

SECTION III – ASSESSMENT OF PUBLIC PROCUREMENT SYSTEMS

Pillar I. Legal, Regulatory and Policy Framework

Pillar I assesses the existing legal, regulatory and policy framework for public procurement. It identifies the formal rules and procedures governing public procurement and evaluates how they compare to international standards. The practical implementation and operation of this framework is the subject of Pillars II and III. The indicators within Pillar I embrace recent developments and innovations that have been increasingly employed to make public procurement more efficient. Pillar I also considers international obligations and national policy objectives to ensure that public procurement lives up to its important strategic role and contributes to sustainability.

Pillar I refers to four elements of the legal, regulatory and policy framework:

- i)* the supreme legal instrument governing public procurement (laws, acts, decrees)
- ii)* regulations and other instruments that are of a more administrative nature
- iii)* procurement-related provisions in other national laws (e.g. laws governing public private partnerships and concessions, trade and competition, access to information, anti-corruption, alternative dispute resolution, state-owned enterprises, etc.)
- iv)* obligations deriving from international agreements to ensure consistency and policy coherence.

Indicator 1. The public procurement legal framework achieves the agreed principles and complies with applicable obligations.

The indicator covers the different legal and regulatory instruments established at varying levels, from the highest level (national law, act, regulation, decree, etc.) to detailed regulation, procedures and bidding documents formally in use. This indicator is divided into 12 sub-indicators (a-l), which are individually assessed.

Sub-indicator 1(a) – Scope of application and coverage of the legal and regulatory framework

The purpose of this sub-indicator is to determine: i) the structure of the regulatory framework governing public procurement; ii) the extent of its coverage; and iii) the public access to the laws and regulations.

The assessor should evaluate the adequacy of the structure of the legal framework, its clarity and the precedence of the different instruments. It is important that the legal framework is differentiated and distinguishes between laws, regulations and procedures and that precedence be firmly established, to minimise inconsistencies in application. Higher-level instruments should normally be less detailed and more stable, since their modification requires higher levels of authority. The higher a provision is placed in the hierarchy of the legal framework, the more stable it is. This means that lower-level instruments should be chosen to regulate more detailed procedures for implementation that require some flexibility (e.g. thresholds).

The assessor should evaluate the extent to which the legal framework applies to all procurement undertaken using public funds (goods, works and services, including consulting services). In addition, the assessor should assess the extent to which national legislation applies to all public bodies and sub-national governments and entities, when national budget funds are used either directly or indirectly.

One aspect to evaluate is whether the laws or regulations exclude particular agencies or areas of public expenditure from the provisions of the law (i.e. the army, defence or similar expenditures, autonomous or specialised state-owned enter-

prises, as well as utility companies with special or exclusive rights). This also includes assessing whether these exclusions are established by law or can be made administratively without public oversight. The assessor should also evaluate whether the public procurement law or other national laws support and regulate the contracting of other forms of public service delivery that are closely related to public procurement, such as public/private partnerships (PPPs), including concessions. (Specific characteristics are assessed under sub-indicator 1(l)).

Uniformity and universality of coverage contribute to predictability and savings in the operation of the procurement system. Access to the rules and regulations contribute to transparency, which results in more economic procurement.

Laws and policies can be made accessible by keeping them in places that are easily accessible to the public. Preferably, the information should be published on line on a single, freely accessible online portal (refer to sub-indicator 7(a)). If the information is primarily posted on the Internet, the assessor should verify whether the information is accessible to the public and regularly updated.

Assessment criteria

The legal and regulatory body of norms complies with the following conditions:

- (a) Is adequately recorded and organised hierarchically (laws, decrees, regulations, procedures), and precedence is clearly established.
- (b) It covers goods, works and services, including consulting services for all procurement using public funds.
- (c) PPPs, including concessions, are regulated.
- (d) Current laws, regulations and policies are published and easily accessible to the public at no cost.¹⁰

Sub-indicator 1(b) – Procurement methods

This sub-indicator assesses whether the legal framework includes: i) a clear definition of the permissible procurement methods; and ii) the circumstances under which each method is appropriate.

The legal framework should provide an appropriate range of procurement methods comprising competitive and less competitive procedures, when appropriate.¹²

The law and regulations should define the situations in which open tendering or alternatives procurement methods can be used and ensure that acceptable justification and approval levels are clearly specified. The application of procurement methods and processes should be proportional to the value and risks of the underlying project activities. This means that in procurement projects with low value or lower risks, lighter methods – such as restricted tendering, request for quotations, etc. – can be applied, when the benefits of some “process-heavier” methods are not evident or necessary. Although open (competitive) tendering should be the standard procurement method, the choice of the method should also depend on the time it takes to follow through on the procedure and strive to avoid delays.

The use of direct awards (single-source procurement) should be analysed and its justifications understood. It is also important to understand how the justifications to avoid more competitive procedures are being used in general. For example, urgency is often an excuse not to use open tendering. However, justifying single-source procurement on the grounds

11 PEFA PI-24.3 (1)

12 The UNCITRAL Model Law on Public Procurement (2011), for example, provides terms, model definitions and procedures for different options (Refer to Chapters II-VII). When specific procurement methods are mentioned in this document, the terms established by UNCITRAL are used.

of an emergency should be permitted only in the exceptional circumstances of a catastrophic event, where there is an extremely important need and where any other method of procurement would be impractical given the time constraints. It should not, however, be used simply because of poor planning.

Fractioning of contracts to avoid open competition should be prohibited, when it aims at circumventing competitive rules.

The legal framework should restrict individual agencies' or procurement officials' discretion. This should result in minimal use of procurement methods that limit competition.

Assessment criteria

The legal framework meets the following conditions:

- (a) Procurement methods are established unambiguously at an appropriate hierarchical level, along with the associated conditions under which each method may be used.
- (b) The procurement methods prescribed include competitive and less competitive procurement procedures and provide an appropriate range of options that ensure value for money, fairness, transparency, proportionality and integrity.
- (c) Fractioning of contracts to limit competition is prohibited.
- (d) Appropriate standards for competitive procedures are specified.

Sub-indicator 1(c) – Advertising rules and time limits

This sub-indicator assesses whether: i) the legal framework includes requirements to publish procurement opportunities as a matter of public interest and to promote transparency; ii) there is wide and easily accessible publication of business opportunities; and iii) there is adequate time provided between publication of opportunities and the submission date, consistent with the method and complexity of the procurement, to prepare and submit proposals.

Time between publication of the invitation for prequalification applications, or for an open tender and the submission of proposals, depends on the complexity of the procurement and the level of competition expected. If foreign bidders are expected to compete, this is a factor to consider. The law and regulations should establish the criteria for setting the minimum time between the call for proposals and their submission. The timelines may be shortened in case of electronic transmission of procurement notices and bidding documents.

Assessment criteria

The legal framework meets the following conditions:

- (a) The legal framework requires that procurement opportunities are publicly advertised, unless the restriction of procurement opportunities is explicitly justified (refer to indicator 1(b)).
- (b) Publication of opportunities provides sufficient time, consistent with the method, nature and complexity of procurement, for potential bidders to obtain documents and respond to the advertisement. The minimum time frames for submission of bids/proposals are defined for each procurement method, and these time frames are extended when international competition is solicited.
- (c) Publication of open tenders is mandated in at least a newspaper of wide national circulation or on a unique Internet official site where all public procurement opportunities are posted. This should be easily accessible at no cost and should not involve other barriers (e.g. technological barriers).
- (d) The content published includes enough information to allow potential bidders to determine whether they are able to submit a bid and are interested in submitting one.

Sub-indicator 1(d) – Rules on participation

This sub-indicator assesses the policies that regulate participation and selection, to ensure that they are non-discriminatory. As a general principle, firms, including qualified foreign firms, should not be excluded from participating in a procurement process for reasons other than lack of qualifications, and only in accordance with clearly specified rules on eligibility and exclusions.

There may be cases in which the legal framework will allow restrictions that require purchasing from or associating with domestic firms, or that mandate the inclusion of a minimum of locally manufactured content. Many countries also allow price preferences for domestic firms. Such local content requirements or preferences should be in line with the country's international obligations (e.g. the World Trade Organization-Agreement on Government Procurement, association agreements or free-trade agreements ratified by the country). Excessive price preferences or other concessions for certain groups of bidders can deter competition and reduce efficiency. The assessor should evaluate whether the provisions are adequate and justified, and make sure that they do not undermine the economy and efficiency of the system. The regulatory framework should not oblige foreign firms to associate with local firms or to establish subsidiaries in the country as a condition of bidding. These conditions may promote oligopolistic or monopolistic conditions, rather than promoting the development of local industry, and can become a de facto barrier to competition.

Registration should not be a barrier to participation in a procurement process.

The law should provide for exclusions for criminal or corrupt activities, debarment, subject to due process, and for the prohibition of commercial relations in cases of criminal activity. Firms or individuals that have been the subject of a conviction by final judgment for one of the following reasons should be excluded from participation: participation in a criminal organisation; corruption as defined in the national law of the contracting authority or the firm/individual; fraud; terrorist offences or offences linked to terrorist activities, or inciting or aiding or abetting or attempting to commit such an offence; money laundering or terrorist financing; child labour; and all forms of trafficking in human beings.

The process for reaching decisions on administrative debarment (e.g. failure to perform in earlier contracts, etc.) should be clearly defined, including the process related to any possible appeals. Other legitimate exclusions (e.g. prohibition of commercial relations by law or adherence to UN Security Council sanctions) should be prescribed. Additionally, there may be international agreements that limit participation to members of the agreements.

Participation of state-owned enterprises should be governed by rules that create a level playing field for all competitors

and should not be granted preferential treatment in the form of subsidies or tax exemptions, etc.

The legal framework should detail the procedures that can be used to assess a bidder's eligibility and ability to perform a specific contract. This assessment can be combined with the procurement documents as part of the specific procurement, or it can be initiated as a separate exercise that is conducted before full offers are requested.

In highly complex procurement, use of multi-stage procedures (for example, pre-qualification or competitive dialogue) can make the procurement more efficient by ensuring that only eligible and qualified participants are included. It can also save money by limiting the number of participants that incur the expense of putting together a comprehensive bid. The circumstances under which multi-stage procedures may be used should be clearly defined, to ensure that they are not abused or used as a method for limiting competition by overstating the qualification requirements. .

Assessment criteria

The legal framework meets the following conditions:

- (a) It establishes that participation of interested parties is fair and based on qualification and in accordance with rules on eligibility and exclusions.
- (b) It ensures that there are no barriers to participation in the public procurement market.
- (c) It details the eligibility requirements and provides for exclusions for criminal or corrupt activities, and for administrative debarment under the law, subject to due process or prohibition of commercial relations.
- (d) It establishes rules for the participation of state-owned enterprises that promote fair competition.
- (e) It details the procedures that can be used to determine a bidder's eligibility and ability to perform a specific contract.

Sub-indicator 1(e) – Procurement documentation and specifications

The sub-indicator assesses the degree to which the legal framework specifies the content of procurement documents, to enable suppliers to understand clearly what is requested from them and how the procurement process is to be carried out.

Procurement documents should contain sufficient information to enable the submission of responsive tenders/bids/proposals and to establish the basis for a transparent evaluation and award process. Details of the requirements included in the procurement documents should be neutral and refer to international standard specifications where possible or other officially recognised norms that are essentially equivalent to the ones specified. The legal framework should permit and encourage the use of output-based (functional) specifications to promote innovation, when appropriate.

It is important that the content requirements for procurement documents are relevant to making an award decision. Information that is not needed for the process should not be required as part of the submission. Excessive information and documentation requirements are considered to cost money and can reduce competition or lead to disqualification of potential bidders on grounds of unnecessary requirements.

Assessment criteria

The legal framework meets the following conditions:

- (a) It establishes the minimum content of the procurement documents and requires that content is relevant and sufficient for suppliers to respond to the requirement.
- (b) It requires the use of neutral specifications, citing international norms when possible, and provides for the use of functional specifications where appropriate.
- (c) It requires recognition of standards that are equivalent, when neutral specifications are not available.
- (d) Potential bidders are allowed to request a clarification of the procurement document, and the procuring entity is required to respond in a timely fashion and communicate the clarification to all potential bidders (in writing)

Sub-indicator 1(f) – Evaluation and award criteria

This sub-indicator assesses: i) the quality and sufficiency of the legal framework provisions in respect to the objectivity and transparency of the evaluation process; and, ii) the degree of confidentiality maintained during the process, to minimise the risk of undue influences or abuse.

Pre-disclosed and objective criteria are essential for efficiency, fairness and transparency in the evaluation of bids and proposals. Objectivity means that there is little room for subjective interpretation of the criteria by the evaluator. Vague criteria (e.g. an award to the bid/proposal most convenient for the interests of the state) are not acceptable.

Evaluating and considering the price alone does not in all cases ensure value for money. The principle of value for money requires the evaluation of relevant costs and benefits, along with an assessment of risks and non-price attributes and/or life cycle costs, as appropriate. The legal framework should therefore permit the use of price and non-price attributes and/or the consideration of life cycle costs and environmental/social characteristics, as appropriate in the relevant procurement to ensure value-for-money decisions.

The procuring entity needs to identify the bidders that meet the qualification criteria stipulated in the procurement document, in accordance with applicable rules on eligibility and exclusions. The submitted bid/proposal needs to be substantially responsive. The contract should be awarded to the bidder whose bid/proposal has been determined to offer the lowest evaluated price/cost (if price/cost is the sole criterion) or whose bid/proposal has been determined to be the best evaluated bid/proposal based on the award criteria defined in the procurement document.¹³

Technical capacity and quality are usually key criteria for selection of a large number of procurement processes, including complex procurement, infrastructures, framework agreements or consulting services. While technical qualifications can be assessed by a pass/fail review, in some cases, a scored evaluation of technical qualification against stated criteria is considered necessary to select the most advantageous proposal. The law should specify how this aspect is to be considered. The law should also lay out the conditions under which selection of consulting services may be based exclusively on technical capacity and when price and quality considerations are appropriate.

For cases in which a combination of price/cost and technical capacity or other requirements is permitted by law, the law or regulations should require that the procurement documents state: i) the relative weight to be allocated to the criteria; and ii) the manner in which these criteria are combined. When life-cycle costing is used, the method by which the contracting entity will determine the life-cycle costs (e.g. the consideration of net present value) and the data the bidders

13 Some legal frameworks use the term “most economically advantageous tender” (MEAT).

should provide to make this determination, should be specified. The regulatory framework should prohibit the use of evaluation and award criteria different from those set out in the procurement documents.

Confidentiality and regulated communications with the bidders during the pre-tendering, tendering and evaluation period are necessary to avoid abuse and undue interference in the process. The pre-tendering and tendering include the corresponding clarifications, and the evaluation period runs from the conclusion of the bid opening to the point at which the award of the contract is decided and announced.

Information related to the evaluation process and results should be disclosed to interested parties after the evaluation is complete. There should be rules of disclosure that protect information provided by bidders that is of proprietary nature, or commercially or financially sensitive.

Assessment criteria

The legal framework mandates that:

- (a) The evaluation criteria are objective, relevant to the subject matter of the contract, and precisely specified in advance in the procurement documents, so that the award decision is made solely on the basis of the criteria stipulated in the documents,
- (b) The use of price and non-price attributes and/or the consideration of life cycle cost is permitted as appropriate to ensure objective and value-for-money decisions.
- (c) Quality is a major consideration in evaluating proposals for consulting services, and clear procedures and methodologies for assessment of technical capacity are defined.
- (d) The way evaluation criteria are combined and their relative weight determined should be clearly defined in the procurement documents.
- (e) During the period of the evaluation, information on the examination, clarification and evaluation of bids/proposals is not disclosed to participants or to others not officially involved in the evaluation process.

Sub-indicator 1(g) – Submission, receipt and opening of tenders

This sub-indicator assesses how the legal framework regulates the reception of tenders¹⁴ and tender opening. Public opening of tenders is a means of increasing the transparency of an open tendering exercise. In cases in which the law prescribes public opening of tenders, bidders or their representatives should be permitted to attend, as well as others with a legitimate interest in the outcome (e.g. representatives of civil society organisations). Opening immediately after the deadline for submission of tenders reduces the possibility of loss or alteration of proposals or submissions.

The exception to this rule may be opening of pre-qualification submissions, including expressions of interest or opening of technical proposals for consulting services (which are not priced), in which case they may be opened privately, followed by a simple notification to all participants of the list of submissions.

14 In this context, the term “tender” is used interchangeably with “bids” or “proposals”.

The law or regulations should establish the information that should be read and recorded for open tendering:

- names and addresses of the bidders
- date and condition the tender was received (to determine compliance with formal requirements)
- tender prices
- any withdrawals or modifications to tenders duly submitted
- any alternative offers requested or permitted (name of bidder, tender prices).

Records should be retained and be available for review and audit purposes.

Clarity on how bids are submitted is critical in minimising rejection of otherwise compliant proposals. The law and the regulations should set out clear provisions in this respect. For example, the number of copies, the sealing and marking of envelopes and in the case of electronic bidding, the security and confidentiality requirements should all be specified.

The bids should be kept secure and confidential prior to bid opening and until after contract award. Publication requirements notwithstanding (refer to sub-indicator 7(a)), the system should at all times take into account the legitimate needs for protection of trade secrets and proprietary information and other privacy concerns, as well as the need to avoid disclosing information that can be used by interested parties to distort competition in the procurement process. The legal framework should include definitions and provisions to unambiguously identify and protect specific sensitive information.

Assessment criteria

The legal framework provides for the following provisions:

- (a) Opening of tenders in a defined and regulated proceeding, immediately following the closing date for bid submission.
- (b) Records of proceedings for bid openings are retained and available for review.
- (c) Security and confidentiality of bids is maintained prior to bid opening and until after the award of contracts.
- (d) The disclosure of specific sensitive information is prohibited, as regulated in the legal framework.
- (e) The modality of submitting tenders and receipt by the government is well defined, to avoid unnecessary rejection of tenders.

Sub-indicator 1(h) – Right to challenge and appeal

The purpose of this indicator is to assess whether the legal framework establishes: i) the right to challenge¹⁵ decisions or actions and to appeal; ii) the matters that are subject to review; iii) the time frame for such reviews; and iv) the different stages in the review process.

Confidence in a procurement system is a powerful incentive to competition. A fundamental part of this is the establishment of the right to challenge decisions or actions by initiating a review of procurement decisions and to appeal by an efficient and functionally independent process. Even though the first review is normally carried out by the procurement entity, there should be an administrative/judicial review body that is independent of the procuring entity. This means that this body has no direct interest in the procurement process, does not report to the procuring entity, and, ideally, is a separate agency or entity.

The legal framework should provide for the right of a participant in a procurement proceeding to challenge decisions or actions

¹⁵ The terms used in this document (“challenge/reviews” and “appeal mechanism”) are interchangeable with terms used in other international procurement instruments such as complaints or protests and review mechanisms or remedies, respectively.

by a procuring entity. This can be done by asking for a review if the participant believes he/she is entitled to claim that he/she has suffered or may suffer loss or injury because of the alleged noncompliance of a decision or action with the provisions of the law.

Applications for a review (challenge) should be submitted to the institution in charge¹⁶ within defined time periods. If the challenges relate to the terms of the solicitation, pre-qualification or pre-selection, they should be submitted prior to the deadline for presenting bids. Challenges relating to other decisions or actions should be submitted prior to the entry into force of the procurement contract, or within the standstill period following the notification of award, if applicable.

The institution in charge of the review should be required to take appropriate actions within a defined time frame (e.g. decide if the application shall be entertained or dismissed and if procurement proceedings shall be suspended; notify the applicant and other participants in the procurement proceedings; take and issue its decision).

The legal framework should provide for the right to appeal a decision following a first review to an independent body (appeals body) within specified timelines. This right should extend to cases in which the institution in charge of the review has failed to issue a decision. The appeals body should have the authority to order the suspension of procurement proceedings, dismiss an application where it decides that it is without merit or was not presented within the specified deadlines, and take and issue decisions appropriate in the circumstances. This should include the authority to confirm, overturn or revise a decision taken by the procuring entity or to prohibit the procuring entity from following a procedure that is not in compliance with the provisions of the law observing defined time frames. The legal framework should specify the range of available remedies in compliance with good international practice.¹⁷

Appeals to and decisions by the independent appeals body should be public by law and posted in easily accessible places, preferably on a central online platform within specified timelines. The publication of decisions allows interested parties to be better informed as to the consistency and fairness of the process. Publications should be in line with legislation protecting sensitive information.

This sub-indicator is closely linked to Indicator 13 (Efficiency of appeals mechanism).

Assessment criteria

The legal framework provides for the following:

- (a) Participants in procurement proceedings have the right to challenge decisions or actions taken by the procuring entity.
- (b) Provisions make it possible to respond to a challenge with administrative review by another body, independent of the procuring entity that has the authority to suspend the award decision and grant remedies, and also establish the right for judicial review.
- (c) Rules establish the matters that are subject to review.
- (d) Rules establish time frames for the submission of challenges and appeals and for issuance of decisions by the institution in charge of the review and the independent appeals body.
- (e) Applications for appeal and decisions are published in easily accessible places and within specified time frames, in line with legislation protecting sensitive information.
- (f) Decisions by the independent appeals body can be subject to higher-level review (judicial review).

¹⁶ In many countries, the procuring entity is in charge of responding to an application for a first review (challenge). In some countries, complaints may be sent directly to the independent appeals body.

¹⁷ For example, the UNCITRAL Model Law on Public Procurement (2011), Chapter VIII. Challenge proceedings, Article 9, describes the range of actions that should be at the disposal of an appeals body.

Sub-indicator 1(i) – Contract management

The purpose of this sub-indicator is to assess whether the legal framework establishes the following: i) functions and responsibilities for managing contracts; ii) methods to review, issue and publish contract amendments in a timely manner; iii) requirements for timely payment; and iv) dispute resolution procedures that provide for an efficient and fair process to resolve disputes during the performance of the contract.

To ensure complete and timely implementation of the contract, the following functions and responsibilities for managing contracts should be defined in the legal and regulatory framework:

- monitoring the timely delivery of goods, works and services, including consulting services (“products”)
- inspection, quality control, supervision of civil works and final acceptance of products;
- monitoring of contract performance clauses designed to ensure social or environmental standards, e.g. compliance with International Labour Organization core conventions, application of specific environmental management measures for construction works, etc.
- review, issuance and publication of contract amendments
- examination of invoices and timely processing of payments, including administration of guarantees
- handling of disputes/termination of contracts.

The legal framework should determine the conditions for contract amendments and extensions, to ensure economy and avoid the arbitrary limitation of competition. The legal framework should also define suppliers’ rights in case of late payment.

Disputes during the performance of a contract are a common occurrence. Naturally, disputes can be resolved through judicial proceedings. In some countries, however, litigation may take years to conclude, and the costs may be prohibitive. To avoid long delays in resolving disputes, it should be the policy of the country to accept alternative dispute resolution (ADR). Methods of ADR refer to any means of settling disputes outside the courtroom. Arbitration and mediation are two major forms of ADR.

A framework should be in place that provides for fair and timely resolution, including procedures to enforce the final outcome of a dispute resolution process. For example, there should be an Arbitration Law in the country and the law should be consistent with generally accepted practices for neutrality of arbitrators, due process, expediency and enforceability. The country could accept as a matter of course international arbitration as appropriate. The following are some proposed examples providing for enforcement of the final outcome of an arbitration process: i) the country is a member of the New York Convention on enforcement of international arbitration awards; and ii) the country has procedures to enable the winner in a dispute to seek enforcement of the outcome by going to the courts.

Assessment criteria

The legal framework provides for the following:

- (a) Functions for undertaking contract management are defined and responsibilities are clearly assigned,
- (b) Conditions for contract amendments are defined, ensure economy and do not arbitrarily limit competition.
- (c) There are efficient and fair processes to resolve disputes promptly during the performance of the contract.
- (d) The final outcome of a dispute resolution process is enforceable.

Sub-indicator 1(j) – Electronic procurement (e-Procurement)

This sub-indicator assesses the extent to which the legal framework addresses, permits and/or mandates the use of

electronic methods and instruments for public procurement. The more sophisticated the use of electronic technologies, the more specific are the standards needed to ensure consistent application of the technology, provide for unrestricted and full access to the system, and ensure privacy and security of data and authentication. The use of electronic methods requires standardised formats, technical equipment and connection arrangements, and procedures to grant unrestricted and full access to the e-Procurement system.

An important part of using electronic methods in procurement is the requirement for governments to inform potential bidders which parts of the processes will be managed electronically (e.g. availability of procurement documents, communication, bid submission, contract awards, billing and payments, etc.). The legal framework also needs to clarify whether conventional paper-based procurement is still allowed, whether in parallel or as an alternative to the electronic procurement proceedings.

Assessment criteria

The legal framework meets the following conditions:

- (a) The legal framework allows or mandates e-Procurement solutions covering the public procurement cycle, whether entirely or partially.
- (b) The legal framework ensures the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.
- (c) The legal framework requires that interested parties be informed which parts of the processes will be managed electronically.

Further analysis: MAPS Module e-Procurement

Sub-indicator 1(k) – Norms for safekeeping of records, documents and electronic data

The ability to look at implementation performance depends on the availability of information and records that track each procurement action. This information is also important for the functioning of both internal and external control systems, as it provides the basis for review.

A system for safekeeping of records and documents should cover the entire procurement process, including contract management, and, at a minimum, include either physical and/or electronic:

- public notices of procurement opportunities
- the procurement method, including justification
- a complete set of bidding/selection documents, including clarifications and any amendments
- bid/proposal opening records
- evaluation reports, including clarifications sought and provided during the evaluation process
- award decisions, including all elements on which the decision was based
- award notices (if applicable)
- formal challenges (requests for review and appeals) by bidders and outcomes
- final signed contract documents and amendments
- contract variations, modifications and changes
- certificates and reports of inspection, quality control and acceptance
- claims and dispute resolutions
- payments
- disbursement data (as required by the country's financial management system)
- any correspondence, meeting notes and minutes, including contract negotiations (if applicable).

There should be a document retention policy that is compatible with the statute of limitations in the country for investigat-

ing and prosecuting cases of fraud and corruption and with the audit cycles. There should also be established security protocols to protect records, either physical or electronic.

Assessment criteria

The legal framework provides for the following:

- (a) A comprehensive list is established of the procurement records and documents related to transactions including contract management. This should be kept at the operational level. It should outline what is available for public inspection including conditions for access.
- (b) There is a document retention policy that is both compatible with the statute of limitations in the country for investigating and prosecuting cases of fraud and corruption and compatible with the audit cycles.
- (c) There are established security protocols to protect records (physical and/or electronic).

Sub-indicator 1(l) – Public procurement principles in specialised legislation

Many countries have adopted specialised legislation governing procurement by entities in the utilities sector, such as water, energy, transport, postal services, etc., and/or regulating the selection and award of concession contracts and other forms of PPPs. This sub-indicator assesses whether public procurement principles (e.g. competitive procedures, transparency, fairness, value-for-money decisions) and related laws apply across the entire spectrum of public service delivery as appropriate.

It is important to understand the competition policies that apply to different sectors and what the specific conditions for conducting public procurement processes in these sectors are. Given the possibility that special or exclusive rights may exist governing the supply or operation of these entities, the market in which these entities operate may be restricted. The range of available procurement methods, the situation in which they can be used, the thresholds, advertising rules and time limits, transparency requirements, risk allocation, challenge and appeals mechanisms and so on, may be regulated in a manner specific to the sector.

Similar questions apply to the selection and contracting of concessions and/or other forms of PPPs. The assessor should describe the government's policy related to PPPs and evaluate to what extent public procurement principles and laws apply in the process of establishing partnerships with private firms. Alternative or supplementary legislation/regulation should be described. Responsibilities for developing policies and supporting the implementation of PPPs should be clearly assigned.

Assessment criteria

The legal and regulatory body of norms complies with the following conditions:

- (a) Public procurement principles and/or the legal framework apply in any specialised legislation that governs procurement by entities operating in specific sectors, as appropriate.
- (b) Public procurement principles and/or laws apply to the selection and contracting of public private partnerships (PPP), including concessions as appropriate.
- (c) Responsibilities for developing policies and supporting the implementation of PPPs, including concessions, are clearly assigned.

Further analysis: MAPS Module on Public Private Partnerships (PPP)

Indicator 2. Implementing regulations and tools support the legal framework.

This indicator verifies the existence, availability and quality of implementing regulations, operational procedures, handbooks, model procurement documentation and standard conditions of contract. Ideally the higher-level legislation provides the framework of principles and policies that govern public procurement. Lower-level regulations and more detailed instruments supplement the law, make it operational and indicate how to apply the law to specific circumstances. This indicator consists of four sub-indicators (a-d).

Sub-indicator 2(a) – Implementing regulations to define processes and procedures

This sub-indicator aims at verifying the existence, clarity, accessibility and comprehensiveness of regulations to the law that further detail and clarify its application. Regulations are an important aspect of a procurement system, as they provide the detail that explains and enables the application of the legal framework in a variety of applications. Regulations should be available to the public in a single accessible place.

Assessment criteria

- (a) There are regulations that supplement and detail the provisions of the procurement law, and do not contradict the law.
- (b) The regulations are clear, comprehensive and consolidated as a set of regulations readily available in a single accessible place.
- (c) Responsibility for maintenance of the regulations is clearly established, and the regulations are updated regularly.

Sub-indicator 2(b) – Model procurement documents for goods, works and services

Model documents of good quality create level playing fields, improve overall procurement standardisation, promote competition and increase confidence in the system. Potential suppliers are more willing to participate when they are familiar with the documents and their interpretation. Model documents should contain the basic required clauses that will be incorporated into contracts. This enables participants to evaluate the cost and risk of mandatory clauses when fulfilling a contract for the government. Model documents should also refer to the standstill period, if applicable, and address the right to challenge decisions or actions and to appeal. If model documents are not available, there should be, at a minimum, a set of standard and mandatory clauses and templates that will help in the formulation of the procurement documents.

Assessment criteria

- (a) There are model procurement documents provided for use for a wide range of goods, works and services, including consulting services procured by public entities.
- (b) At a minimum, there is a standard and mandatory set of clauses or templates that reflect the legal framework. These clauses can be used in documents prepared for competitive tendering/bidding.
- (c) The documents are kept up to date, with responsibility for preparation and updating clearly assigned.

Sub-indicator 2(c) – Standard contract conditions

This sub-indicator focuses on standard contract conditions for public sector contracts covering goods, works and services, including consulting services that set forth the basic provisions that will be included in a contract with the government. Standard contract conditions, also often referred to as general contract conditions (GCC), are based on the laws in the country and generally reflect the commercial codes that deal with contracts between parties. Contract conditions often influence pricing. It is thus important that participants in procurement proceedings know the conditions under which they will perform a contract before they submit a price. The standard contract conditions provide information that enables participants to understand the allocation of risk between parties to a contract as well as other obligations that the signatories to the contract will incur.

It is important that the government establish standard contract conditions that are fair and balanced and reflect laws that impact contracts and their performance. Standard contract conditions should also cover some practical aspects of contract implementation, e.g. general conditions on inspection, quality control and final acceptance of products, and general procedures relating to invoicing and payment. Standard contract conditions should also include provisions on dispute resolution. Alternative Dispute Resolution (ADR), specifically through arbitration, should conform to international standard wording and be used as appropriate. Contract templates can provide an additional source of predictability for participants.

Standard contract conditions need to be mandatory in their use and not subject to negotiations on terms and conditions of contract.

Assessment criteria

- (a) There are standard contract conditions for the most common types of contracts, and their use is mandatory.
- (b) The content of the standard contract conditions is generally consistent with internationally accepted practice.
- (c) Standard contract conditions are an integral part of the procurement documents and made available to participants in procurement proceedings.

Sub-indicator 2(d) – User’s guide or manual for procuring entities

This sub-indicator covers the existence of a user’s guide or manual for procuring entities. This is an important implementation tool that can help provide staff with information that incorporates the law, policy and procedures and helps turn policy into practice. Such tools are more important as a system becomes more decentralised. Creating a manual or user’s guide is often a function of a normative/regulatory body and can help create a consistency of application within the government procurement system. Although not a substitute for training, a manual can contribute to building and maintaining capacity and provides an easy reference for users. Guidance should be specific and comprehensive.

Assessment criteria

- (a) There is (a) comprehensive procurement manual(s) detailing all procedures for the correct implementation of procurement regulations and laws.
- (b) Responsibility for maintenance of the manual is clearly established, and the manual is updated regularly.

Indicator 3. The legal and policy frameworks support the sustainable development of the country and the implementation of international obligations.

This indicator assesses whether horizontal policy objectives, such as goals aiming at increased sustainability, support for certain groups in society, etc., and obligations deriving from international agreements, are consistently and coherently reflected in the legal framework, i.e. whether the legal framework is coherent with the higher policy objectives of the country. The indicator is broken down into two sub-indicators (a-b), which are individually assessed.

Sub-indicator 3(a) – Sustainable Public Procurement (SPP)

The 2030 Agenda for Sustainable Development promotes public procurement practices that are sustainable in accordance with national policies and priorities (Sustainable Development Goal 12.7).¹⁸ Following up on more general information gathered in the analysis of the country context (Section II), this sub-indicator assesses whether:

- i) the country has adopted a policy and an implementation plan to implement Sustainable Public Procurement (SPP)¹⁹ in support of national policy objectives
- ii) the legal and regulatory framework includes provisions on the inclusion of sustainability criteria in public procurement
- iii) those provisions require a well-balanced application of sustainability criteria to ensure value for money.

To be effective, SPP should be incorporated in programmes that are part of the country's sustainable development strategy, and their objectives should be consistent with the objectives of public procurement, such as economy, efficiency and transparency, as articulated in Pillar I. An in-depth assessment determining the status quo as well as opportunities for SPP should be conducted to inform the strategic planning process for SPP. The strategic plan should include objectives, indicators and targets in support of national policy objectives. Implementation of SPP should take into account the capacity and training/development needs of the procurement workforce, the development and application of new tools and techniques, prioritisation of measures, impact assessment methodologies to measure the effectiveness of SPP, and the provision of guidance material. It is also necessary to decide which institution is best suited to manage and oversee the nationwide deployment of SPP and/or whether new institutions need to be established (e.g. certification institutions or product-testing facilities).

Assessment criteria

- (a) The country has a policy/strategy in place to implement SPP in support of broader national policy objectives.
- (b) The SPP implementation plan is based on an in-depth assessment; systems and tools are in place to operationalise, facilitate and monitor the application of SPP.
- (c) The legal and regulatory frameworks allow for sustainability (i.e. economic, environmental and social criteria) to be incorporated at all stages of the procurement cycle.
- (d) The legal provisions require a well-balanced application of sustainability criteria to ensure value for money.

18 United Nations General Assembly: "Transforming our World: The 2030 Agenda for Sustainable Development", Resolution 70/1 adopted by the General Assembly on 25 September 2015. A/RES/70/1. Goal 12.7: "Promote public procurement practices that are sustainable, in accordance with national policies and priorities." <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

19 Sustainable Public Procurement (SPP) promotes the integration of the three pillars of sustainable development: economic development, social development and environmental protection. Goals of SPP typically focus on reducing demand for resources and minimising any negative impact of goods, works or services across their life cycle. They also aim to ensure fair terms of contracts, including ethical, human rights and employment standards, and to promote diversity and equality throughout the supply chain, for example by providing opportunities for small and medium-sized enterprises or by supporting training and skill development. SPP can also include methods that support innovation.

Further analysis: MAPS Module on Sustainable Public Procurement (SPP)

Sub-indicator 3(b) – Obligations deriving from international agreements

Membership in international and/or regional associations or binding international/regional agreements may result in legal obligations relating to public procurement and may shape a country's procurement system. Based on the general information gathered in Section II on the country context, this indicator assesses i) the existence of procurement-related provisions in binding international agreements and ii) the consistent reflection of those obligations in national procurement laws and regulations.

A recognition of the international context is necessary for understanding the presence of certain provisions in the national law and, in some cases, might explain a lack of compliance with certain parameters laid out in this methodology. As noted in Section I, "User's Guide", procurement systems are based on different models. The focus in assessing this indicator is thus to provide clarity on international obligations that impact public procurement in a country and to determine whether relevant provisions have been consistently adopted in the national legal and policy framework for procurement.

Assessment criteria

Public procurement-related obligations deriving from binding international agreements are:

- (a) clearly established
- (b) consistently adopted in laws and regulations and reflected in procurement policies.