the Proclamation on qualifications of candidates.

3.11.6 Two-Stage Bidding

Two-stage bidding¹⁴³, as its name denotes, involves two stages. In the first stage, the public body request Bidders to submit their proposals without price. Then, the public body induces a more appropriate specification based on the evaluation against the requirements of the proposals submitted to it at the first stage of the bid proceeding. It then communicates the revised specification to the candidates who submitted qualified bids at the first stage and invited such candidates to submit proposals based on the revised specification. It is applied when the public body cannot prepare detailed specifications, a contract for research, experiment, study, or development, because of the technical character of the required goods and services, then the public body must negotiate with the Bidders.

3.8 Open International Bidding

Open international bidding¹⁴⁴ is used when national open bidding is ineffective, and competition cannot be obtained unless foreign firms are invited to bid depending on the threshold level. Open international bidding shall be used whenever in national open bidding an effective competition cannot be obtained unless foreign firms are invited to bid or for procurements above a threshold¹⁴⁵ (For Works above birr150,000,000.00, For goods above birr 50,000,000.00, For consultancy service 7,500,000.00, For other services above birr 21,000,000.00)

The invitation to bid shall be advertised in a newspaper published in the English language, worldwide circulation, and the Agency's website. Moreover, Technical specifications of the goods and services shall be harmonious with national requirements and international standards. Without detriment to the threshold conditions for using other methods of procurement than open bidding is provided, Public Bodies may conduct procurement through international competitive bidding

¹⁴³ The procurement Proclamation, supra notes 2, at Article 57 and 58

¹⁴⁴ The procurement Proclamation, supra note 2, at Article 59 and Art. 18 of the Dir.

¹⁴⁵ Federal Public Procurement Directive Amendment, December /2015 Article 7

using two stages bidding restricted, tendering, request for proposals, request for a quotation, or direct procurement where it is determined that it is impossible to carry out effective procurement without the participation of foreign companies.

1.9 Electronic Procurement

The market can be transacted in a physical place or digital space.¹⁴⁶ The physical market is a setup where buyers and sellers physically meet and purchase the desired merchandise in exchange for money. In contrast, digital marketing is the marketing of products or services using digital technologies. Buyers and sellers communicated digitally by using the Internet sphere, then communicating or negotiating with each other and paying the money online, and the products will be delivered to the buyers' address per the specification. The primary difference between these two in physical marketing is that buyers and sellers must meet physically to conduct the exchange, but in the Electronic Procurement or Digital Market, technologies like the Internet are used to purchase goods, works, and services. Electronic procurement¹⁴⁷ benefits economy, transparency, speed, and efficiency in PP; thus, the Agency has conducted a study¹⁴⁸ and announced its plan to conduct electronic procurement within two years, confirming that the appropriate infrastructure level related to telecom and other technological equipment is planted.¹⁴⁹

3.14 Two Envelop Bidding Process

Technical and financial documents are required in PP in separate sealed envelopes that were opened simultaneously (Art16.18.2 and 16.18.3 of the Dir). However, PPPDS launched two envelopes bid opening processes. According to the new method, the technical document is opened first and evaluated to select which bidder fulfills the required technical standard; then, the financial document of the Bidders, which passes the technical standard opened consequently. According to

¹⁴⁶ Digital transformation of public procurement <[Digital transformation of public procurement | Government at a Glance 2019 | OECD library \(oecd-ilibrary.org\)](#)> last accessed September 14, 2021

¹⁴⁷ The procurement Proclamation, supra note 2, at Article 31

¹⁴⁸ Dr. Rajesh Kumar Shakya, “E-Government Procurement (E-Procurement) Strategy of Ethiopia and Action Plan”, FPPAA, (2018)

¹⁴⁹ Interview with Ato, Jonsa Gedefu Deputy Director at FPPAA, he confirmed that Ethiopia would start E-procurement within two years and world bank 2,8 million dollars for the E-procurement project

Tsewaye Muluneh¹⁵⁰, the new scheme would hasten the procurement process. A company representative who participated in several PPs for several years also advised that the new method is helpful to fight corruption since it is transparent and clear. However, the World Bank-funded PP like Addis Ababa City Government Food Security and Productive Safety Net Agency simultaneously opens technical and financial documents¹⁵¹.

3.11 The Ethiopian PP Challenges

3.11.1 Unplanned Procurement and Ambiguous Specifications

As stated in the literature review, the first step in PP begins with identifying a need. At this stage, it is necessary to define the need clearly. Thus, the PP plan deserts the use of the budget efficiently. Furthermore, specifications should be prepared according to an appropriate standard. The specifications must be clear to purchase suitable goods, works, and services. Specifications are means of communication with the Bidders about what is needed and what should be supplied. The major problem in PP is related to the preparation and evaluation of the specifications. Unfortunately, however, it is found that even some specifications are prepared to benefit a particular supplier. In addition, even though it is forbidden to stipulate a brand name unreasonably, though the brand name is written under the specification of some bid documents.¹⁵² In the other scenario, the brand name is not mentioned under specifications; however, the specification describes a particular brand. The FPPAA reported¹⁵³ that from 52 Public Bodies audited in 2014-2017; 10(19.23%) of the Public Bodies procuring without preparing the annual public procurement plan, 39 (75%) of them did not use the SBD, 30 (57.70%) of the public entities describe trademarks in their PP specifications.¹⁵⁴

¹⁵⁰ W/r, Tsewaye Muluneh, Director General of PPPDS, (January 2021)

¹⁵¹ Ato, Mekakelegnawe Andaregea, Public procurement Director of City Government of Addis Ababa Food Security and Productive Safety Net Agency (April 2021)

¹⁵² Ibid

¹⁵³ The FPPAA Report on the Training of Public Procurement and Property Administration Personals on its Relevance (2017) p 12

¹⁵⁴ FPPAA < http://www.ppa.gov.et/index.php?option=com_joomdoc&view=documents&path=publications%5C > last accessed August 17, 2020

Moreover, According to Article 16(5) of the PP directive, only complex goods, works, and services required specifications. It stated that ‘Public Bodies shall be required to draw up detailed technical specifications, especially for complex and high-cost procurements according to Article 29 of the Proclamation.’ Thus Article 16(5) of the directive opens a gap to procure without a Specifications. According to annex 3 of the Procurement Directive, the following goods, works, and services may be purchased without specifications;¹⁵⁵

Goods	works	Consultancy Service	Other Services
<ul style="list-style-type: none"> ▪ Standard stationery materials ▪ Standard Sanitary materials ▪ Standard Computers and related accessories ▪ Standard Printers ▪ Standard office equipments ▪ Tyres ▪ Standard spare parts (For vehicles or Office Equipments) ▪ Standard Electric, Electronics or Electro- mechanical goods ▪ Standard office machine i.e. (Fax, photocopier, binding machine) ▪ Construction materials i.e. (Cement, steel, quarry Products, water pipe, paint, wood, nail) ▪ Primary food products and processed foods ▪ Petroleum and various lubricants ▪ Ready made clothes, garments or shoes ▪ Standard drugs and medical equipments ▪ Chemicals and Re-Agents ▪ Books and Journals. 	<ul style="list-style-type: none"> ▪ Maintenance of buildings ▪ Paintings ▪ Temporary housing ▪ Fence works ▪ Partition of offices 	<ul style="list-style-type: none"> ▪ Assignment which do not require in depth study 	<ul style="list-style-type: none"> ▪ Printing ▪ Maintenance of vehicle ▪ Lease or Rental of equipments and goods ▪ Maintenance of office equipment and machine ▪ Transport service ▪ Hotel service ▪ Plumbing and electrical repair services ▪ training ▪ Audit service ▪ Security and sanitary service ▪ Procurement service ▪ Beautification of compound and ▪ Office decoration ▪ Lease of office

Table 2 List of Non- Complex Procurements¹⁵⁶

3.11.2 Absence of PP Professionals and effective PP entities

¹⁵⁵ According to Article 16 (3)of the PP Proc. Contrary to free market system FPPPA is boosted with the power to suspend bidders for a definite or indefinite period from participating in public procurement where it proves that bidders have offered a price higher than the market. It also has the authority to permit the use of a procedure which is not consistent with the procedures laid down by the PP Proclamation or the procurement directive. Article 16 (5) of the PP Proc.

¹⁵⁶ Procurement directive, supra note 128 at p 125

Procuring entity is responsible for enforcing the PP laws, regulations manual, and directives. However, the procurement department is not staffed with the essential professions.¹⁵⁷ There is a problem with employing qualified employees at a government office because of the Low scale wage and the absence of experts in PP since the field was started in recent years at the university level. Moreover, it is said that the procurement officers missed the occasional training by the Agency for different reasons, including busyness on their primary obligations.¹⁵⁸ Moreover, there is ignorance of the PP rules and the absence of organizational structures with the required skills. That resulted in a risk of exposure to corruption intentionally or negligently.

3.11.3 Unjustified Selection of Procurement Methods

An efficient PP outcome is dependent on the proper implementation of procurement principles, methods, and proper knowledge of these by the PP officers. It is also the outcome of the value for money principle that resulted from the proper bid method.¹⁵⁹ The federal PP approved six procurement methods: open bid, restricted bidding, request for quotation, and single-source or direct procurement from the procurement provided in different international models as stated above. An open bid is the general or preferred method of PP. In contrast, others are exceptional since an open bid creates a wide opportunity for many participants, leading to better competition. The Government benefited from the competition of many Bidders that yields value for the money; according to the value for money or efficiency theory presented in the literature review, PP primary objective is value for money that the Government acquires better goods and services with the best price, the best quality at the right time.

The procurement Proclamation stated that unless provided in the Proclamation and directives, Public Bodies shall follow the open bidding procurement method as the preferred procurement method; if they apply other than open bidding, they shall state the grounds and circumstances to justify the application of other procurement methods. Despite the clear statement of the

¹⁵⁷ Interview supra note 150

¹⁵⁸ Interview, Ato, Asamen Gerawork, Director General of City Government of Addis Ababa Food Security and Productive Safety Net Agency (April 2021)

¹⁵⁹ *ibid*

Proclamation and directive, the Agency's finance report shows that some procurements that had supposed to be performed through open bid were processed through other means of procurement method like the direct purchase or proforma invoice.¹⁶⁰ It is said that PP unites select other than the preferred methods (open bid method), without justifying the selected procurement methods because of corruption or negligently caused by lack of the PP rules.¹⁶¹ It is evident that Form 52 Public Bodies audited in 2014-2017; 35(67.30%) of the public entities procure from one supplier using direct procurement method without following the requirements provided under the public procurement Proclamation and directives.¹⁶²

3.11.4 Corruption and Bid-rigging

Personal integrity is one of the principles of PP; however, corruption is a most significant challenge for competitive PP. The challenge of corruption, including bid-rigging, has been reviewed under the literature review.¹⁶³ Bid-rigging occurs when Bidders in advance agree on who will win the bid or the PP and increase the amount of the winning bid apportion and distribute the additional higher price among them. Moreover, Corruption in the PP occurs in many ways; for instance, corrupt PP officials deliver decisive information to Bidders with whom they committed the corruption; they even prepare the specification based on the bidder's interest. Thus, ACP is devastating, mainly when it affects PP. Such Bid-rigging conspiracies take taxpayers' money, diminish public confidence in PP, and undermine the benefits of society or supply of public service. Corruption is noted more in PP than in other Government services, such as the judiciary, taxation, and state administration. Most of the corruption charges against public officials are related to corruption in PP.¹⁶⁴ Moreover, the lack of stakeholders' participation in the PP process, including the media and the public, lack of awareness of the PP process, transparency, and integrity contributes to the challenges.

¹⁶⁰ FPPAA, supra note 134

¹⁶¹ Interview, supra note, 145

¹⁶² The FPPAA Report on the Training of Public Procurement and Property Administration Personals on its Relevance (2017) p 12

¹⁶³ Corrupt practices, supra note 101

¹⁶⁴ Ibid

3.11.5 Hybrid Competition and Consumer Authority

Hybrid laws and authorities are more appropriate than single authority or partially integrated authority models for countries like Ethiopia for saving resources. However, the Ethiopian hybrid system is inefficient in its balance. ETCCPA is focused more on consumer protection matters. In addition, implementing competition and consumer protection laws by the single Authority (ETCCPA) is observed when it creates conflicts between the anti-competition principles and the customer interest, particularly concerning price controls.¹⁶⁵ Moreover, the authority issues many directives that fix commodities prices contrary to the principle of competition. In addition FPPPAA According to Article 16(3) of the Proc. also contrary to the principle of free market gives warning to or suspend for a definite or indefinite period from participating in public procurement suppliers where it proves that they have offered a price higher than the market and of upon the request of public bodies, exceptionally and when justified on sound grounds, may permit the use of a procedure which is not consistent with the procedures laid down by the Proclamation or the procurement directive.

3.11.6 The Autonomy of the Authorities

FPPPAA and ETCCPA lack autonomies¹⁶⁶ in the structural framework, and it is influenced by political decisions and depends on a budget of the Executive branch of the Government. UNCTAD Model Law on Competition suggests that competition authorities should have autonomy with judicial and administrative powers to lead investigations and enforce sanctions.¹⁶⁷ Moreover, the World Bank stated that autonomy, professional and monetary independence are essential factors for developing effective competition and consumer protection agencies. However, Article 27(2) of the Competition proclamation asserted that "The Authority shall be accountable to the Ministry." Therefore, ETCCPA is accountable to the ministry and subject to civil service constraints on recruiting professionals and necessary funds allocations in their regulatory

¹⁶⁵ Tessema Elias, "Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia", Mizan Law Review, Vol 9, No1 (September 2015) p 91

¹⁶⁶ Muhammed, "A Critical Appraisal of the Institution Controlling Competition in Ethiopia: Analysis of the Law and the Practice", (LLM Thesis, Addis Ababa University College of Law and Governance Studies School of Law, Unpublished February 2014) p 74

¹⁶⁷ UNCTAD, "Competition Law and Policy Substantive Possible Elements for A Competition Law, Commentaries and Alternative Approaches in Existing Legislations", (2007) p 66

actions. In addition, Article 12(2) of the PP proclamation stated that the FPPPAA shall be accountable to the Minister.

3.11.7 Cooperation of FPPPAA and ETCCPA and Workloads

Cooperation of competition authority with PP authority and other relevant public bodies is crucial for achieving competitive PP. For example, FPPPAA and ETCCPA have a common objective in advancing competitive PP. However, it is said that those authorities lack coordination¹⁶⁸ and corporation.¹⁶⁹ Thus, it may result in two or more agencies administrating the same subject or none of the agencies because they mistakenly believe that another body is administrating the matter. Hence, the risk of either a jurisdictional overlap or missing the objectives demands inter-institutional collaboration and cooperation among the PP Authority, Competition Authority, and other relevant public bodies with similar objectives. Accordingly, there should be a clean line defining the jurisdiction to overcome the probability of such incidents. Moreover, building a communication channel between the authorities with the common end to change of information and evidence about the activities undertaken by each body reduces duplication or the gapes.

According to the ¹⁷⁰respondents, the main problem in enforcing the PP rules is the FPPPAA's workload. For instance, all Federal Government Bodies shall announce their procurement plan in the annual budget that started in July and ended on June 30. In addition, the Agency ratifies the Procurement Plans, the PP methodology, hears any complaints from Bidders and procuring entities, and gives direction and training to all public bodies PP unit and Public Enterprises when they seek advice. In addition, only one agency (FPPPAA) handles the compliance auditing (it does not employ performance audit) on the PP.¹⁷¹ Thus, there are impediments observed in the Agency because of the overload duties.

¹⁶⁸ UNCTAD, "A Review of Competition Policy in Ethiopia, Project for Strengthening Competition and Consumer Protection Law Enforcement Capacities in Ethiopia" (2015-2017) p 33

¹⁶⁹ Ato, Mekakelegnawe Andaregea, Public procurement Director of City Government of Addis Ababa Food Security and Productive Safety Net Agency (April 2021)

¹⁷⁰ Ibid

¹⁷¹ Ibid

3.17 Bidders Complaints

The participation of many Bidders in PP is vital to have a competitive procurement. However, besides the prevalence of corruption and a lack of transparency in the PP specifications, the procurement process and bureaucracy are frustrated Bidders.¹⁷² The other grievance of bidders is contract administration and the delivery of the good and service. PP takes a long time to complete the procurement while the Bid Guaranty, Performance Bond, or the Bid Security are held in the Government's hand. (Bid Security/Bond, the range of 0.5% to 2% of the total estimated contract price, shall not exceed 500,000.00 (five hundred thousand) birr.¹⁷³ The successful bidder shall provide performance security in an amount equal to 10% of the price.) The goods may be run out of the store or the market, the price changed, and foreign exchange unavailable for imported goods when the final procurement order is issued due to the lengthy PP process.

Another major problem the bidders commonly complain about is the delay of payment¹⁷⁴; since there is a finance shortage within bidders, the Bidders are encouraged only by a fast payment system. There are many complaints against the Government bodies, and Bidders or Bidders were reported to the Agency¹⁷⁵. They also complain about the Agency's delays when dealing with the complaints arising between Procuring Entities and Bidders.¹⁷⁶ In addition, it has complained against the Agency that the measure against the Government body is less than the Bidders. The agency personnel replied that they are working to amend the Proclamation in this manner¹⁷⁷. The following two tables summarize the Bidders' and the public entities' complaints found on the Agency's websites.¹⁷⁸

¹⁷² Interview, supra note 156

¹⁷³ Public Procurement Manual - December 2011

¹⁷⁴ Interview with Ato, Endalekacewe Asefa General manager of Wogerate Construction PLC G 1, (April 2021)

¹⁷⁵ FPPPAA, supra note 134

¹⁷⁶ Interview with Ato, Abey Geberu Public Procurement Department Head at Agazework General Business PLC (April 2021)

¹⁷⁷ Ato Jonsa Gedefu Deputy Director at FPPPAA (January 2021)

¹⁷⁸ Ibid

Budget year	Public Body given notice to: <ul style="list-style-type: none"> change its decision, take corrective measures, that the procurement proceeding is against the law cancel the bid (in favors of the supplier) 	the procuring entity did not commit the offence (The procurement proceeding is not against the law)	case not reviewed because: <ul style="list-style-type: none"> the procuring entity is not a federal public body procurement performed by World Bank procedures 	case closed because: <ul style="list-style-type: none"> of absence of sufficient evidence it was submitted after the stipulated time it was submitted prior to the submission to the public body 	case closed because the public body and the supplier came to agreement	total
2004/2005	-	2	-	1	-	3
2005/2006	2	6	-	3	-	11
2006/2007	2	1	8	-	-	11
2007/2008	4	3	1	-	1	9
2008/2009	9	3	-	5	-	17
2009/2010	3	2	-	4	-	9
Total	20	17	9	13	1	60

Table 3, Complaints Submitted by Bidders Against Procuring Entities

Budget Year	supplier declared not committing offence	warning given to supplier for committing offence	Cancellation of supplier from suppliers' list for committing offence	case closed because the public body and the supplier came to agreement	case closed because of absence of sufficient evidence	case being reviewed	case not examined because the procuring entity is not a federal public body	total cases entertained
2004/2005	-	1	2	5	4	-	-	12
2005/2006	1	5	1	1	13	-	1	22
2006/2007	2	9	3	1	1	-	-	16
2007/2008	1	2	-	2	6	-	-	11
2008/2009	4	18	2	1	28	-	-	53
2009/2010	4	11	-	2	1	24	-	42
Total	12	46	8	12	53	24	1	156

Table 4, Complaints Submitted by Procuring Entities Against Bidders

3.13 PP Complaints Reviewing

The Public Body conducting bid proceedings shall wait for seven working days after disclosing the bid evaluation result to give the Bidders time to submit the complaint; within ten working days, the head of the public entity shall respond to the complaints in writing. After that, the aggrieved

supplier or the public entity may¹⁷⁹ appeal to the Complaint Review Board, formed with the Private Sector, Public Enterprises, Procuring Entities, MoFED (the Chairman's), and FPPAA (Secretariat) within five days. Finally, if they are not satisfied with the decision of the Complaint Review Board, they can take the case to court.¹⁸⁰

¹⁷⁹ The Federal Democratic Republic of Ethiopia Public Procurement and Property Administration Agency, Manual on Public Procurement Complaint Procedure, (April 2011)

¹⁸⁰ Public procurement Proclamation, *supra* note 2, at Article 73

Chapter Four

Conclusion and Recommendation

4.1 Conclusion

The study focused on the competitiveness of Ethiopian PP and the prevalence of international PP and Competition Models in Ethiopian PP laws. Efficient PP depends on the proper awareness of the Competition and PP; policies, laws, principles, methods by relevant public bodies, the PP personnel, Bidders, transparency, accountability, integrity, and all stockholders' participation, including media the public. The study exposed the anti-competition practice in Ethiopian PP even though it found that the PP legislation is prepared based on the UNICTRAL Model¹⁸¹ on PP law¹⁸².

The findings show that the PP of Ethiopia lacks the following;

- 1 **Awareness;** The awareness of PP and competition principles, laws, regulations, directives, and manuals within public procurement personnel and Bidders are low.
- 2 **Transparency,** information on how the PP is processed is not adequately revealed to interested parties.
- 3 **Proper specifications:** The findings reveal a deliberate or negligent preparation of ambiguous, discriminating specifications and qualifications. Moreover, it is founded that procuring without specifications, evaluating below or above the requirements, and mentioning trademarks in specifications. Moreover, According to Article 16(5) of the PP directive,¹⁸³ only complex goods, works, and services required specifications; it stated that 'Public Bodies shall be required to draw up detailed technical specifications, especially for complex and high-cost procurements according to Article 29¹⁸⁴ of the Proclamation.' Thus, it creates a gap to procure without specifications for the goods, works, and services mentioned in Table 2.

¹⁸¹ UNCITRAL Model Law on Public Procurement (2014)

¹⁸² Document Of the World Bank, "International Development Association Program Paper on A Proposed Additional Credit in The Amount of 431 million (Us\$600 million Equivalent) And Additional Grant in The Amount of 72 million (Us\$100 million Equivalent) To the Federal Democratic Republic of Ethiopia for A Program-For-Results (ESPES)", For Official Use Only Report No: 115228-Et, August 22, 2017 p 146

¹⁸³ Directive, supra note 128

¹⁸⁴ Public procurement Proclamation, supra note 2

- 4 **Selection of the proper PP method;** The findings showed that the procurement units selected other methods than the preferred or open bid PP method or procured using direct or restricted PP method from one supplier without observing the requirements provided under the public procurement Proclamation and directives.
- 5 **Speedy PP,** PP process takes a lengthy time.
- 6 **Speedy payment:** the Bidders have complained about the delay of the PP payment system.
- 7 **Integrity:** Corruption is increasing in PP of Ethiopia.
- 8 **Competition between Bidders;** PP of Ethiopia manifest the prevalence of bid-rigging or collusion
- 9 **Self-regulation,** there is the absence of self-regulation within Bidders.
- 10 **Performance audit;** the Agency provided a compliance audit only.
- 11 **Professionals,** skilled human power is absent in the PP units and the ETCCPA.
- 12 **Good salary,** low Government salary scale is one of the reasons for the lack of PP professionals.
- 13 **Institutional frameworks:** there is impotence in FPPAA, PP units, and ETCCPA structure.
- 14 **Autonomy:** there is political influence, dependency on budgetary, and employment of skilled human resources on the executive branch of the Government.
- 15 **Coordination;** absence of Coordination of the Public Bodies with other organs having similar objectives
- 16 **Participation;** minute participation of relevant stakeholders, including Media, Academicians, and the general Public

Based on the standard of the perfectly competitive model, the anti-competitive PP of Ethiopia is summarized as the following;

- 1 **Few suppliers and many buyers;** Public Procuring Entities with huge budgets evidenced the availability of many buyers. However, the presence of many Bidders or seller is contrary; the Proclamation provisions which allowed procuring from one supplier or a few Bidders using; Restricted Tendering, Request for Quotation, Direct Procurement disclose the absence of many sellers or Bidders in supplying of some sectors of goods, works, and services.
- 2 **Difficulty to entry;** the entries into the PP processes are rigid, particularly for new Bidders because of high requirements and sophisticated specifications.

- 3 **Bidders dominate the market price;** the inability of Sellers or Bidders to exert any control over market price but are price takers is not the actual practice of the PP of Ethiopia. Collusion or bid rigging between Bidders in PP allows them to avoid the pressures of competition, with the result that the Public Bodies get less for their money or pays more than the market price.
- 4 **Absence of knowledge about market conditions;** sellers and buyers have complete information about the product's quality, quantity, and price in the perfectly competitive market. However, the lack of proper PP professionals contributes to the ignorance of the right qualities, quantities, and price of goods, works, and services required. Moreover, the corrupt procurement officials deliver decisive information to a particular Bidder with whom they committed the corruption; they even prepare the specification based on a Bidder's interest.
- 5 **monopolistically competitive market structure;** the pp market of Ethiopia mainly bestows A monopolistically competitive market structure. Bidders do not compete with the same products. Instead, they supplied different goods that empowered them to employ a degree of market power over their products exclusively.
- 6 **Fix prices;** the Ethiopian hybrid system of ETCCPA is inefficient in its balance. It is found that it focused more on consumer protection matters, particularly in price controls. Moreover, the authority issues many directives that fix the price of commodities contrary to the perfectly competitive model. Moreover, according to Article 16 (3) of the PP Proc. Contrary to free market system FPPPAA, gives warning to or suspend for a definite or indefinite period from participating in public procurement suppliers where it proves that they have offered a price higher than the market

4.2 Recommendations

- 1 To create awareness regarding the rules of PP, the FPPPAA should enhance the awareness through; continued training, giving short and long-term training, developing effective monitoring and evaluation instruments, advance structural and professional development.
- 2 There is no "one size fits all" procedure regarding transparency. The principle of transparency may be resulting in undesirable dissemination of commercially sensitive information. Therefore, bidding procedures should not provide sensitive information regarding the actions of other Bidders.

- 3 However, there should be easy access to the information on the rules of the process, decision-making, and enforcement of PP. Furthermore, the decisions of public officials should be reviewed.
- 4 The drafting of the technical bid specifications is a stage of the public procurement process that is vulnerable to corruption. Therefore, specifications should be precise, non-discriminatory, inclusive, and focus on functional performance. Furthermore, according to Article 29 of the Proclamation¹⁸⁵ and Article 16(5) of the PP directive¹⁸⁶, Public Bodies must only prepare detailed technical specifications for complex and high-cost procurements. Thus, the provisions opened a gap for procuring without specifications for goods, works, and services annexed on directive resulting in substantial loss of public resources. Therefore, the above provision should be reconsidered and amended. Furthermore, the technical specifications should be carefully drafted not to exclude potential Bidders, whether domestic or foreign. Therefore, careful attention is necessary to the tender specifications to ensure that the market is defined as widely as possible and barriers to entry are as low as possible.
- 5 Preventing the mismanagement of PP begins at an early stage in selecting the PP method; the FPPAA should be capable of regulating, training; the PP unites on delivering careful PP plane and selection of proper PP method. Furthermore, it should take appropriate measures on the PP units which intentionally or negligently did not follow the rules.
- 6 Bidders complain about Ethiopia's PP system's lengthy process and time-consuming, resulting in a change of price and unavailability of the goods and services when the purchasing order is awarded after a long time and the delay of payments. So, the Government should develop a fast PP and payment system, including e-procurement, to attract many participants to the PP.
- 7 Detecting and preventing corruption in PP requires considering the procurement procedure, the integrity of the PP officials, the parties involved, and the vast budget funded. Therefore, the Procurement officials' discretion should be less in PP, starting from planning the bid and selecting the PP methods and contract administrations. Thus, comprehensive preventive measures, precise regulation, transparent procedures, education, enhancing awareness through

¹⁸⁵ Ibid

¹⁸⁶ Directive, supra note 125

different media, developing PP officials' integrity, and disciplining them when they commit corruption should be developed.

- 8 The PP procurement staff should be aware of any bid-rigging indications provided under this paper, and different international recommendations, indicators like; a pattern of price increases that cannot be explained by cost increases, subcontracting to another bidder, or bidder participation that only benefit another bidder. Thus, the public entity should be retaining data from prior bids, and all information should be recorded so that a pattern of behavior can be established over time and should have developed checklists. Moreover, the data analysis should be implemented to find evidence indicating the bids were prepared by the same person or prepared jointly.
- 9 Facilitation of Bidders' self-regulation should be carefully implemented. Bidders may make rules disciplinary action on their members. Self-regulation should be supervised not to utilize as an instrument for collusion and other anti-competition practices.
- 10 The Agency should implement a performance audit in addition to the compliance audit. The research shows that the FPPPAA provides a compliance audit. Making a performance audit while the PP is processed prevents abuse of the taxpayers' money on time. It also boosts efficiency, accountability, and transparency in PP.
- 11 In order to enforce competitive PP, the authorities should be independent of political and budgetary influence. Moreover, they should enhance inspection, criminal prosecutions, civil proceedings, and administrative actions without any interference. Thus, FPPPAA should be accountable to the parliament and have the necessary budget and freedom of hiring professionals without being limited by civil service employment rules.
- 12 The authority's effectiveness depends on institutional development, human resources, and the financial capacity of the authority. The survey result manifested a lack of skilled human resources in the PP units and competition authority because of the low Government salary scale. The Governmental bodies need to hire skilled staff by reconsidering their salary scale, designing incentive programs to motivate good performance, and employing qualified procurement professionals.
- 13 There should be coordination and cooperation between authorities with similar objectives, particularly between FPPPAA, ETCCPA and Central Statistics Agency as Art16.14.2 D of the Directives also referred. Coordination of the Public Bodies with other organs having similar

objectives is crucial for properly implementing competitive PP. It avoids jurisdictional overlap or duplication of effort and facilitates evidence-sharing. Therefore, they should support one another for the benefit of the common end.

- 14 Government bodies, firms, media, academia, and the general public should strengthen their participation for better results or developing an efficient PP system.
- 15 Barriers to entry into PP and a few Bidders facilitate collusion and limit the competitiveness of PP. A few Bidders also decrease the competition in PP, affect the value for money principle, and increase bid-rigging. Therefore, barriers should be eliminated, and careful attention is necessary when preparing specifications and requirements. Furthermore, it should be carefully drafted not to exclude potential domestic or foreign Bidders for ensuring that the market is defined as widely as possible and barriers to entry are as low as possible. In addition, the cost of participation in PP, including the expense for Bid Security, should be affordable to small businesses, and the access of bids should be facilitated, e.g., employing electronic bidding systems.
- 16 The study found that few Bidders dominate the PP and the price they have offered is above the market price, So the Government should gather the actual market price with the appropriate professionals in addition in cooperation with the central statistics agency of Ethiopia.
- 17 Before preparing the specification, the PP officials should recognize the quality of goods, works, and services. However, the study found that the preparation of specification is done by a civil servant who does not have special knowledge about the detailed qualities of the goods works and services. Thus, the PP should not require the demand only; instead, the specifications should be prepared by an appropriate professional, and they should have the information about the market, including the better season for a good supply of the demands.
- 18 Even though a few homogenous product supplies facilitate collusion, when there are many homogenous products, the Public Body benefits from the competition; thus, the Government should encourage the entry of goods works and services and procuring using ICB and decrease the irrelevant requirements and high qualifications.
- 19 Even though the Hybrid laws and authorities of ETCCPA save resources, the Ethiopian hybrid system is inefficient in its balance. Thus, it should enforce consumer protection and anti-competition matters in balance. In addition, it should decrease interference by fixing the market price; instead, it should encourage price determination by the market.

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