



MAPS

Methodology for Assessing
Procurement Systems

Kingdom of Eswatini

Assessment of the Public Procurement System

VOLUME II – MATRIX

FULL ANALYSIS OF ALL INDICATORS BY CRITERIA

WITH GAPS AND RECOMMENDATIONS



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Pillar I. Legal, Regulatory, and Policy Framework

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

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

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

Assessment criterion 1(a)(a):

Is adequately recorded and organized hierarchically (laws, decrees, regulations, procedures), and precedence is clearly established.

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal and regulatory framework for public procurement is organized hierarchically with clear precedence at primary and secondary legislative levels (Act and Regulations).

Constitution: The Constitution¹ provides that “the supreme legislative authority ... vests in the King-in-Parliament and that “the King and Parliament may make laws for the peace, order and good government” of the country.² Primary legislation (Acts) are introduced into Parliament as bills and require royal assent and publication in the Eswatini Government Gazette prior to coming into operation.

Procurement Act 2011: The primary legislation governing public procurement in Eswatini is the Procurement Act No. 7 of 2011³ (“Procurement Act”) enacted by the King and Parliament, which came fully into force on 27 May 2013⁴.

The Procurement Act s.65 provides that the Minister may, on the recommendation of the Agency⁵ (ESPPRA⁶), issue public procurement regulations to regulate the procurement of goods, work and services by procuring entities. The Procurement Act contains a significant number of enabling provisions referencing public procurement regulations in which further detailed requirements are to be set out.

Public Procurement Regulations: There was a prolonged delay in the adoption of the public procurement regulations in support of the Procurement Act. The Public Procurement Regulations 2020 (PPR) were finally passed in 2020, after several years of debate. The PPR came fully into effect on 24 May 2021, repealing the Public Procurement Regulations 2008 (“PPR 2008”)⁷, which had continued in force despite lack of alignment with the Procurement Act and ESPPRA Circular No.1/2016, Public Procurement Procedures (“Public Procurement Procedures 2016”) which had been introduced as an interim measure by the ESPPRA.

Supporting circulars, instructions, manuals (See further analysis at 2(a)): The Procurement Act s.10 provides that the Public Procurement Regulatory Agency (ESPPRA) “shall issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation and application of [the Procurement Act] and public procurement regulations”, with related powers set out in the Procurement Act s.66. The Ministry of Finance also issues procurement related circulars addressed to Ministries and Departments as well as the Government Tender Board, where relevant.

¹ The Constitution of the Kingdom of Swaziland Act 2005.

² A.106 of the Constitution of the Kingdom of Swaziland Act 2005.

³ The Procurement Act No.7 of 2011; Swaziland Government Gazette, VOL. XLIX, No.97 September 9, 2011.

⁴ Public Procurement Act (Date of Commencement) Notice, 2012, Swaziland Government Gazette, VOL. XLXJ, No.23 March 9, 2012 & Procurement Act (Date of Commencement) Notice, 2013, Swaziland Government Gazette, VOL. LIJ, No.64 May 28, 2013.

⁵ The Procurement Act s.10 provides one of the functions of the Agency (ESPPRA) is to “formulate regulations governing the procurement of goods, works and services for the Government and recommend these to the Minister” (Minister of Finance).

⁶ For simplicity, the acronym “ESPPRA” is used in this analysis and report to refer to Eswatini Public Procurement Regulatory Agency (ESPPRA). The ESPPRA was previously known as the Swaziland Public Procurement Regulatory Agency (SPPRA) and is also often referred to in the procurement legal framework as “the Agency”.

⁷ Public Procurement Regulations 2008, issued pursuant to s.26 Finance and Audit Act, No.18 of 1967.

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Parts of the Government Stores related regulations dating from 1993 also remain in force.

Gap analysis

Recommendations

Assessment criterion 1(a)(b):

It covers goods, works and services, including consulting services for all procurement using public funds.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act covers procurement of goods, works and services (consulting and non-consulting services) using public funds.

The Procurement Act s.4 provides that the Procurement Act “shall apply to all public procurement conducted by or for requesting or procuring entities” subject to specified exceptions for (i) defence or national security reasons (subject to safeguards), and (ii) where, in the event of conflict with the Procurement Act provisions in international agreements will prevail.

According to the Procurement Act s.2 definitions:

““procurement” means the acquisition, by purchase, rental, lease, hire purchase, license, franchise or any other contractual means, of any type of goods, works, services or assets or any combination of goods, works, services or assets;

“public procurement” means procurement using public funds, whether wholly or partially, in accordance with this Act;”

Gap analysis

Recommendations

Assessment criterion 1(a)(c):

PPPs, including concessions, are regulated.

Conclusion: No gap

Red flag: No

Qualitative analysis

PPPs including concessions are required to be awarded in accordance with the principles and objectives of the Procurement Act. More detailed PPP Policy sets out further requirements for identifying, approving, structuring, awarding and managing PPP projects. PPP activity has been limited and the legal and institutional framework to facilitate implementation of PPPs is currently subject to review.

The Procurement Act s.43 Procedures for procurement of infrastructure on the basis of private financing and for award of concessions, provides that “Contracts for the construction and/or operation of public infrastructure and other public goods on the basis of private investment, and contracts for service concessions, shall be awarded in accordance with the principles and objectives of this Act and Government policy.” Special methods and procedures for implementation may be specified in regulations.

PPR s.44 confirm that PPP as contemplated in Procurement Act s.34 shall be regulated by PPP Policy (see below) and lists principles which shall be adhered to in all PPP procurement including transparency and value for money. The Government has published a Public Private Partnership Policy (PPP Policy) developed by the Ministry of Finance

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and applying to all procuring entities and listing principles of transparency, accountability and value for money. In practice, however, PPP activity has been limited⁸ and the legal and institutional framework to facilitate implementation of PPPs is currently subject to review, with funding for review activity recently confirmed.⁹

Gap analysis

Recommendations

Assessment criterion 1(a)(d):

Current laws, regulations and policies are published and easily accessible to the public at no cost

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.7 Public Accessibility, requires that the text of the Procurement Act, public procurement regulations and all administrative rulings and “directives of general application in connection with procurement” covered by [the Procurement Act], shall be promptly made accessible to the public and systematically maintained by the Agency. The Procurement Act and PPR are available to download at no cost from the ESPPRA website.

Gap analysis

Recommendations

Sub-indicator 1(b) Procurement methods

The legal framework meets the following conditions:

Assessment criterion 1(b)(a):

Procurement methods are established unambiguously at an appropriate hierarchical level, along with the associated conditions under which each method may be used.

Conclusion: No gap

Gap analysis

Recommendations

Suggestions for improvement

Procurement methods and financial thresholds in legislation: Procurement methods should, ideally, be established in the primary legislation i.e. the Procurement Act. This is to ensure certainty as to available methods embedded in more stable legislation. See, for example, A.27 UNCITRAL Model Law on Public Procurement and Guide to Enactment.

The PPR R.38(4) does not include reference to financial thresholds as one of the conditions for international participation. To improve clarity, the PPR should be amended to refer to and align with CIC requirements.

Assessment criterion 1(b)(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.

⁸ Two PPPs were mentioned to the Assessment Team in discussions with authorities in Eswatini: MR31 Road Manzini-Mbabane (Ministry of Public Works) & Mbabane Government Hospital (Ministry of Health).

⁹ Information provided to the Assessment Team in discussion with Ministry of Finance, August 2023 & February 2024.

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Conclusion: No gap

Red flag: No

Qualitative analysis

The procurement methods prescribed include competitive and less competitive methods, two stage tendering as well as simpler methods for low value procurements, ensuring an appropriate range of options.

Gap analysis

Recommendations

Assessment criterion 1(b)(c):

Fractioning of contracts to limit competition is prohibited.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.43 Prohibition on Disaggregation, prohibits procuring entities from dividing procurement requirements which could be procured using a single contract “to avoid the use of open tendering or any other procurement method involving competition.” Dividing a contract into lots to be tendered together is permitted where it is envisaged this will result in the best overall value for the procuring entity.

Gap analysis

Recommendations

Assessment criterion 1(b)(d):

Appropriate standards for competitive procedures are specified.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Provisions in the legal framework in theory restrict individual agencies’ and procurement officials’ discretion, thus limiting the use of less competitive procurement methods. In practice, the use of less and non-competitive procurement methods is high. This can be seen in data collected by the MAPS Assessment team and has been raised as an issue of concern by both ESPPRA and the Government Tender Board. The MAPS Assessment Team have concluded that the specified standards for competitive procedures and safeguards in the legislative framework are not working effectively and do not achieve the intended aim of ensuring that competitive procurement is the preferred method for procurement.

According to the Procurement Act s.42, methods other than open tendering and requests for proposals shall only be used where specified conditions are met. In addition, where a procuring entity wishes to deviate from the prescribed method, rule procedure or document it must submit an application to the ESPPRA and receive approval from the ESPPRA for such deviation. The PPR lists the range of methods for tendering, conditions for use and procedures to be followed. Use of emergency single source procurement is high. Although there are some safeguards against misuse, there is no list of what constitutes an “emergency” justifying use of this procedure and the terms “emergency” and “emergency situation” are not defined in the Procurement Act or PPR.

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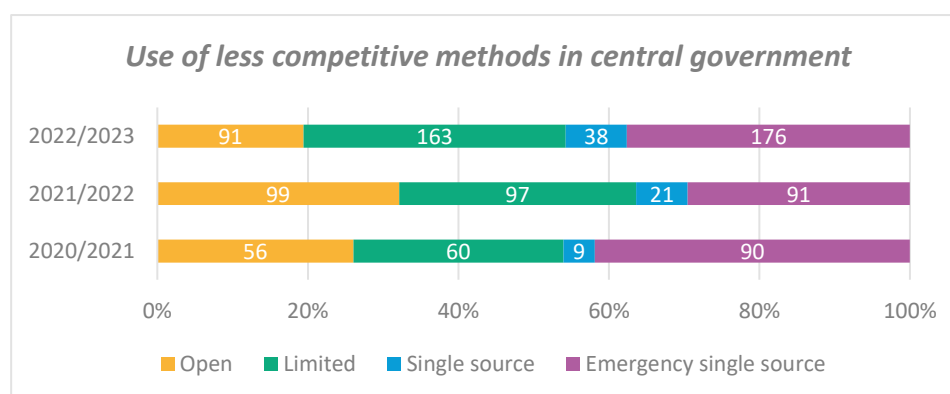
Single source procurement: PPR 42 (3) provides that single source procurement may be used where “(b) there is insufficient time for use of any other method in an emergency situation”. The procedures to be followed for single source for emergency needs are set out in PPR Part XI R.101 to 108. PPR R.105 provides that “(1) The emergency shall not be a result of self-created urgency or as a result of dilatory Conduct” and “(2) A procuring entity shall not use an emergency procurement method if - (a) goods or services fall under common procurement arrangement; or (b) the specific event could have been anticipated and planned.” There is no list of what constitutes an “emergency” justifying use of this procedure and the terms “emergency” and “emergency situation” are not defined in the Procurement Act or PPR. According to Ministry of Finance feedback, the process and invitation documents to be used in emergency or urgent procurement are inadequate.¹⁰

As noted elsewhere in this Matrix and Report, there is a lack of reliable central source of data on procurement activities. Data provided by ESPPRA relates primarily to activities of local government and Category A parastatals. Data provided by the Ministry of Finance and the Government Tender Board relates primarily to activities of central government and it is not possible to establish whether the same methods have been adopted for collection of the available data.

Despite these hindrances it is appropriate to comment in the analysis on available data which shows a worrying increase in use of less competitive and non-competitive methods for procurement.

ESPPRA data on 786 procurement files shows use of open advertised bidding in 56.7% of cases in 2022/2023. This is a significant drop from 2021/2022 when the percentage of open advertised bidding was 96%, and 75% in 2020/2021.

According to the Government Tender Board there has been a significant increase in use of emergency single source procurement in tenders from central government (Ministries and Departments) which it reviews. The figure below shows data on methods used by central government purchasers, extracted from the Government Tender Board’s Annual Report 2023.



Source: Government Tender Board Annual Report, 2023

Gap analysis

Appropriate standards for competitive procedures: The legislative framework specifies standards for competitive procedures and provides safeguards but there is strong evidence that these provisions are not working effectively and do not achieve the intended aim of ensuring that competitive procurement is the preferred method for procurement. There are high levels of use of emergency single source/single source as a method of procurement. This reduces opportunities for market competition and diminishes the transparency and integrity of the procurement system. Value for money is a less likely outcome where direct award is used.

This Gap significantly impedes achieving competition and value for money outcomes, impacting on the overall effectiveness of the procurement system.

¹⁰ Information provided by Ministry of Finance, April 2024.

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Recommendations

Appropriate standards for competitive procedures: Consider enhanced measures, including amendments to the PPR, to ensure that the choice of procurement procedure is, in all cases, clearly documented and justified in accordance with the legal framework **and that the terms “emergency” and “emergency situation” are well-defined, to prevent over-use or misuse.** This may be tied in with requirements relating to preparation and publication of procurement plans, with justification for use of methods other than open tendering to be addressed in that plan. Implement measures to ensure that use of emergency single source procurement/single source method is permitted only in exceptional circumstances. Key stakeholders (Ministry of Finance Technical Secretariat, ESPPRA and Eswatini Government Tender Board) should collaborate and jointly issue **enforceable regulatory provisions**, policy and/or guidelines to apply to all procuring entities. This should stress the importance of documenting and justifying choice of procurement methods and emphasise the limited and prescribed circumstances where emergency single source may be used. The policy and/or guidelines should confirm that the circumstances and conditions permitting use of single source procurement/single source method must be interpreted narrowly. This may be tied in with requirements relating to procurement plans for specific procurements with justification for use of methods other than open competitive bidding to be addressed in that plan.

Sub-indicator 1(c)

Advertising rules and time limits

The legal framework meets the following conditions:

Assessment criterion 1(c)(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)).

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal framework requires public advertisement of procurement opportunities.

PPR R.21 Request for Information, requires notices inviting tenderers to participate in procurement proceedings to be published in (a) in at least one publication (i.e. newspaper) in Eswatini, which shall be of wide enough circulation to reach sufficient potential tenderers to ensure effective competition; and (b) in the Eswatini Government website. See note at 1(c)(c) on use of two websites for on-line publication.

Gap analysis

Recommendations

Assessment criterion 1(c)(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.

Conclusion: No gap

Red flag: No

Qualitative analysis

The PPR specify minimum tendering periods. The time allowed for potential bidders to obtain documents and respond to the advertisement is sufficient and varies according to the method of procurement. The time provided is extended when international competition is solicited.

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PPR R.51 Minimum Tendering Periods, provides that the tendering shall start on the date of the first publication of the tender notice or issue of the invitation document to all pre-qualified or shortlisted tenderers and shall finish on the date of the tender submission deadline. Minimum Tendering Periods are summarized in the table below.

Method	Minimum tendering period (days)
Open Tendering - National	28
Open Tendering - International	42
Limited Tendering - National	21
Limited Tendering - International	28

Where limited tendering is used on grounds of urgency, in accordance with PPR R.51 the tendering period may be reduced to a minimum of seven (7) days.

Gap analysis

Recommendations

Assessment criterion 1(c)(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).

Conclusion: No gap

Red flag: No

Qualitative analysis

Publication of open tenders is mandated in a newspaper of wide national circulation and also on the Government website. In practice, two websites are used for publication. In general, central government procuring entities use the Government website and Local Government and Category A parastatals use the ESPPRA's tender portal. The ESPPRA charges procuring entities a fee for publication of tender opportunities on its websites. Access by suppliers to both websites is free of charge to suppliers.

PPR R.21 Request for Information, requires notices inviting tenderers to participate in procurement proceedings to be published in (a) in at least one publication in Eswatini, which shall be of wide enough circulation to reach sufficient potential tenderers to ensure effective competition; and (b) in the Eswatini Government website.

In practice, information about tender opportunities for open tenders are published and available at no cost on-line in one of two locations, the Eswatini Government website or the ESPPRA website, tenders page (see below). Opportunities are also advertised in newspapers, where required, and may be advertised on the procuring entity's own website.

(1) the Eswatini Government website, which is used by government Ministries, Departments and the Prime Minister's Office. Tenders by Category A parastatals and local government are not advertised on the Eswatini Government website.

The Eswatini Government website home page¹¹ includes a "Tenders" tab which has a drop-down menu listing Ministries, "judiciary", some Government services as well as the Prime Minister's Office. Links from the named bodies are then available to tenders publishes by those bodies, where applicable. This is not a user-friendly or easily searchable system and available content is inconsistent.¹²

(2) the ESPPRA website tender page, which is used by Category A parastatals, local government and, in some cases, government Ministries. ESPPRA charges user a fee for publishing on the ESPPRA website, with advertisements also

¹¹ <https://www.gov.sz/>, accessed 23 January 2024

¹² Review of Government Tender web pages and downloaded sample advertisement/tender documents: MAPS Assessment Team, 21 June 2023.

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then placed in newspapers and notified through an app. In 2023/2024 the fee for advertising only was SZL 2132.67 (approx. USD 2132).

ESPPRA's online tender page provides a more modern, user-friendly and searchable resource that the Government Website and provides direct access to tender information.¹³ Tenders advertised on the ESPPRA tender page are also published in national newspapers in a consolidated list prepared and dispatched for publication by the ESPPRA. Bidders can also register to receive notifications of opportunities published by the ESPPRA by e-mail or through an app.

Gap analysis

Recommendations

Suggestions for improvement

Definition of "Government website": The term "Government website" is not defined and in practice procurement related information is published either on the general website of the Government of Eswatini or ESPPRA website. Include in the legislative framework precise definitions of website/s where procurement related information must be published currently and allow for transition to use of e-GP for publication of information.

Assessment criterion 1(c)(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.

Conclusion: No gap

Red flag: No

Qualitative analysis

The content of tender notices prescribed in the PPR is sufficient to allow potential bidders to determine whether they are able to submit a bid and also whether they are interested in submitting one.

PPR R.48, Tender Notices provides that tender notices shall be published in accordance with PPR R.21 and shall contain at least (a) the name, address and contact details of the procuring entity; (b) the nature of the procurement requirement, including the quantity of goods, works or services and the location and timetable for delivery or performance of the contract; (c) a statement of any key technical requirements, where applicable; (d) instructions on obtaining the invitation documents, including any fee payable; and (e) instructions on the location and deadline for submission of tenders.

Gap analysis

Recommendations

Sub-indicator 1(d)

Rules on participation

The legal framework meets the following conditions:

Assessment criterion 1(d)(a):

It establishes that participation of interested parties is fair and based on qualification and in accordance with rules on eligibility and exclusions

Conclusion: No gap

Red flag: No

¹³ Review of ESPPRA tender pages and downloaded sample advertisement/tender documents: MAPS Assessment Team, 21 June 2023.

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Qualitative analysis

The rules on eligibility, qualification and exclusion of interested parties seeking to participate in a tender process are set out in the Procurement Act. These rules require participation of interested parties to be established in a fair manner and in accordance with specified conditions. All invitation documents must state eligibility requirements and qualification criteria.

Eligibility: The Procurement Act s.40 Supplier Eligibility, sets out rules on eligibility to participate in public procurement and requires that all invitation documents shall state the eligibility requirements and specify any documentary evidence required as proof of eligibility. Eligibility requirements relate to legal capacity, fulfilment of tax and social security obligations, adherence with basic labour legislation, conflict of interest, conviction for criminal offences relating to professional conduct or the making of false statements or misrepresentations on qualifications to enter a procurement contract. The tenderer must also demonstrate that the tenderer, its directors or officers are not subject to a suspension in accordance with Procurement Act s.55. See analysis at 1(d)(c) on process for suspension of tenderers and suppliers from participation in public procurement.

Qualification: The Procurement Act s.41 Supplier Qualifications, lists the matters to which qualification criteria may relate. It requires qualification criteria to be specified in the invitation document, together with supporting documentary evidence or information required.

Gap analysis

Recommendations

Assessment criterion 1(d)(b):

It ensures that there are no barriers to participation in the public procurement market.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

Restrictions on participation of international companies or firms in construction contracts: PPR R.38(4) requires international tendering where the goods, works or services “are not available under competitive price and other conditions from at least three suppliers in Eswatini” or “regional or international participation is required in accordance with an agreement entered into by the Government.” There are restrictions on participation of international tenderers for construction contracts pursuant to the Construction Industry Council Act No.14 of 2013 (“CIC Act”), being: (1) requirements for mandatory partnership or joint working with domestic companies/firms (CIC Act ss.41 & 42), and; (2) CIC Act Registration Rules providing that foreign contractors may only tender for contracts above stated financial thresholds set out in CIC Registration Rules.¹⁴ or where a specialized skill is involved.

The CIC website states that foreign contractors “may only tender for contracts” above the specified thresholds but the CIC Act s.38 prohibits award of a tender to a person not registered, rather than prohibiting tendering.

CIC Act s.40 requires, in summary, approval by the CIC for the award of a contract for construction works to a foreign company or foreign firms, with a fine or imprisonment for contravention of this provision.

CIC Act s.41 provides that “a person shall not award a contract for any construction works to a foreign company or foreign firm unless the foreign company or firm undertakes the construction works in partnership or jointly with a Swazi Company or Swazi firm”, with a fine or imprisonment for contravention of this provision.

¹⁴ The financial thresholds set out in CIC Registration Rule are: General Building Works – contracts above Emalangeni 120 million; General Civil Works - contracts above Emalangeni 200 million; General Electrical Works - contracts above Emalangeni 40 million; Building Works Specialist - contracts above Emalangeni 60 million; Civil Works Specialist - contracts above Emalangeni 100 million; Electrical Works Specialist - contracts above Emalangeni 40 million; Mechanical Works Specialist - contracts above Emalangeni 40 million.

<https://www.cic.co.sz/registration/fees/> accessed 24 August 2023.

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Preference provisions: The Procurement Act s.39 Non Discrimination and Measures to Promote Swazi Companies, permits use of price preference and other measures to facilitate participation of participation by Swati companies, with a view to promoting economic capacity and competitiveness of businesses in Eswatini. Detailed implementing provisions are set out in PPR R.11 which lists permissible measures and PPR R.12 which specifies margins of preference which are not at levels to raise concerns in terms of barriers to entry. The MAPS Assessment team concludes that the preference provisions are not excessive and do not constitute a gap for the purposes of the MAPS Methodology.

Access to Finance: Both the private sector survey and direct engagement with SME/SMME suppliers (who represent a significant part of the supplier market in Eswatini) flagged up issues of lack of financing available to suppliers/potential suppliers who may wish to participate in public procurement. The International Monetary Fund Country Report 2023,¹⁵ notes as an impediment to growth “Limited access to finance. Private sector credit in Eswatini is highly concentrated. Weaknesses in technical and managerial skills constrain the ability of SMEs to identify and develop bankable projects, hindering access to credit.” This is identified as a Gap at 10 (b).

Gap analysis

International participation: The mandatory requirement for international companies or firms in construction contracts to work in partnership or joint working with domestic companies (CIC Act ss.41 & 42) constitutes a barrier to entry and may reduce competition and value for money outcomes.

This Gap is assigned a Red flag because it may impede achieving competition and value for money outcomes, impacting on the overall effectiveness of the procurement system and because it will require joint review and decision making by stakeholder institutions and does not lie solely within the procurement sphere.

Recommendations

International participation: ESPPRA and CIC should review the impact of the requirements for international companies/ in construction contracts to work in partnership or work jointly with domestic companies in the delivery of construction contracts and consider amendment of these provisions to reduce barriers to entry. This review should also clarify registration requirements to ensure it is clear that registration is not a precondition to participation in a tender process.

Assessment criterion 1(d)(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.

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal and regulatory framework details eligibility requirements and provides for exclusion relating to certain criminal offences.

The Procurement Act s.40 provides that in order to be eligible a tenderer shall demonstrate to the satisfaction of the procuring entity that, in summary, (a) it has legal capacity to contract; (b) it is not insolvent, in receivership, bankrupt or equivalent situations; (c) it has fulfilled its obligations to pay taxes and social security contributions; (d) it adheres to basic labour legislation; (e) it does not have a conflict of interest; (f) it or its directors or officers have not in the preceding 5 years been convicted of any criminal offence relating to professional misconduct, or making of false statements or misrepresentations as to its qualification to enter a procurement contract; (g) it is not suspended (debarred) in accordance with the Procurement Act s.55 (see below) and none of its directors or officers have been involved in a tenderer/supplier currently subject to suspension. The Procurement Act s.40 also requires

¹⁵ <https://www.imf.org/en/Publications/CR/Issues/2023/05/05/Kingdom-of-Eswatini-2023-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-533091>, page 74.

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that invitation documents shall state eligibility requirements and specify documentary evidence required as proof of eligibility. It does not include specific provisions listing grounds for ineligibility due to conviction by final judgment for specified offences concerning organised crime, terrorist and trafficking; money laundering, or; child labour. There is a system for administrative debarment, according to due process and subject to a right of appeal.

Administrative debarment (suspension by the ESPPRA)

The Procurement Act s11 Powers of the Agency, gives authority to the ESPPRA to suspend bidders and suppliers from participation. The Procurement Act ss.55 and 56 set out the process and grounds for suspension.

Initiation of suspension proceedings: PPR R.16 provides that suspension proceedings may be initiated by the ESPPRA (1) as a result of audit or investigation conducted by the Agency, or (2) “where a suspension proposal is submitted to it, by any person.”

Grounds for suspension: The Procurement Act s.56 Grounds for Suspension, lists ten grounds on which a tenderer or supplier may be suspended from participation in procurement. The grounds cover: misconduct relating to the submission of tenders, including corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of underpricing of tenders and breach of confidentiality; conviction of a criminal offence relating to obtaining or attempting to obtain a contract or subcontract, and; conviction of a crime related to business or professional activities. In addition, suspension is automatic where the tender, supplier or person is on the Register for Tender Defaulters, but this Register is not operational.

Process for suspension: The Procurement Act s.55 Suspension of Tenderers and Suppliers sets out basic principles for due process to be followed, prior to a decision on suspension. A suspension shall be for a minimum period of one year and a maximum period of five years.

Right of appeal: There is a right of appeal to the Independent Review Committee against a suspension decision and the Procurement Act sets out timescales and process for the conduct of that appeal.

Register of suspended suppliers: There is a register of suspended suppliers maintained by ESPPRA and published on the ESPPRA website. There is only one supplier listed.¹⁶

Gap analysis

Recommendations

Suggestion for improvement

Eligibility requirements: Include in the legal and regulatory framework specific provisions listing grounds for ineligibility due to conviction by final judgment for specified organised crime, terrorist and trafficking offences (participation in a criminal organization; 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.)

Assessment criterion 1(d)(d):

It establishes rules for the participation of state-owned enterprises that promote fair competition.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The legal framework establishes rules for participation of state-owned enterprises as service/consultancy providers which are aimed at promoting fair competition. There are no equivalent rules for participation of state-owned enterprises as potential suppliers of goods or as works contractors.

PPR R.92 Selection of public bodies, agencies and consultants, sets out conditions that consulting firms or service providers which are partially controlled or sponsored by the government or public authorities must satisfy to be

¹⁶ ESPPRA website, Register of Suspended Suppliers, accessed 02 November 2023.

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eligible for public finance projects. These include neutralisation at cost comparison stage of privileges as well as other advantages such as tax emptions and special payment provisions.

Gap analysis

Rules for participation of state enterprises: The legal framework does not establish rules for state-owned enterprises participating as suppliers of works or goods. This may jeopardise fair competition as state-owned enterprises may have an unfair advantage over other bidders because, for example, they benefit from subsidies, tax exemptions or other forms of preferential treatment.

Recommendations

Rules for participation of state enterprises: Include in the legal framework specific rules applying to participation of state-owned enterprises as bidders for the supply of works or goods, aimed at promoting fair competition. This could, potentially, be dealt with in the eligibility criteria in standard bidding documents for mandatory use, pending revision of PPR.

Assessment criterion 1(d)(e):

It details the procedures that can be used to determine a bidder's eligibility and ability to perform a specific contract.

Conclusion: No gap

Red flag: No

Qualitative analysis

All invitation documents must state eligibility requirements and qualification criteria. In open tendering, assessment of a bidder's eligibility and ability to perform a specific contract may be conducted with or without pre-qualification. A separate pre-qualification process may be used in circumstances which are specified in the PRR, including where the contract is complex, specialized or requires a detailed design or method. The process for pre-qualification is set out in the PRR.

PPR R.38 Open Tendering, provides that open tendering may be conducted with or without pre-qualification. PPR R.46, Pre-qualification, sets out the circumstances where pre-qualification may be used in open tendering, where: the goods, works or services are complex, specialized or require detailed design or method; the costs of preparing a detailed tender would discourage competition; or the evaluation is particularly detailed and the evaluation of a large number of tenders would require excessive time and resources from a procuring entity. In addition, pre-qualification may be used to pre-qualify tenderers for a group of similar contracts, such as regular procurements of common-use items. PPR R.46 sets out the process for conducting pre-qualification and record-keeping.

Gap analysis

Recommendations

Sub-indicator 1(e)

Procurement documentation and specifications

The legal framework meets the following conditions:

Assessment criterion 1(e)(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.

Conclusion: No gap

Red flag: No

Qualitative analysis

PPR lists the minimum content of procurement documents, which is relevant and sufficient for suppliers to respond to the requirements of the procuring entity.

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PPR R.50 Invitation Documents, lists the information to be included in every invitation document, being: (a) Clear instructions on the management of the procurement process and the applicable rules; (b) a clear statement of requirements giving a description of the goods, works or services to be procured; (c) a clear explanation of the evaluation process and a statement of all evaluation, eligibility and qualification criteria to be applied; (d) the proposed form and conditions of contract; and (e) grounds on disqualifications.

Gap analysis

Recommendations

Assessment criterion 1(e)(b):

It requires the use of neutral specifications, citing international norms when possible, and provides for the use of functional specifications where appropriate.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The principle of use of neutral specifications for goods, works and services is recognised in the legal framework although there is no specific reference to citing of international norms and the drafting in this respect could be improved. Use of functional specifications is specifically referenced in the case of goods.

PPR R.34 to 37 set out general principles on preparation of Statement of Requirements (i.e. specifications) (R.3) and list specific requirements for procurement of each of goods (R.35), works (R.36) and services (R.37). Statements of Requirements are required to “provide a complete, precise and unambiguous description” of what is required. PPR R.34, applying to goods, works and services provides that statement of requirements shall be prepared with a view to creating fair and open competition and “[t]o the extent possible, the statement of requirements shall be based on the relevant objective technical and quality characteristics of the goods, works or services to be procured.”

In the case of goods (PPR R.35), there are provisions requiring use of functional description of the goods, including any environmental and safety features.

Gap analysis

International norms and functional specifications: There is no specific reference to use of international norms, or other recognized equivalent norms, in the legal framework and use of functional specifications is referred to only in the case of goods.

Recommendations

Combined recommendation for 1(e)(b) and 1(e)(c)

International norms, functional specifications and equivalence: Update relevant provisions to specifically refer to international or other recognized equivalent norms and to the principle of equivalence for procurement of goods, works and all services. Also include provisions referring to use of functional specifications in the case of all procurements, where relevant. This may be most effectively resolved by including these requirements in standard tender documents for mandatory use by all procuring entities.

Assessment criterion 1(e)(c):

It requires recognition of standards that are equivalent, when neutral specifications are not available.

Conclusion: **Substantive gap**

Red flag: No

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Qualitative analysis

PPR R.35 Statement of Requirements for Goods provides that, in the case of goods, the statements of requirements shall not include reference to “a particular trademark, brand name, patent, design, type, specific origin, producer, manufacturer, catalogue or numbered item” and includes provisions on equivalence when neutral specifications are not available.

The ESPPRA has published a “Frequently Asked Questions” document¹⁷ which answers the question “Can a procuring entity specify the brand name of an item in a tender document.” The answer to this FAQ is that “in general a procuring entity should not include reference to a particular trademark, brand name, patent, design, type, specific origin, producer, manufacture, catalogue or numbered item.” The FAQ goes on to provide that where there is no other sufficiently precise or intelligible way of describing the requirement the words “or equivalent” shall be used.

Gap analysis

Equivalence: There is no specific reference to application of the principle of equivalence when neutral specifications are not available in the case of procurement of services or works.

Recommendations

See combined recommendation at 1(e)(b).

Assessment criterion 1(e)(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).

Conclusion: No gap

Red flag: No

Qualitative analysis

Potential bidder may request clarifications of procurement documents and procuring entities are required to respond within appropriate timescales with clarifications provided to all tenderers in writing.

PPR R.54 sets out the process and timescales for requests for and provision of clarification and requires that subsequent amendments are provided to all tenderers, in writing, at the same time.

PPR R.54 Clarification and Amendment of Tender Documents, requires the invitation document to include a statement that a tenderer may seek clarification of the invitation document in writing from the procuring entity.

Gap analysis

Recommendations

Sub-indicator 1(f) Evaluation and award criteria The legal framework mandates that:

Assessment criterion 1(f)(a):

The legal framework mandates that 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.

Conclusion: No gap

Red flag: No

¹⁷ https://esppra.co.sz/sppra/documents/press_release/1643010822.pdf

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Qualitative analysis

The Procurement Act s.44 General Procurement Rules, requires that the methodology and criteria to be used in the evaluation of tenders and determination of the best evaluated tenders shall be “clearly stated”. The Procurement Act s.45 Contract Award Procedures provide that the “awarding of the contract shall be recommended to the best evaluated tenderer, as determined by the evaluation methodology and criteria specified in the invitation document.”

Procurement Act s.64(3) provides that “Tenders shall be compared by ranking them according to their evaluated price or cost and determining the tender with the lowest evaluated price or cost, which shall be the best evaluated tender”.

PPR R.60 includes provisions on correction of purely arithmetical error and on non-material non-conformity, errors or omission. In the latter case PPR R60(6) requires that such an error or omission shall be quantified in monetary terms to the extent possible and taken into account in the financial evaluation and comparison of tenders. This provision is not well understood and so is not applied in practice.

Gap analysis

Recommendations

Suggestion for improvement

Quantification of non-material non-conformity: Review drafting of PPR R.60 (6) on quantification of non-material non-conformity, errors or omissions to decide on fitness for purpose and remove or amend as appropriate.

Assessment criterion 1(f)(b):

The legal framework allows the use of price and non-price attributes and/or the consideration of life cycle cost as appropriate to ensure objective and value-for-money decisions.

Conclusion: No gap

Red flag: No

Qualitative analysis

The PPR allow the use of price and also non-price attributes, using “additional evaluation criteria”. There is no specific reference to use of life-cycle cost or whole life cost.

PPR R.61 Evaluation Methodology, sets out detailed provisions on the methodology to be adopted. This includes reference to “additional evaluation criteria” to be applied in determining evaluated price of each tender. Additional evaluation criteria (that is, in addition to the price offered) shall related to performance, characteristics or terms and conditions of a tender and “shall be quantified in monetary terms and applied as an increase or decrease to the tender price, for the purposes of evaluation only.” The tender document shall state the methodology for calculating and applying the adjustment in tender price.

PPR R.111 Records of past performance provides that Procuring Entities shall submit record of past performance to the Technical Secretariat and such record shall be used in evaluation of subsequent tenderers. This is not happening in practice. ESPRA confirmed in discussions with the MAPS Assessment team that contract implementation and contract performance appraisals are limited to a few procuring entities.

Gap analysis

Recommendations

Suggestion for improvement

Life-cycle costing/total cost of ownership: Introduce additional provisions in the legal and regulatory framework to promote the use of life cycle costing or total cost of ownership, as appropriate in relevant procurements to ensure

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value for money decisions. All legal provisions must be supported by clear, practical guidelines on how to incorporate life cycle costing or total cost of owner into the entire procurement cycle, from planning to delivery. This should be tied in with measures to address sustainable public procurement more widely and recommendations at sub-indicator 3(a) Sustainable Public Procurement.

Assessment criterion 1(f)(c):

The legal framework mandates that quality is a major consideration in evaluating proposals for consulting services, and clear procedures and methodologies for assessment of technical capacity are defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

For consulting services, Quality and Cost Based selection is the preferred selection procedure and the legal framework includes clear procedures and methodologies for assessment of technical capacity.

Requests for proposals for consulting services: PPR R.72 Evaluation Methods provides that Quality and Cost Based Selection shall be the preferred selection procedure for Requests for proposals. Quality and Cost Based Selection “takes into account both the quality and cost of proposals and selects the proposal which offers the optimum balance of quality and cost”. PPR R.79 provides that technical evaluation is carried out first and any proposal with a score less than the minimum technical qualifying mark shall be rejected and eliminated from further evaluation. PPR R.88 allows for selection based solely on technical quality.

Gap analysis

Recommendations

Assessment criterion 1(f)(d):

The legal framework mandates that the way evaluation criteria are combined and their relative weight determined should be clearly defined in the procurement documents.

Conclusion: No gap

Red flag: No

Qualitative analysis

PPR R.60 General Evaluation Rules requires that “All invitation documents shall clearly state the method and criteria to be used in the evaluation of tenders and the determination of the lowest or best evaluated tender.” There is no additional published guidance to support procuring entities in the choice and application of evaluation criteria and weightings.

Gap analysis

Recommendations

Assessment criterion 1(f)(e):

The legal framework mandates that 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.

Conclusion: No gap

Red flag: No

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Qualitative analysis

The legal framework requires all details of tenders submitted to be treated as confidential between the tenderer and the procuring entity and requires procuring entities, public officials and politicians involved in procurement to keep confidential information coming into their possession relating to procurement.

The Procurement Act s.3 Purpose and Objectives, provides that one of the objectives of the Procurement Act is to establish a system and practices that serve to “ensure transparency and accountability in public procurement while maintaining appropriate confidentiality of information”.

The Procurement Act s.44 General Procurement Rules, requires that procuring entities shall “keep confidential the information that comes into their possession relating to procurement proceedings”.

The Procurement Act s.60 Conduct of Public Officers and Politicians Involved in Procurement, provides that all public officers and politicians who have responsibilities for procurement shall “keep confidential the information that comes into their possession relating to procurement, including tenderers’ proprietary information”.

PPR R.23 Request for Information, requires all details of tenders submitted to be treated as confidential between the tenderer and the procuring entity, except where a tenderer specifically advises otherwise.

PPR R.56 Receipt of Tenders, requires the Tender Board to ensure that all tenders are kept confidential.

PPR R.10 requires that copies of opened tenders shall be retained by the Technical Secretariat. In practice the Technical Secretariat does not receive or retain copies of opened tenders.

Gap analysis

Recommendations

Sub-indicator 1(g)

Submission, receipt, and opening of tenders

The legal framework provides for the following provisions:

Assessment criterion 1(g)(a):

Opening of tenders in a defined and regulated proceeding, immediately following the closing date for bid submission.

Conclusion: No gap

Red flag: No

Qualitative analysis

PPR R.58 Tender Opening, regulates the tender opening procedure and provides that the time for tendering opening shall be the same as, or immediately after, the time of dealing for submission of tenders.

Gap analysis

Recommendations

Assessment criterion 1(g)(b):

Records of proceedings for bid openings are retained and available for review.

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal framework requires records of proceedings for bid openings to be made and retained. These records must be available for review and audit purposes.

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PPR R.58 Tender Opening, requires that the Tender Opening Committee shall make a record of the tender opening, which shall be kept as part of the procurement record.

PPR R.14 Record Keeping, requires retention of procurement records for a period of five years from the date of (a) contract completion or termination; (b) a decision to terminate the procurement proceedings; or (c) settlement of any dispute under the contract; whichever is the later.

PPR R.30 Procurement Contract and Performance Audits, requires procuring entities to keep procurement records in the manner prescribed in PPR R.14 for ease of procurement information retrieval.

Procuring entities must provide access to records of proceedings and other procurement records to external audit, internal audit and ESPPRA.

Gap analysis

Recommendations

Assessment criterion 1(g)(c):

Security and confidentiality of bids is maintained prior to bid opening and until after the award of contracts.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.44 General Procurement Rules, requires that procuring entities shall “keep confidential the information that comes into their possession relating to procurement proceedings”.

PPR R.23 Request for Information, requires all details of tenders submitted to be treated as confidential between the tenderer and the procuring entity, except where a tenderer specifically advises otherwise.

PPR R.56 Receipt of Tenders, requires the Tender Board to ensure that all tenders are kept confidential.

Gap analysis

Recommendations

Assessment criterion 1(g)(d):

The disclosure of specific sensitive information is prohibited, as regulated in the legal framework.

Conclusion: No gap

Red flag: No

Qualitative analysis

There is a requirement in the legal framework to keep tenderers’ proprietary information confidential.

The Procurement Act s.60 Conduct of Public Officers and Politicians Involved in Procurement, provides that all public officers and politicians who have responsibilities for procurement shall “keep confidential the information that comes into their possession relating to procurement, including tenderers’ proprietary information”. There are no additional provisions dealing with disclosure of specific sensitive information.

Gap analysis

Recommendations

Suggestion for improvement

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Protection of sensitive information: Consider preparation of guidance to provide clarity for all procuring entities on what constitutes specific sensitive information requiring protection from disclosure and how to handle that information.

Assessment criterion 1(g)(e):

The modality of submitting tenders and receipt by the government is well defined, to avoid unnecessary rejection of tenders.

Conclusion: No gap

Red flag: No

Qualitative analysis

PPR R.56 Receipt of Tenders, clearly sets out requirements for submission and receipt of tenders. PPR R.58 defines the process for receipt, opening and checking of tenders. Information on submission of tenders and opening must be included in the tender documents.

Gap analysis

Recommendations

Sub-indicator 1(h)

Right to challenge and appeal

The legal framework provides for the following:

Assessment criterion 1(h)(a):

Participants in procurement proceedings have the right to challenge decisions or actions taken by the procuring entity.

Conclusion: No gap

Red flag: No

Qualitative analysis

Tenderers have a right of review, to challenge decisions or actions taken by a procuring entity. The initial application for review is submitted to and considered by the controlling officer or Chief Executive Officer of the procuring entity conducting the procurement.

The Procurement Act s.46 Right to Review, provides tenderers with a right to challenge decisions or actions taken by a procuring entity in breach of a duty owed under the Procurement Act or public procurement regulations. The application for review is submitted, in the first instance, to the controlling officer or Chief Executive Officer of the procuring entity conducting the procurement. The process and time limits for the review process are set out in the Procurement Act s.47.

Gap analysis

Recommendations

Assessment criterion 1(h)(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.

Conclusion: No gap

Red flag: No

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Qualitative analysis

The Procurement Act provides tenderers with a right to administrative review of a review decision made by a procuring entity. The application for administrative review is to the Independent Review Committee (IRC). Submission of an application for administrative review triggers suspension of award of the contract pending completion of the administrative review process. The IRC has authority to grant a range of remedies and the legal framework also establishes a right for judicial review of an IRC decision.

The Procurement Act s.48 Right to Administrative Review, provides the tenderer with a right of administrative review where the controlling officer or Chief Executive Officer of the procuring entity conducting the procurement does not issue a decision within the specified period or the tenderer is not satisfied with the decision. The application for administrative review must be submitted in writing to the ESPPRA which establishes an Independent Review Committee (IRC) to investigate and decide upon the application.

The Procurement Act s.49(3) provides that upon receipt of an application for administrative review the ESPPRA, to which the application is submitted, shall “prohibit the procuring entity from awarding a contract prior to completion of the administrative review process.” Contract award is not permitted pending resolution of applications for review (challenge) and administrative review (appeal). There are limited exceptions to this rule, subject to authorization by the Government Tender Board.

The IRC may grant a range of remedies listed in the Procurement Act s.52, as follows: “(a) prohibit a procuring entity from acting or deciding unlawfully or from following an unlawful procedure and require the procuring entity to act or to proceed in a lawful manner or to reach a lawful decision; (b) annul in whole or in part or revise an unlawful act or decision of the procuring entity or substitute its own decision for such a decision, other than any act or decision bringing a contract into force; (c) require the payment of compensation for any reasonable costs incurred by the tenderer submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of the procuring entity; (d) order that the procurement proceedings be terminated; (e) recommend to the procuring entity that a contract be terminated; or, (f) recommend to the Agency that specific action be taken including prosecution.”¹⁸

IRC Rules of Procedure, R.23 refers to a right of judicial review to the court (High Court).

Gap analysis

Recommendations

Suggestion for improvement

Right of judicial review: When next updating the Procurement Act, to enhance clarity, consider including a specific provision referring to the right of judicial review to the court.

Assessment criterion 1(h)(c):

Rules establish the matters that are subject to review.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act establishes the matters which are subject to review.

The Procurement Act s.46 Right to Review, tenderers with a right to challenge decisions or actions taken by a procuring entity in breach of a duty under the Procurement Act or public procurement regulations.

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Gap analysis
Recommendations
Assessment criterion 1(h)(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.
Conclusion: No gap
Red flag: No
Qualitative analysis The Procurement Act defines the time frames for submission of challenge (review by procuring entity) and submission of appeal (administrative review) to the Independent Review Committee. Review by the procuring entity: Procurement Act s.47 requires submission of application for review within ten working days of when the tenderer became aware of the circumstances giving rise to the right to apply for review of when that tenderer should have become aware of those circumstances, whichever is the earlier. The controlling officer/Chief Executive Officer of the procuring entity shall issue a written decision within ten working days after submission of the application. Administrative review by the IRC: Procurement Act s.49 requires submission of the application for administrative review within ten working days of the date of the issue of the procuring entity's review decision. The IRC shall issue a written decision within fifteen working days after submission of the application for administrative review.
Gap analysis
Recommendations
Assessment criterion 1(h)(e): Applications for appeal and decisions are published in easily accessible places and within specified time frames, in line with legislation protecting sensitive information.
Conclusion: No gap
Red flag: No
Qualitative analysis IRC decisions on administrative review are published on the ESPPRA website. There is a timeframe of fifteen working days after submission of the application for administrative review within which the IRC shall make and deliver its decision to the parties concerned. There are no specified time frames for publication of decisions on the ESPPRA website but, save in exceptional cases, decisions are published very promptly (see analysis at 13(c)(d)). There is no index of decisions and decisions are not in machine readable format. There is no specialized legislation protecting sensitive information which the IRC must have regard to, but the members of the IRC are mindful of the importance of protection of sensitive information and the objective of the Procurement Act s.3(2)(a) to "ensure transparency and accountability in public procurement while maintaining appropriate confidentiality of information". ¹⁹
Gap analysis
Recommendations

¹⁹ Information provided to MAPS Assessment Team in discussion with IRC members and IRC Secretariat, July 2023.

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Suggestion for improvement

Publication of IRC decisions: In practice, IRC decisions are published promptly on the ESPPRA website and each decision can be downloaded. To further improve opportunities for stakeholders to analyse and understand review decisions consider publishing a consolidated list of IRC decisions and publish all IRC decisions in a machine readable format. To increase clarity in the process, include provisions in the legal/regulatory framework setting out time scales and specific location for publication of IRC decisions.

Assessment criterion 1(h)(f):

Decisions by the independent appeals body can be subject to higher-level review (judicial review).

Conclusion: No gap

Red flag: No

Qualitative analysis

IRC Rules of Procedure, R.23 refers to a right of judicial review to the court, which shall be instituted within 10 working days from the date of the IRC decision or judgment.

Decisions of the IRC have been appealed, as can be seen from the High Court decisions published on the ESPPRA website IRC pages.

Gap analysis

Recommendations

Sub-indicator 1(i)

Contract management

The legal framework provides for the following:

Assessment criterion 1(i)(a):

Functions for undertaking contract management are defined and responsibilities are clearly assigned.

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal framework defines the procurement process to include contract management and designates management of contracts as a function to be fulfilled by procuring entities as well as setting out a list of contract management responsibilities.

The Procurement Act s.3 Interpretation, defines the “procurement process” to include “process of procurement from the planning stage... and contract management to formal acknowledgement of the completion of the contract.”

The Procurement Act s.34 Functions of Procuring Entities provides that the functions of the procuring entity designated as responsible for any procurement in accordance with the Procurement Act s.31 shall include: (h) managing contracts, including supplier performance, where appropriate;”. The Procurement Act s.36 provides that that one of the functions of requesting entities is “managing contracts, including supplier performance.”

PPR Part XII Contract Management, s.111 sets out a list of Contract Management Responsibilities. The procuring entity is required to designate a member of staff as contract manager for every contract awarded whose responsibilities are listed at s.111(2).

PPR R.111 Records of past performance provides that Procuring Entities shall submit record of past performance to the Technical Secretariat and such record shall be used in evaluation of subsequent tenderers. In practice, these records are not submitted.

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The Construction Industry Council (CIC), has worked with the Eswatini Standards Agency to approve a Standard for Contractor Performance Reports and ISO 8045. According to the CIC, the next phase of the work is to consider methods for enforcement and how to measure, performance, quality, financial and time management.²⁰

In discussions with the MAPS Assessment Team, stakeholders consistently commented that review of contract implementation and contract performance appraisals is limited. Proactive contract management is carried out by a few procuring entities as standard practice, most notably where a dedicated project manager is appointed to cover the entire procurement cycle. The lack of contract management in practice has been picked up in the MAPS Assessment sampling process and is assigned a Red flag at 9 (c) Contract management.

Gap analysis

Recommendations

Assessment criterion 1(i)(b):

Conditions for contract amendments are defined, ensure economy and do not arbitrarily limit competition.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The legal and regulatory framework contains provisions concerning contract amendments but these relate primarily to the process for preparing amendments and obtaining approval.

The Procurement Act s.34 Functions of Procuring Entities provides that the functions of the procuring entity designated as responsible for any procurement in accordance with the Procurement Act s.31 shall include “(g) preparing contract documents and amendments;”

PRR R.111 designates the contract manager as responsible for preparing any contract amendments and obtaining all required approvals before their issue.

PRR R.113 Contract Amendments requires a written contract amendment to be prepared for “any change to the terms and conditions of a contract” and for prior authorization to be obtained from the relevant approvals authority, with the relevant approvals authority being determined by the value of the entire original or amended contract and not by the value of the amendments. Once approved, amendments must be in writing and signed by authorised representatives.

PPR R.8 provides that all amendments or series of amendments which, in aggregate, increases the contract value, are subject to prior authorisation of the relevant approvals authority.

PPR R.14 requires contract amendments or variations to be included in procurement records, together with all submissions to approvals of the relevant approvals authority.

PRR R.114 Variation of Contract, permits contract variations “in order to facilitate adaptation to unanticipated events or changes in requirements, the contract may permit” and subject to prior commitment of funds, with the contract to clearly state any approval requirements relating to contract variations.

The Government Tender Board, which is the approvals authority in all cases over specified financial thresholds has raised concerns in its most recent annual report for 2022-2023 that “Applications for increase of scope sometimes double the initial contract price for works.”

Gap analysis

Contract amendments: The legal and regulatory framework contains provisions concerning contract amendments but these relate primarily to the process for preparing amendments and obtaining approval. It does not, however,

²⁰ Information provided by CIC to MAPS Assessment Team in discussions, August 2023.

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list or define in detail the circumstances and conditions where contract amendments, including extensions, are permitted. Thus, there are no clear statutory requirements enabling procuring entities and suppliers to understand what is or is not permitted, which creates legal uncertainty. Nor is there a clear legal framework in the PA or PPR to guide approvals authorities in their decision making on requests for approval of amendments, potentially resulting in inconsistency in that decision making. Inappropriate or overuse of contract amendments can reduce value for money and limit competition and the likelihood of use of amendments, for example to remedy poor planning, will be higher if conditions for use are not carefully prescribed.

Recommendations

Contract amendments: Amend the legal/regulatory framework to include provisions on contract amendments which detail the circumstances where they may be permitted and any conditions which must be met. This should assist both procuring entities and suppliers who are seeking the amendments and approvals authorities who are deciding on the efficacy and permissibility of proposed amendments. There should also be a specific requirement for a clear audit trail with written justification for contract amendments (other than minor amendments, to be defined). Provisions on contract amendments must be accompanied by clear, practical guidance and training to ensure that they are well understood and consistently applied.

Assessment criterion 1(i)(c):

There are efficient and fair processes to resolve disputes promptly during the performance of the contract.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There are no provisions in the Procurement Act or PPR concerning processes for dispute resolution during the performance of the contract.

In a small sample of published tender documents analysed for the purposes of this criterion, the MAPS Assessment Team found in the contract terms, as standard, an initial requirement to seek amicable resolution of disputes moving on variously to use: general arbitration in accordance with the laws of Eswatini, arbitration applying UNCITRAL rules or adjudication. Where FIDIC or JBCC standard contract terms are used, those dispute resolution clauses will apply. The Eswatini Arbitration Act 1904 allows for arbitration of disputes and enforcement of awards. Contractual disputes may also be referred to the Courts but there are significant delays in the court system meaning that contractual disputes pursued through the courts are unlikely to be resolved promptly.

The MAPS Assessment Team learned during stakeholder engagement that there is a preference to seek to resolve matters at a local level but this is partly driven by the perception of potential negative consequence for suppliers who do seek more formal redress.

Eswatini is not a party to the New York Arbitration Convention on Recognition and Enforcement of Foreign Arbitral Awards.²¹ The High Court of Eswatini has held, in a decision directly relevant to foreign arbitral awards, that foreign court decisions can be recognized and enforced by application of Roman Dutch Common Law if they do not fall under the Reciprocal Enforcement of Judgments Act 1922.²²

The Construction Industry Council has, with the assistance of legal advisors, prepared the first draft of a proposed disputes management mechanism for contractual disputes in the construction sector. This includes consideration of a structure to ensure that this is not in conflict with the CIC's regulatory role. These proposals are currently on hold pending review of the CIC Act and CIC regulations.

Business Eswatini has assisted member, with some success, in seeking to resolve contractual problems by means of direct approaches to government, in particular relating to late or nonpayment and VAT issues.

²¹ <https://www.newyorkconvention.org/countries> accessed 14 July 2023.

²² Improchem (Pty) Limited v USA Distillers (Pty) Limited, Civil Case No.1130/17. Appealed to Supreme Court, case dismissed, Case No. 17/2020.

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Gap analysis

Dispute resolution: There are no provisions in the Procurement Act or PPR concerning processes for dispute resolution during the performance of the contract. Dispute resolution provisions may be included in contract terms used by procuring entities, but there is currently no standard suite of contract documents for use by all procuring entities and so legal provisions and practices, after initial attempts to resolve disputes amicably, are inconsistent. Significant delays in the court system mean that this is not an efficient route for dispute resolution.

Recommendations

Dispute resolution: The simplest short-term measure to start to improve dispute resolution processes is to introduce consistency in the methods of dispute resolution. The appropriate standard methods may vary according to the type and complexity of the contract. This can be addressed initially by inclusion of appropriate clauses in standard contract documents for mandatory use by all procuring entities.

Assessment criterion 1(i)(d):

The final outcome of a dispute resolution process is enforceable.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Arbitration Act 1904 allows for arbitration of disputes and enforcement of awards. Court decisions are enforceable.

Gap analysis

Recommendations

Sub-indicator 1(j)

Electronic Procurement (e-Procurement)

The legal framework provides for the following:

Assessment criterion 1(j)(a):

The legal framework allows or mandates e-Procurement solutions covering the public procurement cycle, whether entirely or partially.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act envisages the introduction of e-procurement solutions (ICT) and mandates the ESPPRA to explore options, make recommendations and issue circulars and instructions to support introduction of e-procurement solutions. Dating from 2011, the Procurement Act does not contain more detailed provisions on use of e-procurement to support current practice.

The PPR is more recent legislation and contains limited provisions allowing for use of e-procurement solutions, relating to: advertisement of tender opportunities, notices of contract award, electronic communication, the possibility of electronic quotations and publication of limited specified information on the Eswatini Government website.

Procurement Act s.8 Introduction of Information and Communication Technology, (ICT) provides that the ESPPRA “shall examine and recommend ways of introducing in public procurement, at appropriate stages, the use of information and communications technology, and other technical innovations, where such technology promotes

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the objectives of this Act.” It goes on to provide that the ESPPRA may issue circulars and instructions on measure and programmes to introduce ICT in public procurement and identify additions or amendments to the public procurement legal and regulatory framework to support the application of ICT and shall promote their introduction. The Procurement Act is, otherwise, silent as to use of e-procurement.

PPR is more recent legislation and contains some provisions allowing for use of e-procurement solutions:

for publication on the Eswatini Government website of information on common use items (PPR R.9); allowing for communications between tenderers and procuring entities and tender board to be in either written or electronic format (PPR R.15); requiring the ESPPRA to maintain and publish the register of suspended tenderers; and requires the register to be made available to the public online (PPR R.18); requiring invitation notices to be published online (PPR R.21); requiring publication of results of tender award and notice of intention to award online (PPR R.22), and: permitting use of electronic quotations (PPR R.93).

Gap analysis

Recommendations

Suggestion for improvement

Update legal framework to allow for future developments on introduction of new e-GP System: The legal framework will need to be reviewed to permit and facilitate the introduction and implementation of the new e-GP system. This will require consideration of changes having an impact on the whole procurement cycle, from procurement planning through to contract and performance management, delivery and payment. In order to ensure legal certainty, it is important that this does not lag behind the roll-out in practice and so careful consideration needs to be given to which part of the legal framework will be updated to meet these needs and achieve necessary changes within timescales which mean that the legal framework and e-GP system are aligned in practice.

With the introduction of a new e-GP system it is likely that functionalities will be progressively rolled out. Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out, including stages when end-to-end procurement is conducted partly using e-GP system and partly paper-based. In order to facilitate roll out of e-GPS to apply to the full procurement cycle, measures should be taken now to improve current paper-based procurement and to start to change behaviours. Examples of immediate improvement measures for activities where e-GPS functionalities may be rolled out at a later stage, are record keeping at tender evaluation stage and in contract management, including variations and amendments.

See 1(j)(a) and 1(j)(b) below for specific Gaps and related Recommendations, to include provisions in the revised legal framework that (1) ensure the use of appropriate tools and standards that provide unrestricted and full access to the system (2) require interested parties to be informed which parts of the processes will be managed electronically.

Assessment criterion 1(j)(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.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The e-GP system has not yet been introduced and there are no provisions in the current legal framework that ensure the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.

Gap analysis

Tools and standards for use of e-procurement/e-GP system: With the proposed introduction of e-GP system within a short time period, it is imperative that the legal framework is updated to specify tools and standards to be applied.

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Recommendations

Tools and standards for use of e-procurement/e-GP system: Update the legal framework to include provisions to ensure the consistent application of electronic technologies and require standardized formats, technical equipment and connection arrangements and procedures to grant unrestricted and full access to e-procurement. These provisions will need to be comprehensive and tailored to reflect the particularities of the e-GP system in Eswatini. See also Suggestion for improvement at 1(j)(a).

Assessment criterion 1(j)(c):

The legal framework requires that interested parties be informed which parts of the processes will be managed electronically.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The e-GP system has not yet been introduced and there are no provisions in the current legal framework that require interested parties to be informed which part of the process will be managed electronically.

Gap analysis

Informing interested parties of processes to be managed electronically: With the proposed introduction of a new e-GP system within a short time period, it is imperative that the legal framework is updated to include provisions which make it mandatory to inform potential bidders which parts of the process will be managed electronically.

Recommendations

Informing interested parties of processes to be managed electronically: Update the legal framework to include provisions to make it mandatory 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.). Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out and will need to clarify whether conventional paper-based procurement is still allowed and at what phases of the procurement process.

See also Suggestion for Improvement at 1(j)(a).

Sub-indicator 1(k)

Norms for safekeeping of records, documents and electronic data

The legal framework provides for the following:

Assessment criterion 1(k)(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.

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

PPR R.14 Record Keeping, sets out a comprehensive list of procurement records and documents to be retained at operational level, including documents and correspondence relating to contract management. In practice, however, there is substantial evidence that record keeping is poor in many cases. This can be clearly established from sampled files, reports of the Auditor General, ESPRA compliance audits and through information received direct from stakeholders by the MAPS Assessment team.

There are no provisions in the procurement legal framework outlining what is available for public inspection and conditions for access.

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The Public Service Act, Code of Conduct refers to the general principle that information should be made available on request, unless compelling reasons exist why it should not. It requires that departments should lay down specific procedures for dealing with release of information. There is, however, no general right of public access to procurement documents and no dedicated legislation concerning access to information or freedom of information. In practice, stakeholders report an environment which does not facilitate disclosure of information (see analysis at indicator 11(a)).

Gap analysis

Procurement records and documents: There is a comprehensive list in the PPR of the procurement records and documents to be retained by procuring entities at operational level. In practice, however there is substantial evidence that compliance with record keeping requirements set out in the legal framework is poor in many cases. This can be clearly established from sampled files, reports of the Auditor General, ESPPRA compliance audits and through information received direct from stakeholders by the MAPS Assessment team.

There are no provisions in the procurement legal framework outlining what is available for public inspection and conditions for access.

This Gap is assigned a Red flag because it severely limits opportunities to look at implementation performance and it also inhibits the proper functioning of both internal and external control systems. Both of these factors have a significant negative impact on the overall effectiveness of the procurement system. In addition, proactive inter-institutional cooperation beyond the procurement sphere will be required to agree, prepare, implement and support the introduction of relevant and proportionate legal/regulatory provisions plus internal and external control and audit measures to ensure consistent application to all procuring entities, and effective enforcement of requirements for record keeping.

Recommendation

Procurement records and documents: Introduce measures to ensure that procurement records and documents, or where relevant copy documents, are collated and retained in a single file in one location at procuring entity level. These measures should not wait for roll out of e-GP but need to be considered and implemented immediately, to apply consistently to procuring entities, and supported by relevant guidelines and, ideally training, both to address the current Gap and also to facilitate the implementation of e-GP. e-GP is usually introduced in a phased manner with initial focus on use of e-GP to publish contract opportunities and information on contract award. If the e-GP roll out in Eswatini follows this model, it is likely that some procurement records particularly those relating to the conduct of evaluation, remain paper based for some time. This means that proper record keeping at procuring entity level will remain a critical issue.

See also 1(k)(b) and 1(k)(c) below for specific Gaps and related Recommendations on (1) timescales for retention of procurement documents and (2) security protocols.

Assessment criterion 1(k)(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.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

PPR R.14 Record Keeping, requires procurement records to be retained for a period of five (5) years from the later of: (a) contract completion or termination; (b) a decision to terminate the procurement proceedings; or (c) the settlement of any dispute under the contract. This is compatible with the audit cycle.

There is a 20 year limitation period for prosecution of cases of fraud and corruption, running from the time of commission of the offence. (Criminal Procedure and Evidence Act 1938 s.20). The standard retention period for retention of records is relatively short, raising the possibility of loss of relevant evidence in some cases.

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Gap

Document retention period: The timescales for retention of procurement documents and the limitation period for fraud and corruption period are not aligned, raising the potential that investigations of fraud and corruption may be hampered because relevant procurement documents have not been retained.

This Gap is assigned a Red Flag because it is likely to impede anti-corruption related activities in the public procurement environment and will require joint review and decision making by various institutional stakeholders, including anti-corruption, finance and procurement institutions as well as the Office of the Attorney General and thus does not lie solely within the procurement sphere.

Recommendations

Document retention period: Review the impact of non-availability of procurement related records on effective investigation and prosecution of cases of fraud and corruption. Consider revising requirements for retention of procurement records to better align with limitation periods applying an appropriate risk assessment process to determine appropriate dates for destruction of records and period for retention. The same retention periods must apply to all three types of procuring entities.

Assessment criterion 1(k)(c):

There are established security protocols to protect records (physical and/or electronic).

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There are no established security protocols to protect public procurement records (physical and/or electronic). There is no law on archives or equivalent legislation concerning retention of government records. Practical concerns on security of record keeping were raised in the Auditor General's Compliance Audit Report.

Gap

Security protocols for protection of records: There are no established security protocols to protect public procurement records (physical and/or electronic) thus jeopardizing the ability to check implementation performance due to lack of availability of relevant records.

Recommendations

Security protocols for protection of records: Establish security protocols to protect records of public procurement, both physical and electronic and consider measures, including enforcement, to ensure compliance in a consistent manner by all procuring entities. This will need to be closely aligned with new provisions to be introduced to ensure appropriate alignment with operation of the e-GP system.

Sub-indicator 1(l)

Public procurement principles in specialized legislation

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

Assessment criterion 1(l)(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.

Conclusion: **No gap**

Red flag: No

Qualitative analysis

There is no specialised legislation governing procurement by entities operating in specific sectors. The Procurement Act s.65(2) provides that "Where appropriate, different regulations may regulate central government bodies, public enterprises and local government authorities". No regulations have been issued pursuant to this provision.

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Gap analysis
Recommendations
Assessment criterion 1(l)(b): Public procurement principles and/or laws apply to the selection and contracting of public private partnerships (PPP), including concessions as appropriate.
Conclusion: No gap
Red flag: No
Qualitative analysis The Procurement Act s.43 Procedures for procurement of infrastructure on the basis of private financing and for award of concessions, requires that these contracts shall be awarded “in accordance with the principles and objectives” of the Procurement Act and Government policy. Special methods and procedures may be specified in regulations. The Ministry of Finance has developed the Public Private Partnership Policy ²³ which applies to all Ministries and Government Departments, state owned or controlled enterprises and local authorities. S.8 Principles Governing Implementation of PPPs include principles of transparency in procurement, public interest (good value and enhanced services) and value for money in terms of the overall project and PPP contract. PPP activity has been limited and the legal and institutional framework to facilitate implementation of PPPs is currently subject to review. ²⁴
Gap analysis
Recommendations
Assessment criterion 1(l)(c): Responsibilities for developing policies and supporting the implementation of PPPs, including concessions, are clearly assigned.
Conclusion: No gap
Red flag: No
Qualitative analysis The Ministry of Finance developed the Public Private Partnership Policy. (PPP Policy). PPP Policy s.4 provides that overall responsibility for implementation of the policy rests with the Ministry of Finance.
Gap analysis
Recommendations

Indicator 2. Implementing regulations and tools support the legal framework

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

²³ <https://www.gov.sz/images/stories/finance/corporate%20Services/final%20ppp%20policy.pdf>, accessed 15 June 2023.

²⁴ Information provided to Assessment Team in discussion with Ministry of Finance, August 2023.

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Assessment criterion 2(a)(a):

There are regulations that supplement and detail the provisions of the procurement law, and do not contradict the law.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Public Procurement Regulations 2020 (PPR) were issued by the Minister of Finance pursuant to s.65 of the Procurement Act and came into effect on 24 May 2021. PPR repealed the previous Public Procurement Regulations 2008 and Public Procurement Procedures 2016. The PPR apply to “all procurement of goods, works and non-consultancy services undertaken by a procuring entity” and selection and employment of consultants. The definition of “procuring entity” is as in the Procurement Act.

Public Procurement Regulations 2020 (PPR): There was a prolonged delay in the adoption of public procurement regulations in support of the Procurement Act. In the meantime, pre-existing Public Procurement Regulations 2008 (“PPR 2008”),²⁵ not aligned with the Procurement Act, continued to apply. In 2016, ESPPRA issued Circular No.1/2016, Public Procurement Procedures (“Public Procurement Procedures 2016”), intended to support effective implementation of the Procurement Act, pending full passage of the draft public procurement regulations. Circular No.1/2016 was addressed to the “Government Tender Board, Entity Tender Boards, procuring entities and requesting entities”.

The Public Procurement Regulations 2020 (PPR) were finally passed in 2020, after several years of debate. The PPR came fully into effect on 24 May 2021, repealing the Public Procurement Regulations 2008 and the Public Procurement Procedures 2016. The PPR apply to “all procurement of goods, works and non-consultancy services undertaken by a procuring entity” and selection and employment of consultants. The definition of “procuring entity” is as in the Procurement Act.

The Procurement Act s.65(2) provides that “Where appropriate, different regulations may regulate central government bodies, public enterprises and local government authorities”. No regulations have been issued pursuant to this provision.

Gap analysis

Recommendations

Assessment criterion 2(a)(b):

The regulations are clear, comprehensive and consolidated as a set of regulations readily available in a single accessible place.

Conclusion: No gap

Red flag: No

Qualitative analysis

The PPR are a single set of consolidated provisions which are clear and comprehensive. They can be downloaded free of charge from the ESPPRA website.

Gap analysis

Recommendations

Assessment criterion 2(a)(c):

Responsibility for maintenance of the regulations is clearly established, and the regulations are updated regularly

²⁵ Public Procurement Regulations 2008, issued pursuant to s.26 Finance and Audit Act, No.18 of 1967.

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Conclusion: No gap

Red flag: No

Qualitative analysis

Responsibility for formulation and maintenance of regulations lies with ESPPRA. PPR 2020, which became fully operational in May 2021, have not yet been reviewed and updated.

The Procurement Act s10 Functions of the Agency [ESPPRA] provides that one of the functions of the ESPPRA is regulation, in pursuance of which the ESPPRA shall “formulate regulations governing the procurement of goods, works and services for the Government and recommend these to the Minister.”

The Procurement Act s.7 requires the ESPPRA to make the following information, including amendments, accessible to the public and to systematically maintain such information: public procurement regulations, all administrative rulings and directives of general application in connection with procurement.

There is no specific reference in the Procurement Act to responsibility for maintenance, although this may be implied from the more general responsibility allocated to ESPPRA under the Procurement Act s.10.

Gap analysis

Recommendations

Suggestion for improvement

Review of PPR: The PPR were issued in 2020 and became fully operational in May 2021. After nearly three years in operation, it is now an appropriate time to undertake a review of the PPR for fitness for purpose for use by all procuring entities and to identify necessary improvements, amendments and additions. This is timely, in the light of the planned implementation and roll out of the new e-GP system. The review process should involve active engagement with stakeholders including procuring entities, private sector suppliers (large, medium, small and micro businesses) and civil society.

Sub-indicator 2(b)

Model procurement documents for goods, works and services

Assessment criterion 2(b)(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.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

There is no common set of model procurement documents available and mandated for use by all procuring entities. As a result, there are a number of documents in circulation, presenting a very fragmented picture.

The MoF Corporate Services Department has published a number of model documents for use by Ministries, which can be downloaded from its webpage. These include an Invitation to Tender document for Open and Limited Tendering but it dates from 2010 and thus predates the Procurement Act and PPR. Model documents used by the Technical Secretariat also appear, in most cases, to date from 2010.

According to the Procurement Act s.10 one of the functions of the ESPPRA is to issue standard tender documents and other standard procurement documents, use of which is mandatory for all procuring entities. A set of standard tender documents has been in preparation for some years and was due to be finalised in 2023, but it has not yet been published. Preparation of these documents, which include contract terms, has been led by ESPPRA.

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Gap analysis

Standard tender documents: There is no single set of model procurement documents (standard tender documents) provided for use by all procuring entities. Published documents used by Ministries are out of date and not aligned with the current legal framework. Evidence to date shows that the process for introduction of new standard tender documents has been problematic, with official publication substantially delayed and still not achieved.

Recommendation

Combined recommendation for 2(b) and 2(c)

Standard tender documents and standard contract documents: In order to ensure consistency and enhance understanding and application for all stakeholders, prioritise the finalisation and adoption of: (1) a set of standard tender documents; and (2) standard contract conditions, and mandate their use by all procuring entities (Central government, local government and Category A parastatals). Core standard contract conditions should be fair and balanced and reflect national laws which impact on contracts and their performance. Ensure that all procuring entities are clearly directed, ideally by means of communications issued jointly by ESPPRA and MoF, to use the new standard tender documents and contract conditions. Consider measures to enforce appropriate use of the standard tender documents and standard contract conditions by all procuring entities. New standard tender documents and standard contract conditions should be issued by a single institution and supported by clear instructions and guidance on their use which should be issued by that institution at the same time as the standard tender documents and standard contract conditions. In order to further ensure correct use of the documents their launch should be tied in with a programme of training to support procuring entities as well as public dissemination so that suppliers are also aware of the changes. To increase legal certainty, responsibility for review and updating the standard tender documents and standard contract conditions, including mandatory clauses or templates, must be clearly assigned. In order to ensure consistency of use of appropriate procurement documents where standard tender documents are not available or standard contract conditions are inappropriate, responsibility for advising procuring entities on which documents to use should be provided to all procuring entities by a single authority with relevant expertise.

Assessment criterion 2(b)(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.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There is no common standard and mandatory set or clauses or templates and the situation is highly fragmented. See analysis at 2(b)(a).

Gap analysis

Standard tender clauses: There is no common standard and mandatory set or clauses or templates for use in documents prepared for competitive tendering/bidding.

This Gap is assigned a Red Flag for the same reasons stated under 2(b)(a).

Recommendation

Standard tender clauses: See combined recommendation at 2(b)(a).

Assessment criterion 2(b)(c):

The documents are kept up to date, with responsibility for preparation and updating clearly assigned.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There is no common standard and mandatory set or clauses or templates and the situation is highly fragmented.

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Documents issued by Ministry of Finance and reviewed by the MAPS Assessment team do not, in general, reflect the current legal framework and are out of date. See analysis at 2(b)(a).

There is no specific reference in the Procurement Act to responsibility for updating the documents, although this may be implied from the more general responsibility allocated to ESPPRA under the Procurement Act s.10.

Gap analysis

Documents currently available: Standard documents used by Ministries do not, in general, reflect the current legal framework and are not kept up to date.

Recommendation

See combined recommendation at 2(b)(a).

Suggestion for improvement

Allocation of responsibility for review and updating standard tender documents: Responsibility for preparation of standard tender documents is clearly allocated to the ESPPRA and those provisions can be read to include updating. To improve clarity, include specific reference in the legal framework to where responsibility lies for review and updating of the standard tender documents.

Sub-indicator 2(c) Standard contract conditions used

Assessment criterion 2(c)(a):

There are standard contract conditions for the most common types of contracts, and their use is mandatory.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There is no single set or consolidated collection of standard contract conditions for most common types of contracts for mandatory use by all procuring entities.

The overall picture is highly fragmented, with procuring entities using a range of different contract conditions. The MoF Corporate Services Department has published an Invitation to Tender document for Open and Limited Tendering (September 2010) which includes general conditions of contract (Goods GCCs). These Goods GCCs predate the Procurement Act 2011 and PPR 2020. They have been updated to change "Swaziland" to "Eswatini". Samples of recent tender documents published on the MoF website²⁶ use the Goods GCCs (including in some cases for works related contracts), as well as FIDIC conditions for construction related contracts.

A limited sample of advertised tenders on ESPPRA website²⁷ shows use of a range of contract conditions at varying levels of detail and also use of FIDIC and Joint Building Contracts Committee Principal Building Agreement in the case of construction related contracts.

Gap analysis

Standard contract documents: There is no single set or consolidated collection of standard contract conditions for most common types of contracts for mandatory use by all procuring entities. To enhance confidence in the system, particularly from a supplier perspective, it is important to establish core standard contract conditions which are mandatory for use and consistently applied. Evidence to date shows that the process for introduction of new standard tender documents including contract conditions has been problematic, with official publication substantially delayed and still not achieved.

²⁶ 20 June 2023: Review of current advertisements on Government Website (central government/ministries).

²⁷ 15 July 2023: Review of 10 recent tenders published on ESPPRA website - for purposes of analysis for sub-indicator 2(c).

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Recommendations

Combined recommendation for 2(b) and 2(c) (duplicated from 2(b)(a) for clarity).

Standard tender documents and standard contract documents: In order to ensure consistency and enhance understanding and application for all stakeholders, prioritise the finalization and adoption of: (1) a set of standard tender documents, and (2) standard contract conditions, and mandate their use by all procuring entities (Central government, local government and Category A parastatals). Core standard contract conditions should be fair and balanced and reflect national laws which impact on contracts and their performance.

Ensure that all procuring entities are clearly directed, ideally by means of communications issued jointly by ESPPRA and MoF, to use the new standard tender documents and contract conditions. Consider measures to enforce appropriate use of the standard tender documents and standard contract conditions by all procuring entities. New standard tender documents and standard contract conditions should be supported by clear instructions and guidance on their use which should be issued at the same time as the standard tender documents and standard contract conditions. In order to further ensure correct use of the documents their launch should be tied in with a programme of training to support procuring entities as well as public dissemination so that suppliers are also aware of the changes. To increase legal certainty, responsibility for review and updating the standard tender documents and standard contract conditions, including mandatory clauses or templates, must be clearly assigned. In order to ensure consistency of use of appropriate procurement documents where standard tender documents are not available or standard contract conditions are inappropriate, responsibility for advising procuring entities on which documents to use should be provided to all procuring entities by a single authority with relevant expertise.

Assessment criterion 2(c)(b):

The content of the standard contract conditions is generally consistent with internationally accepted practice.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There is no standard set of contract conditions applicable to all procuring entities (see analysis at 2(c)(a)).

Gap analysis

Standard contract conditions: There is no single set or consolidated collection of standard contract conditions for most common types of contracts for mandatory use by all procuring entities.

This Gap is assigned a Red Flag for the same reasons stated under 2(c)(a).

Recommendations

See combined recommendation at 2(c)(a).

Assessment criterion 2(c)(c):

Standard contract conditions are an integral part of the procurement documents and made available to participants in procurement proceedings.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

In the sample cases reviewed (see analysis at 2(c)(a)), contract conditions are included in procurement documents and made available to participants.

However, the lack of standard procurement documents and standard contract conditions applicable to all procuring entities and non-alignment of available documents with the current legal framework (see analysis and 2(a) and 2(b)) leads the MAPS Assessment team to conclude that this criterion is not satisfied.

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Gap analysis

There is no single set or consolidated collection of standard contract conditions for most common types of contracts for mandatory use by all procuring entities.

Recommendations

See combined recommendation at 2(c)(a).

Sub-indicator 2(d)

User's guide or manual for procuring entities

Assessment criterion 2(d)(a):

There is (a) comprehensive procurement manual(s) detailing all procedures for the correct implementation of procurement regulations and laws.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There is currently no comprehensive procurement manual.

Supporting circulars, instructions, manuals: The Procurement Act s.10 provides that the Public Procurement Regulatory Agency (ESPPRA) "shall issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation and application of [the Procurement Act] and public procurement regulations", with related powers set out in the Procurement Act s.66.

The ESPPRA has been working on preparation of a manual for some time. Publication has been delayed and the most recent target date for publication was the last quarter of 2023/2024. No procurement manual has been issued to date.

Gap analysis

Comprehensive procurement manual: There is no comprehensive procurement manual. This is an important implementation tool that helps turn policy and the legislative/regulatory framework in to practice and can help create consistency of application within the public procurement system.

Recommendation

Comprehensive procurement manual: Prepare and publish a comprehensive procurement manual covering, as a minimum all procedures for the correct implementation of the Procurement Act and PPR. This should both explain, in easily understandable way, the legal and regulatory requirements together with information on how these requirements are implemented in practice, including reference to relevant standard documents and templates. This procurement manual must be available to and used by all procuring entities (central government, local government and Category A parastatals), to ensure consistency of understanding and practice by all procuring entities.

Assessment criterion 2(d)(b):

Responsibility for maintenance of the manual is clearly established, and the manual is updated regularly.

Conclusion: **No gap**

Red flag: No

Qualitative analysis

The Procurement Act s.10 provides that the Public Procurement Regulatory Agency (ESPPRA) "shall issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation and application of [the Procurement Act] and public procurement regulations".

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There is no specific reference in the Procurement Act to responsibility for updating guides or manuals, although this may be implied from the responsibility allocated to ESPRA under the Procurement Act s.10.

Gap analysis

Recommendations

Suggestion for improvement

Allocation of responsibility for review and updating procurement manual: Responsibility for preparation of a manual is clearly allocated to the ESPRA and those provisions can be read to include review and maintenance. To improve clarity, include specific reference in the legal framework to where responsibility lies for review and updating the manual.

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

Sub-indicator 3(a)

Sustainable Public Procurement (SPP)

Assessment criterion 3(a)(a):

The country has a policy/strategy in place to implement SPP in support of broader national policy objectives

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

There is no policy/strategy in place to implement sustainable public procurement (SPP).

National Development Plan 2023/24-2027/28: the National Development Plan (NDP) flags the need to mainstream climate change, environment and disaster risk in the planning and budgeting process, stating that priority will be given to climate proofing capital project and “integrating climate change during procurement and implementation as well as developing strategies that mitigate the impact of drought” (p 55). The NDP also flags strategy for enforcing preference margins in the Procurement Act.

MSME: The ESPRA commissioned and published a report in November 2019, “Strategies for promoting MSME participation for the attainment of Vision 2022”.²⁸ This report provides findings on how the Government of Eswatini can use public procurement as a strategic instrument for development and strengthening the local economy.

Gap analysis

Sustainable Public Procurement policy/strategy: There is no policy/strategy in place to implement sustainable public procurement (SPP).

► This Gap is assigned a Red flag because lack of SPP policy/strategy hinders promotion and delivery of sustainable public procurement practices consistent with the principles of economy, efficiency and transparency and aligned with national goals. In addition, preparation and agreement on an SPP policy/strategy and implementation plan applying to all procuring entities and aligning with broader national policy objectives will require input from a number of institutions and ministries, with high level government support, and is not solely within the procurement sphere.

Recommendations

Combined recommendations for 3(a)(a), (b) & (c)

²⁸ The Impact of Procurement on Sustainable Economic Development in Eswatini, Strategies for promoting MSME participation for the attainment of Vision 2022, prepared by ESEPARC (Eswatini Economic Policy Analysis and Research Centre, 15 November 2019).

Pillar I. Legal, Regulatory, and Policy Framework

Sustainable Public Procurement policy/strategy and implementation, including incorporation of sustainability criteria into all stages of the procurement lifecycle: Develop a sustainable public procurement policy/strategy to implement SPP (economic, environmental (including climate considerations) and social (including gender equality)) in support of broader national policy objectives and reflecting national priorities. This should include a clear implementation plan/road map to cover introduction of systems and tools to operationalize, facilitate and monitor the application of SPP in priority areas in particular. It should also identify and provide for any amendments necessary to the legal/regulatory framework to allow for sustainability to be fully incorporated at all stages of the procurement cycle ensuring well-balance application of sustainability criteria from planning through to contract delivery and monitoring. SPP requirements embedded in the legal and regulatory framework should be reflected in model procurement documents (standard tender documents), contract conditions and in supporting practical guidelines for implementation and related training.

Assessment criterion 3(a)(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.

Conclusion: Choose an item.

Not assessed

Red flag:

Qualitative analysis

There is currently no sustainable public procurement policy/strategy in place to implement SPP in support of broader national policy objectives and thus no implementation plan to assess.

Gap analysis

Recommendations

Assessment criterion 3(a)(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.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

There are no provisions in the Procurement Act specifically referencing use of economic, environmental and social criteria in the procurement cycle. The PPR include high-level provisions on environmental issues in procurement at all stages of the procurement lifecycle but no specific references to economic or social issues.

PRR R.28 Environmental issues, includes provisions addressing environmental issues at the planning, procurement and contract delivery stages. In summary, PRR R.28 requires a procuring entity to: avoid where possible procurement of chemicals pesticides or other goods which are known to have or suspected to have harmful effects on the health of the population, the environment, domestic animals, wildlife and flora; to ensure that storage of potentially harmful or hazardous goods is restricted so that any harmful effects are avoided or limited; assess the impact on the environment of any works at the planning stage of the project and in any case before procurement proceedings are commenced; pay due regard to repair and re-use of goods wherever practicable and economically viable before disposing them by tender and procuring new replacements, and; with all environmental standards and ensure that all their suppliers comply with such laws.

The PPR allows for the use of price and also non-price attributes, applying “additional evaluation criteria”. (See analysis at 1(f)(b)).

Pillar I. Legal, Regulatory, and Policy Framework

Gap analysis

Provisions in legal framework for incorporation of sustainability into the procurement cycle: Provisions allowing for sustainability to be incorporated into all stages of the procurement cycle are limited and the main focus is on environmental issues in the context of procurement of goods. There is the possibility of using “additional evaluation criteria” which may include criteria relating to SPP. There is no detailed guidance on when and how to incorporate sustainability at all stages of the procurement cycle.

Recommendations

See combined recommendations at 3(a)(a).

Assessment criterion 3(a)(d):

The legal provisions require a well-balanced application of sustainability criteria to ensure value for money.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There are no detailed legal provisions or supporting guidance on how to apply sustainability criteria to ensure value for money.

Gap analysis

Application of sustainability criteria: Provisions allowing for sustainability to be incorporated into all stages of the procurement cycle are limited. There are no detailed provisions or supporting guidance on how to apply sustainability criteria to ensure value for money.

Recommendations

See combined recommendations 3(a)(a).

Sub-indicator 3(b)

Obligations deriving from international agreements

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

Assessment criterion 3(b)(a):

Clearly established

Conclusion: **No gap**

Red flag: No

Qualitative analysis

Eswatini is a party to the following Multilateral and Regional Trade Agreements:

Multilateral: World Trade Organization (WTO): Eswatini is a founder member of the World Trade Organization. It is not a signatory to or observer of the WTO Agreement on Government Procurement (GPA).

Regional: COMESA (Common Market for Eastern and Southern Africa), trading under a derogation; SACU (South African Customs Union); EU-SADC Economic Partnership Agreement.

Eswatini is a signatory to/has ratified the following UN conventions/covenants:²⁹ Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, International Convention on Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child (and optional protocols), Convention on the Rights of Persons with Disabilities.

²⁹Source: UN Treaty Body Database

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN

Pillar I. Legal, Regulatory, and Policy Framework

Eswatini has ratified 8 out of 10 of the ILO Fundamental Conventions.³⁰ Eswatini is also a signatory to United Nations Convention Against Corruption.

Gap analysis

Recommendations

Assessment criterion 3(b)(b):

Consistently adopted in laws and regulations and reflected in procurement policies.

Conclusion: No gap

Red flag: No

Qualitative analysis

COMESA Public Procurement Regulations: As noted above, Eswatini is a member of COMESA (Common Market for Eastern and Southern Africa). COMESA has specific set of Regulations concerning harmonisation of public procurement, issued pursuant to the COMESA Treaty. The COMESA Public Procurement Regulations³¹, which apply to all regional competitive bidding otherwise than provided under those Regulations, provide a helpful example for the purposes of assessment of this sub-indicator. The public procurement legal framework in Eswatini appears to be aligned with the requirements of those Regulations. PPR R.38(4) requires international tendering where “regional or international participation is required in accordance with an agreement entered into by the Government.” The Procurement Plan Template issued by ESPPRA (SPPRA Circular No.2/2015) requires procuring entities to specify in the plan whether a procurement must be advertised regionally, including reference to COMESA.

Gap analysis

Recommendations

³⁰ https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103336

³¹ COMESA Public Procurement Regulations, Legal Notice No.3 of 2009, COMESA Official Gazette Volume 15 No.3 of 09 June 2009. <https://www.comesa.int/wp-content/uploads/2020/05/2009-Gazette-Vol.-15-No3.pdf>

Pillar II. Institutional Framework and Management Capacity

Indicator 4. The public procurement system is mainstreamed and well integrated into the public financial management system

Sub-indicator 4(a) Procurement planning and the budget cycle	
The legal and regulatory framework, financial procedures and systems provide for the following:	
Assessment criterion 4(a)(a):	Annual or multi-annual procurement plans are prepared, to facilitate the budget planning and formulation process and to contribute to multi-year planning.
Conclusion:	No gap
Red flag:	No
Qualitative analysis	<p>The legal and regulatory framework requires annual procurement plans to be prepared to facilitate the budget planning process.</p> <p>The Procurement Act s.36 lists as a function of requesting entities “preparing an annual procurement plan and providing information on forecast requirements to the Technical Secretariat.” The Procurement Act s.44 General Procurement Rules, requires requesting a procuring entity to “plan their procurement in a rational manner”. “Requesting entity” is a defined term applying to both the Procurement Act and PPR which covers all procuring entities in central government, local government and Category A parastatals. In practice, procuring entities do prepare procurement plans as part of the annual budget cycle.</p> <p>PPR R.31 Annual Procurement Plans, requires every Ministry or Department to prepare a procurement plan for each year. There is no equivalent clear obligation in the PPR referring to local government and Category A parastatals and the drafting could be improved to align with the requirements of the Procurement Act. PPR R.31 requires annual procurement planning to be integrated with the applicable budget processes and based on indicative or approved budget and lists the minimum content of an annual procurement plan. PPR R.32 addresses unplanned procurement and requirements for identification of unplanned procurement and updating of procurement plans.</p> <p>PPR R.31(4) requires every “requesting entity” to submit a copy of its annual procurement plan and each updated to the ESPPRA not later than thirty days after approval by the appropriate budget approving authority. The ESPPRA has published a Procurement Plan Template (excel spreadsheet) which can be downloaded from the ESPPRA website. In practice, the level of compliance with this obligation is low particularly by central government procuring entities but improving. According to data from ESPPRA, in 2022/23 ESPPRA received 27 Annual Procurement Plans, in 2023/24 the number rose to 42. The Technical Secretariat, in discussions with the MAPS assessment team confirmed that they receive and review annual procurement plans prepared by all 19 Ministries.</p> <p>There is no express requirement in the procurement legal framework for all procuring entities to publish procurement plans, although PPR R.11 Measures to promote Swati Companies and Citizen Service Providers refers to measures which “may include” publishing indicative notices of planned procurement, particularly for high value procurement.</p> <p>The Procurement Act s.33 designates “coordinating Government wide procurement planning” as a function of the Technical Secretariat. This provision is interpreted as limited to procurement planning by Ministries and Departments. According to the Public Enterprises (Control and Monitoring) Act 1989, Category A parastatals are required to report on financial affairs and budgets to the Public Enterprises Unit, within the Ministry of Finance.</p>
Gap analysis	

Pillar II. Institutional Framework and Management Capacity

Recommendations

Suggestions for improvement

Obligation to prepare and publish an Annual Procurement Plan: PPR to be amended to tie in with requirements of the Procurement Act to clearly state that the obligation to prepare an Annual Procurement Plan applies to all procuring entities and to tie in with relevant budget and reporting obligations for each type of procuring entity. To increase transparency and facilitate data collection, consider: (1) additional measures to ensure that all procuring entities submit their procurement plans to the ESPPRA in accordance with statutory requirement, including consolidated annual review of compliance by all procuring entities, and; (2) including a requirement for publication of approved annual procurement plans and all amendments to procurement plans within specified timeframes. This could be tied in with the roll out of e-GP system, with e-GP being the repository and source for all published approved annual procurement plans and amendments to those plans.

Assessment criterion 4(a)(b):

Budget funds are committed or appropriated in a timely manner and cover the full amount of the contract (or at least the amount necessary to cover the portion of the contract performed within the budget period).

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The PFMA prohibits expenditure, the making of commitments with financial implications or carrying out of activities funded by public money other than in accordance with the authorised annual budget. In practice, however, spending outside or beyond the appropriated budget is common and a significant problem as noted, in particular, by the Auditor General and in Eswatini's National Development Plan 2023/24-2027/2028.

PFMA s.36 provides that a line Minister, public office holder, Chief Executive Officer or public officer shall not "(a) expend public money other than in accordance with authority under the annual budget, or an authority granted under an Act", "(c) make commitments that have financial implications for Government or Local Government budget that are not authorized by the annual budget, or an authority provided by an Act, or other legal authority", and "(d) carry out activities funded by public money for which there is no provision in the annual budget, Appropriate Act or other expenditure in any other Act;"

However, in his Financial Report for the financial year ended 31 March 2021, the Auditor General "drew the attention of the Accountant General and Principal Secretary of the Ministry of Finance that it is now the norm for Ministries, Departments and Agencies to spend beyond the appropriated budget by Parliament and/or on activities that have no budget provision, and to incur expenditure without seeking approval from relevant authorities." The Auditor General observed unauthorized expenditure, over expenditure, unappropriated budgets and uncaptured appropriated budgets and noted that "Both unappropriated budgets and unappropriated expenditures are not only unlawful but also result in serious repercussions in the entire fiscal budget (position)..."

The Auditor General's Compliance Audit 2022 identified repeated instances of weak financial management including over expenditure, unaccounted public funds, poor cash control and lack of purchase orders and contracts to support payments.

The National Development Plan 2023/24-2027/2028 (NDP) identifies weakened budget coordination among "Fiscal Management Key Challenges". "As the fiscal crisis deepens, the fragmentation [of national budgeting co-ordination] has resulted in a poorly coordinated budget, deteriorating procurement processes, diminishing expenditure commitments and controls, as well as financial management." The NDP notes that "commitments are made on behalf of government without central authority's knowledge and approval".

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IMF Technical Assistance Report on Government Finance Statistics Mission (2022)³² notes significant fiscal activity outside Budgetary Central Government i.e. local government and parastatals, for which reliable data is not available.

Gap analysis

Budget commitment controls: There is no effective commitment control to ensure that only approved expenditures are executed, nor that those expenditures that are approved are executed only up to the approved budget.

This Gap is assigned a Red flag because control is the cornerstone of budget management and its absence significantly impedes the objectives of transparency, accountability, efficiency and effectiveness of the public procurement system. It also requires action which cannot immediately be mitigated through actions solely in the public procurement sphere. Wider-reaching public finance reforms consistently applied across government are required to fully resolve this Gap. In particular, the introduction, implementation and use of a suitable Integrated Financial Management Information System is an underpinning requirement to ensure robust and effective commitment controls. The IFMIS will also need to be effectively integrated with the e-GP system.

Combined recommendations for 4(a)(b) and 4(b)(a)

Budget commitment controls - reducing the use of less competitive and non-competition procurement methods and more robust commitment controls: Consider measures, such as strict application of conditions for use of less competitive and non-competitive methods, to ensure increased use of competitive bidding. This should obtain more accurate pricing for each contract, which may reduce the prevalence of contract price variations.

Prioritise implementation of more robust commitment controls, such as those that come from strict operation of a suitable IFMIS when effectively integrated with the e-GP system. This should include measures to enforce and monitor compliance with existing requirements which prohibit solicitation of tenders/proposals without necessary authorization and without, or beyond, budget commitments.

Assessment criterion 4(a)(c):

A feedback mechanism reporting on budget execution is in place, in particular regarding the completion of major contracts.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The budgetary and management systems are fragmented and functioning mechanisms for reporting on budget execution are limited. The invoice portal for the Office of the Accountant General is not linked to the payment system so reliable data on invoicing and payment is not available. The Government Tender Board seeks to track contracting and roll out but this is conducted manually and is not an integrated process.

Gap analysis

Feedback mechanism on budget execution: There is no effective comprehensive feedback mechanism on budget execution to ensure timely information on contracts covering major budget expenditure.

This Gap is assigned a Red flag because lack of feedback on budget execution impedes the objectives of transparency, accountability, efficiency and effectiveness of the public procurement system significantly hindering value for money outcomes. For the Gap to be fully resolved, it requires action which cannot immediately be mitigated through actions solely in the public procurement system. Wider-reaching public finance reforms consistently applied across government are required to fully resolve this gap. In particular, the introduction,

³² <https://www.imf.org/en/Publications/CR/Issues/2022/12/06/Eswatini-Technical-Assistance-Report-on-Government-Finance-Statistics-Mission-July-6-12-2022-525954>

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implementation and use of a suitable Integrated Financial Management Information System is an underpinning requirement to facilitate an effective comprehensive feedback mechanism on budget execution. The IFMIS will also need to be effectively integrated with the e-GP system.

Recommendations

Feedback mechanism on budget execution: Prioritise the proposed introduction of the integrated financial management information system (IFMIS) appropriately integrated with the e-GP system as this should enable an effective feedback mechanism.

Pending full roll out and integration of IFMIS and e-GP system, put into place better mechanisms on budget execution focusing on major budget expenditure using a risk based approach.

Sub-indicator 4(b)

Financial procedures and the procurement cycle

The legal and regulatory framework, financial procedures and systems should ensure that:

Assessment criterion 4(b)(a):

No solicitation of tenders/proposals takes place without certification of the availability of funds.

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

Solicitation of some tenders/proposals take place without necessary authorization and without or beyond budget commitments.

PFMA s.36 provides that a line Minister, public office holder, Chief Executive Officer or public officer from shall not “(a) expend public money other than in accordance with authority under the annual budget, or an authority granted under and Act”, “(c) make commitments that have financial implications for Government or Local Government budget that are not authorized by the annual budget, or an authority provided by an Act , or other legal authority”, and “(d) carry out activities funded by public money for which there is no provision in the annual budget, Appropriate Act or other expenditure in any other Act;”

PPR R.33 Procurement Requisition and Allocation of Funds, requires that every procurement requirement is documented. [Written] approval of requisitions by the controlling officer/designated officer is necessary prior to initiation of procurement proceedings and must include confirmation of the availability of funds for the procurement.

See analysis at 4(a)(a) concerning extra-budgetary expenditure and acknowledgement in National Development Plan that “commitments are made on behalf of government without central authority’s knowledge and approval”.

Gap analysis

Solicitation of tenders/procurement without certification of availability of funds: The legal framework prohibits solicitation of tenders/proposals without available funds but in practice, solicitation of tenders/proposals take place without necessary authorization and without or beyond budget commitments.

This Gap is assigned a Red flag because control is the cornerstone of budget management and its absence, leading to solicitation of tenders/proposals takes place without necessary authorization and without or beyond budget commitments. This significantly impedes the objectives of transparency, accountability, efficiency and effectiveness of the public procurement system and delivery of value for money outcomes. It also requires action which cannot immediately be mitigated through actions solely in the public procurement system. Wider-reaching public finance reforms consistently applied across government are required to fully resolve this Gap. In particular, the introduction, implementation and use of a suitable Integrated Financial Management Information System is an underpinning requirement to assist in monitoring and enforcement of requirements for necessary authorisations within budget commitments.

Recommendations

See combined recommendation at 4(a)(b).

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Assessment criterion 4(b)(b):

The national regulations/procedures for processing of invoices and authorisation of payments are followed, publicly available and clear to potential bidders.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

There are no national regulations or measures in place, of universal application to all procuring entities, for processing and authorization of invoices and payments. Payment provisions are currently provided for in individual contract documents. There is inconsistency between stated period for payment in some tender documents (45 days) and standard order forms (90 days for order, delivery and payment).

In practice, cash flow is an increasing problem, with delayed payments. (See analysis at 9(b)(b)).

PPR R.11 Measures to Promote Swati Companies and Citizen Service Providers, provides that the Government shall initiate measures including ensuring prompt payment of invoices. There are, however, currently no legislative measures in place. Payment of invoices is currently provided for in contract documents.

PPR R.14(3) Record Keeping, provides that the procurement records shall include copies of all invoices and details of payment authorisations.

PPR R.11 Contract Management Responsibilities, provides that the contract manager shall be responsible for ensuring that the procuring entity meets all its payment and other obligations on time and in accordance with the contract.

Procedures for processing are fragmented (see analysis at 4(a)(c)). The proposed integrated financial management information system (IFMIS) appropriately aligned with the e-GP system should facilitate processing and timely payment of invoices in a consistent manner.

Quantitative analysis

// Minimum indicator // * Quantitative indicator to substantiate assessment of sub-indicator 4(b) Assessment criterion (b):

- invoices for procurement of goods, works and services paid on time (in % of total number of invoices).

Source: PFM systems.

Analysis: No national regulations or measures. No comprehensive data available.

Gap analysis

Processing of invoices and authorisation of payments: There are no consistent national level regulations for processing invoices and authorisation of payments. Procedures for processing and authorization are fragmented. Late payment has become a significant problem in practice.

This Gap is assigned a Red flag because it substantially impedes the objectives of transparency, accountability, efficiency and effectiveness of the public procurement system, hindering value for money outcomes. In addition for this Gap to be fully addressed, it requires measures which cannot immediately be mitigated through actions in the public procurement sphere alone. It will require actions, guidelines and measures across government and of universal application.

Recommendations

Processing of invoices and authorisation of payments: To ensure clarity for potential bidders, include provisions in the legal and regulatory framework specifying consistent standard invoice payment periods. As an initial step this

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can be partially addressed by including consistent provisions in the new standard tender documents and contract terms. Action is, however, also required to ensure that the processing of invoices is conducted in a manner and within timescales to comply with the revised provisions in tender documents/contract terms. Consider introduction of government-wide guidance and mandated requirements for processing and payment of invoices of universal application to all procuring entities.

Indicator 5. The country has an institution in charge of the normative/regulatory function

Sub-indicator 5(a)	
Status and legal basis of the normative/regulatory institution function	
The legal and regulatory framework, financial procedures and systems provide for the following:	
Assessment criterion 5(a)(a):	
The legal and regulatory framework specifies the normative/regulatory function and assigns appropriate authorities formal powers to enable the institution to function effectively, or the normative/regulatory functions are clearly assigned to various units within the government.	
Conclusion: Substantive gap	
Red flag: Yes	
Qualitative analysis	
Introductory comment – parallel systems in operation of procurement	
<p>The legal and regulatory framework allocates most normative/regulatory functions to ESPPRA. In some cases there are elements of normative/regulatory activity allocated to Technical Secretariat of the Ministry of Finance. Whilst from a legal perspective there is generally clear allocation of responsibilities, there is a lack of coherence in the operation of the procurement system. This is because there are, in effect, two parallel systems applying to various aspects of the conduct procurement, with Technical Secretariat leading in respect of procurement activities of government Ministries/departments and ESPPRA leading in respect of activities of local government and Category A parastatals. The “parallel systems” are observed, in particular, in relation to use of websites for online advertisement of opportunities and the type of supporting information provided, pre-tender and tender stage advisory activities and quality assurance of tender documents.³³ There is also a commonly held perception that the PRR, or at least some parts of the PRR, are intended to apply only to central government and this is not assisted by drafting ambiguities. Non-compliance, in particular by Ministries, with statutory reporting requirements contribute to problems with ESPPRA functioning effectively as a monitoring and oversight body and with preparation, analysis and publication of procurement related data. Some activities allocated to the Technical Secretariat under the legal framework require engagement with all procuring entities but in practice the Technical Secretariat limits its involvement (other than in its role as Secretariat to the Government Tender Board) to central government Ministries/departments. These factors create silos of practice and limit the overall intelligibility and effective functioning of both the system and the involved institutions.</p>	
<p>ESPPRA: The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to serve as an independent regulatory body. According to the Procurement Act, the ESPPRA has responsibility for “policy, regulation, oversight, professional development and information management and dissemination in the field of public procurement.” The Procurement Act s.10 lists the Functions of the Agency, expanding on its designated responsibilities for policy formulation, regulation, oversight, capacity building & professionalization, and data & information management. The Procurement Act s.11 Powers of the Agency, confirms that ESPPRA “shall have the</p>	

³³ For example, the ESPPRA issued Circular no.2 of 2017 addressed to all procuring entities requiring entities to obtain prior approval from the ESPPRA prior to publication of invitations to tender, advertisements and notices and subject to payment of a fee to ESPPRA. This was issued pursuant to general powers and functions and is not specifically listed as a function of the ESPPRA in the Procurement Act. The MAPs team understands that the Ministry of Finance has made it clear that Ministries and Departments do not require approval or direction from the ESPPRA to advertise tenders.

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competence, authority, power and responsibility to enforce [the Procurement Act] and public procurement regulations issued under [the Procurement Act]” and lists powers the Agency has in the exercise of its functions. The PPR include further detailed requirements to support the functioning of the ESPPRA but also allocates some activities to the Technical Secretariat of the Ministry of Finance which Technical Secretariat carry out only in respect of central government procuring entities, which reduces overall coherence of the system.

In practice, ESPPRA provides day-to-day advice support and assistance to local government and Category A parastatals on the conduct of procurement including quality/compliance review of bidding documents. On some occasions it also provides these services to Ministries.

Technical Secretariat: The Procurement Act s.32 establishes the Technical Secretariat which sits within the Supply Chain Management Department of the Ministry of Finance. According to the Procurement Act, the Technical Secretariat has two responsibilities: (a) the management of designated procurement activities as a lead procurement organisation in accordance with section 31 of the Procurement Act; and (b) providing secretarial services for the Government Tender Board (GTB). The Procurement Act s.33, Functions of the Technical Secretariat, sets out a non-exhaustive list of functions which are, in summary: all functions of a procuring entity; coordinating Government wider procurement planning; and, coordinating activities relating to the procurement of common use items. Specified functions related to the GTB support role are, in summary: to support to the GTB in managing tender processes, review all requests for prior authorization and provide secretarial services.

In practice, the Technical Secretariat provides day-to-day advice, support and assistance to Ministries on the conduct of procurement in particular advising on use of standard procurement documents published by the Ministry of Finance, quality assurance prior to tendering of documents prepared by Ministries including checking content and ensuring compliant timelines. The Technical Secretariat has standard documents templates which it has issued to Ministries for their use, including procurement plans, tender notices and evaluation reports. In addition, it receives and reviews annual procurement plans from Ministries.

The Government Tender Board: The Procurement Act s.25 establishes the Government Tender Board (GTB) as the highest approvals authority in Eswatini, with responsibility for ensuring that procurement above designated thresholds is conducted in accordance with the legal framework and by providing prior authorization at defined stages of the procurement process. Procuring entities submit applications for approval to the GTB prior to conducting procurement processes over their designated thresholds and before agreeing contract increases and extensions in specified cases. In this process, the GTB reviews procurement plans, tender documents and proposed processes. In 2022/2023 the GTB considered 639 applications from procuring entities with the following outcomes: approved – 355, conditionally approved- 197, deferred – 77, withdrawn -5, not approved – 5.

Gap Analysis

Lack of coherence due to operation of two parallel systems: Whilst from a legal perspective there is generally clear allocation of responsibilities, there is a lack of coherence in the operation of the procurement system. This is because there are, in effect, two parallel systems applying to various aspects of the conduct of procurement, with Technical Secretariat leading in respect of procurement activities of government Ministries/departments and ESPPRA leading in respect of activities of local government and Category A parastatals. This has resulted in silos of practice and limits the overall intelligibility and effective functioning of both the system and the involved institutions.

This Gap is assigned a Red flag because it significantly impedes the objectives of transparency, accountability, efficiency and effectiveness of the public procurement system, hindering value for money outcomes. For this complex, multi-faceted Gap to be addressed and resolved, it requires action which does not lie solely within the procurement sphere. It will involve ongoing and active cooperation between a number of stakeholders as well as Government high level decision making.

Recommendations

Combined recommendations for 5(a)(a) and 6(b)

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Lack of coherence due to operation of two parallel systems: Institutional review

Conduct a critical review, drawing on local knowledge and wider expertise, to clearly map the operation of the two parallel systems applying to various aspects of the conduct of procurement resulting from the silos of practice by ESPPRA and Technical Secretariat respectively. The review must assess the impact of those parallel activities, using a range of metrics to be agreed, on the coherence, transparency, effectiveness and efficiency of the procurement system in Eswatini.

When looking at ways to improve the efficiency of the procurement system, it is also advisable to review the current activities of the Government Tender Board to identify whether there is any actual or potential inter-institutional overlap or duplication of activities at any point in the procurement cycle (from planning to contract delivery and contract management). This should include consideration of reallocation of functions and activities currently undertaken by the Eswatini Government Tender Board, including to Entity Review Boards.

It would also be appropriate for the same review to consider procurement of a centralised and specialised nature, including assessing the effectiveness of the current activities of Government Central Stores. It should also consider, for example, future requirements for consolidated procurement of common use or specialised items; solicitation and management of framework agreements; use of e-catalogues, e-market places and e-auctions; as well as management of complex procurement, which could include PPPs, and procurements requiring specialised legal or technical expertise.

The review will need to be framed in the context of the impact of the introduction, roll-out and operation of the new end-to-end e-GP system. This will be an underlying consideration of primary importance.

The review should provide proposals for revised or new institutional and operational structure/s, functions and operational responsibility/ies which are well aligned with operation of the e-GP system and with the aim of improving transparency and effective operation of the whole public procurement system and the involved institutions. Where new or revised institutional structures are proposed the review should also include recommendations on responsibilities, formal powers and accountabilities.

Sub-indicator 5(b)

Responsibilities of the normative/regulatory function

The following functions are clearly assigned to one or several agencies without creating gaps or overlaps in responsibility:

Note: for the purposes of identification of Gaps in the following analysis of sub-indicator 5(b) the focus is on the assignment of functions as set out in the legal and regulatory framework. The MAPS Assessment team has raised significant concerns at 5(a) on the operation of parallel systems in practice including failure of procuring entities to comply with statutory obligations to provide specified information to the ESPPRA for monitoring and oversight purposes. We have cross referred in the analysis of sub-indicator 5(b) to particular functions where the parallel approach in practice is noted. We have not double counted by allocating a Gap for the same failure.

Assessment criterion 5(b)(a):

providing advice to procuring entities

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for... professional development and information management and dissemination in the field of public procurement.”

Parallel practice:

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In practice, the Technical Secretariat also provides advice to Ministries and Departments in respect of their procurement activities, by providing general support and guidance and issuing circulars. In the case of individual procurement processes the Technical Secretariat assists those procuring entities in use of procurement documents issued by the Ministry of Finance and Technical Secretariat and choice of procurement methods, through a quality assurance process. ESPPRA undertakes quality assurance process of procurement documents proposed to be used on individual procurements by local government and Category A parastatals.

Gap analysis

Recommendations

Assessment criterion 5(b)(b):
drafting procurement policies

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for policy...”. The Procurement Act s.10 provides that the functions of the ESPPRA include policy formulation, “in pursuance of which the Agency shall advise the Government and procuring entities on procurement policy and all other matters relating to public procurement...”

Gap analysis

Recommendations

Assessment criterion 5(b)(c):
proposing changes/drafting amendments to the legal and regulatory framework

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

There is no clear assignment of the specific function of proposing changes/drafting amendments to the legal and regulatory framework other than in relation to ICT.

The Procurement Act s.10 provides that the functions of the ESPPRA include policy formulation “...in pursuance of which the Agency shall advise the Government and procuring entities on procurement policy and all other matters relating to public procurement...”. Procurement Act s.10) b)(i) provides that the ESPPRA shall formulate regulations governing the procurement of goods, works and service and recommend these to these to the Minister.

The Procurement Act s.8 Introduction of Information and Communication Technology, (ICT) allocates responsibility to the ESPPRA for examining and recommending ways of introducing ICT into public procurement. S.8 also provides for the ESPPRA to issue supporting circulars and instructions on measures and programmes to introduce ICT in public procurement and to identify and promote relevant additions or amendments to the public procurement legal and regulatory framework.

Gap analysis

Assignment of function for proposing changes/drafting amendments to legal and regulatory framework: Although it may be implied, there is no clear assignment of the specific function of proposing changes/drafting amendments to the legal and regulatory framework other than in relation to ICT.

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Recommendations

Assignment of function for proposing changes/drafting amendments to legal and regulatory framework: Amend the procurement legal/regulatory framework to clearly allocate responsibility for proposing change/drafting amendments to the Procurement Act and implementing regulations.

Assessment criterion 5(b)(d):

monitoring public procurement

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for ... oversight.... in the field of public procurement.” The Procurement Act s.10 provides that the functions of the ESPPRA include to: “monitor compliance with [the Procurement Act] and procurement performance by procuring entities” and “conduct audits of any procurement activities governed by [the Procurement Act]”.

PPR R.29 Continuous Monitoring, requires procuring entities to submit to the ESPPRA “annual procurement plans, information on tender notices, invitations for quotations, request for proposals, contract award, contract termination and in addition, quarterly and annual procurement implementation reports in the prescribed format and through systems developed by the [ESPPRA].” The Procurement Act and PPR contain additional provisions aimed at facilitating the ESPPRA’s monitoring function through submission of documents and data by procuring entities.

Parallel practice:

In practice, the monitoring function of ESPPRA is significantly hindered by failure of procuring entities to comply with legal requirements to submit specified information to the ESPPRA, some of which is submitted to Technical Secretariat instead. The Government Tender Board has also produced information in its annual report which could be used to input into overall review and monitoring of the operation of certain aspects of the procurement system. See, analysis at indicator 7 flagging current issues on reliability of data and difficulties with aligning data available from different sources.

Gap analysis

Recommendations

Assessment criterion 5(b)(e):

providing procurement information

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for “...professional development and information management and dissemination in the field of public procurement.”

The Procurement Act s.7 requires the ESPPRA to make the following information, including amendments, accessible to the public and to systematically maintain such information: public procurement regulations, all administrative rulings and directives of general application in connection with procurement.

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The Procurement Act s.10 provides that the functions of the ESPPRA include data and information management and the ESPPRA “shall organise and maintain systems for the management and public dissemination of procurement data, statistics and information.”

Gap analysis

Recommendations

Assessment criterion 5(b)(f):

managing statistical databases

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.10 provides that the functions of the ESPPRA include data and information management and the ESPPRA “shall organise and maintain systems for the management and public dissemination of procurement data, statistics and information.”

Parallel practice:

ESPPRA receives some data from local Government and Category A parastatals, but very limited or no data relating to the activities of Ministries and Departments.

Gap analysis

Recommendations

Assessment criterion 5(b)(g):

preparing reports on procurement to other parts of government

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for policy ... and information management and dissemination in the field of public procurement.”

The Procurement Act s.10 provides that the functions of the ESPPRA include to “report on the performance and functioning of the public procurement system and recommend changes” and “organise and maintain systems for the management and public dissemination of procurement data, statistics and information.”

The Procurement Act s.23 Annual Report, provides that the Board of the ESPPRA shall submit to the Minister of Finance an annual report concerning the ESPPRA’s activities which shall include “information on the performance and functioning of the public procurement system”.

In practice, data is incomplete and unreliable. There is no annual report published recently by ESPPRA.

Gap analysis

Recommendations

Assessment criterion 5(b)(h):

developing and supporting implementation of initiatives for improvements of the public procurement system

Conclusion: No gap

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Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for policy, regulation, oversight, professional development and information management and dissemination in the field of public procurement.”

The Procurement Act s.10 provides that the functions of the ESPPRA include to “report on the performance and functioning of the public procurement system and recommend changes”,

Gap analysis

Recommendations

Assessment criterion 5(b)(i):

providing tools and documents, including integrity training programmes, to support training and capacity development of the staff responsible for implementing procurement

Conclusion: Minor gap

Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for ... regulation ... professional development and information management and dissemination in the field of public procurement.” There is no specific reference to integrity training programmes, although issues of integrity are addressed in training and capacity development activities.

The Procurement Act s.10 provides that the functions of the ESPPRA include to: “issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation and application of [the Procurement Act] and public procurement regulations issued under [the Procurement Act]”; “issue standard tender documents and other standard procurement documents ...”, and “coordinate and promote capacity-building and professional development in the public procurement system.”

The Procurement Act s.66 Public Procurement Manual, Circulars and Instructions, provide for the ESPPRA to issue these documents “to provide further guidance on the interpretation” of the Procurement Act and PPR.

Parallel practice:

In practice, the Technical Secretariat, Ministry of Finance, delivers training on procurement to central government procuring entities.

Gap analysis

Reference to integrity training: There is no specific reference in the Procurement Act or PPR to responsibility for delivery of integrity training programmes to support development of staff responsible for implementing procurement.

Recommendations

Reference to integrity training: In order to improve clarity, include in relevant legislation specific reference to responsibility for delivery of integrity training programmes to support development of staff responsible for implementing procurement.

Assessment criterion 5(b)(j):

supporting the professionalisation of the procurement function (e.g. development of role descriptions, competency profiles and accreditation and certification schemes for the profession)

Conclusion: No gap

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Red flag: No

Qualitative analysis

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for “...professional development in the field of public procurement.” The Procurement Act s.10 provides that the functions of the ESPPRA include to: “coordinate and promote capacity-building and professional development in the public procurement system” and “work with the appropriate human resources authorities to set standards and professional qualifications requirements for staff involved in procurement activities”.

Gap analysis

Recommendations

Assessment criterion 5(b)(k):

designing and managing centralised online platforms and other e-Procurement systems, as appropriate

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There are provisions requiring the ESPPRA to examine and recommend ways of introducing use of ICT into procurement but there is no clear assignment of the specific function of designing and managing centralized online platforms and other e-procurement systems.

The Procurement Act s.9 establishes the Public Procurement Regulatory Agency (now ESPPRA) to “serve as an independent regulatory body, with responsibility for policy, regulation, oversight, professional development and information management and dissemination in the field of public procurement.”

The Procurement Act s.8 Introduction of Information and Communication Technology, (ICT) provides that the ESPPRA “shall examine and recommend ways of introducing in public procurement, at appropriate stages, the use of information and communications technology, and other technical innovations, where such technology promotes the objectives of this Act.” It goes on to provide that the ESPPRA may issue circulars and instructions on measure and programmes to introduce ICT in public procurement and identify additions or amendments to the public procurement legal and regulatory framework to support the application of ICT and shall promote their introduction.

Gap analysis

Assignment of function of designing and managing centralised online platforms and other e-procurement systems: There is no clear assignment of the specific function of designing and managing centralised online platforms and other e-procurement systems.

Recommendations

Assignment of function of designing and managing centralised online platforms and other e-procurement systems: Include in relevant legislation clear assignment of the specific functions of designing and managing centralised online platforms and other e-procurement systems. Ideally this should be expressed to include assignment of ongoing responsibility for review of the operation of the platforms/e-procurement systems, to identify issues including required changes, improvements and additional functionalities and to carry through necessary implementation. Irrespective of where this function is assigned, it is essential that the management function and the regulatory and monitoring institution cooperate fully and access to and provision of information required by the regulator/monitor to fulfil its functions is embedded in both legislation and practice.

Sub-indicator 5(c)

Organisation, funding, staffing, and level of independence and authority

Assessment criterion 5(c)(a):

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The normative/regulatory function (or the institutions entrusted with responsibilities for the regulatory function if there is not a single institution) and the head of the institution have a high-level and authoritative standing in government.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

In the qualitative analysis at 5(a)(a) the MAPS Assessment team has drawn attention to significant problems in the conduct of procurement in practice due to the operation of two parallel systems applying to various aspects of the conduct procurement, with Technical Secretariat, Ministry of Finance, leading in respect of procurement activities of government Ministries/departments and ESPPRA leading in respect of activities of local government and Category A parastatals. The analysis also notes at 5(a)(a) problems of compliance with statutory reporting requirements in respect of information to be submitted by all procuring entities to the ESPPRA required for monitoring and supervision purposes. Compliance is particularly poor by central government procuring entities. These factors, combined with feedback received by the MAPS Assessment team from a range of stakeholders during direct engagement lead the MAPS Assessment team to conclude that the normative/regulatory function and head of institution do not have sufficiently high level and authoritative standing in government to be effective as an organisation and to enable the proper exercise of its responsibilities.

According to the Public Enterprises (Control and Monitoring) Act s.8 the Chief Executive Officer (CEO) is nominated by the governing body, which in the case of ESPPRA is the Board. The CEO is appointed and dismissed "by the Minister responsible, the Public Enterprises Unit and the [Cabinet] Standing Committee [on Public Enterprise]".

Gap analysis

Standing of the ESPPRA: The ESPPRA does not have sufficiently high level and authoritative standing to be effective as an organisation and to enable the proper exercise of its responsibilities.

Of particular note is non-compliance by a significant number of procuring entities, particularly in central government, with their obligations to submit information and reports, such as annual procurement plans and quarterly monitoring reports, to the ESPPRA. If these behaviours continue, they are likely to have a negative impact on the successful roll-out and ongoing operation of the e-GP system which will require input of consistent and reliable data and information by all types of procuring entities.

This Gap is assigned a Red flag because it significantly impedes the objectives of transparency, of the public procurement system in particular. Resolution of this Gap will require pro-active and effective inter-institutional cooperation as well as Government high level decision making on issues of institutional standing.

Recommendation

Standing of the ESPPRA: In the short term, with successful roll out of e-GP system in mind, it is essential to have coherent and clear messaging and enforcement measures to ensure that all procuring entities submit information and reports to the ESPPRA in accordance with statutory obligations and timescales. This information is important to permit the ESPPRA to properly exercise its functions.

It is also of critical to importance to collect meaningful and accurate national level procurement data which can be analysed and facilitate understanding of how the procurement system operates in practice and identify areas for improvement. These measures need to be prioritised to create behavioural changes which will also be key to the effectiveness of the e-GP System.

See also, recommendations on Institutional Review at 5(a)(a).

Assessment criterion 5(c)(b):

Financing is secured by the legal/regulatory framework, to ensure the function's independence and proper staffing.

Conclusion: **Substantive gap**

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Red flag: **Yes**

Qualitative analysis

ESPPRA is a Category A parastatal (body corporate) established pursuant to the Procurement Act to serve as an independent regulatory body and is financed by a mix of (1) annual subvention from the Government (SZL 13 million in FY 2022/2023) (2) income generation from activities - primarily from charges for services such as tender review and advertisement, application for deviation fees, workload & capacity assessments and procurement policy reviews plus IRC fees (approximately SZL 5.85 million in FY 2022/2023) (3) grant (SZL 710,561 in FY 2022/2023). The Government subvention provides a substantial element of the annual budget is thus in a position to exercise significant influence over the ESPPRA's financial and operating decisions. The annual nature of the budgeting process and level of subvention means that there is uncertainty as to reliability of funds and makes longer term planning more difficult although this will be a challenge shared by all entities reliant on central funding. The ESPPRA is chronically understaffed partly due to the recent and long-term general recruitment freeze since 2018 (Circular No.3 of 2018), only recently lifted.

Gap analysis

Financing of ESPPRA: Significant Government financing by means of subvention casts doubt on the ability of the ESPPRA to exercise its functions as a regulator independently and combined with annual budgeting cycle this limits the ability to plan in the medium to long term for activities and recruitment.

This Gap is assigned a Red flag because financial constraints leading to reduced ability of ESPPRA to properly exercise its functions significantly impedes independent regulation of the system. In addition, the issue of central government funding, budget and subvention process lies outside the procurement sphere.

Recommendation

Combined recommendations for 5(c)(b) and 5(c)(c)

Financing and staffing of ESPPRA: Government to consider prioritizing funding for ESPPRA regulatory and expert functions to ensure effective operation of the public procurement system in Eswatini and to facilitate effective roll out of the e-GP system as this will be partly dependent on areas in which ESPPRA already has significant expertise. Consider measures to increase or diversify sources of funding. This could, for example, include provision of paid-for specialised, practically focused training and expert support for stakeholders in all sectors, including businesses.

Assessment criterion 5(c)(c):

The institution's internal organisation, authority and staffing are sufficient and consistent with its responsibilities.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The ESPPRA's internal organisational structure is appropriate for its functions but it has insufficient staff to fulfil its current responsibilities. The ESPPRA has 32 approved positions. The current staff complement stands at 15.³⁴ There are vacancies in all departments and there are currently no IT staff. The posts of Chief Financial Officer, Head of Legal and Manager Audit & Compliance are also notable vacancies.

Gap analysis

ESPPRA staffing: The ESPPRA's internal organisational structure is appropriate for its functions but it has insufficient staff to fulfil its current responsibilities.

This Gap is assigned a Red flag because the inability of ESPPRA to properly exercise its functions, due to lack of staff, significantly impedes independent regulation of the system. In addition, the issue of central government funding, budget and subvention process which impacts on staffing lies outside the procurement sphere.

³⁴ Information provided by ESPPRA to MAPS Assessment team, 13 February 2024.

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Recommendations

See combined recommendations at 5(c)(b).

Sub-indicator 5(d) Avoiding conflict of interest

Assessment criterion 5(d)(a):

The normative/regulatory institution has a system in place to avoid conflicts of interest.*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The ESPPRA is not directly involved in procurement operations of procuring entities, but it does undertake a number of activities which raise the possibility of actual or perceived conflicts of interest within the ESPPRA. These include, for example: quality assurance review of procuring entities' tender documents and contracts prior to advertising the opportunity on the ESPPRA's website (this is a required step; consideration and approval of applications for deviations; compliance audit, and secretariat functions in support of the Independent Review Committee. Perceptions of conflict of interest may, for example, arise where the ESPPRA has been involved in quality assurance of tender documents and contracts or in approving an application for deviation and then that procurement process is subject to an ESPPRA compliance audit or is the subject matter of a complaint considered by the IRC.

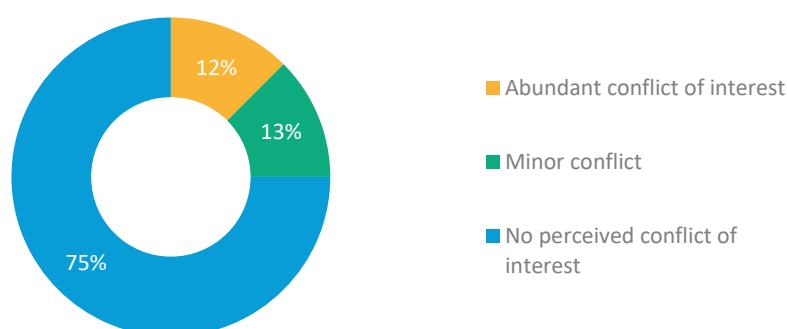
The ESPPRA does not have a clear system or policies in place to identify and risk manage conflicts of interest within the ESPPRA.

Quantitative analysis

* Recommended quantitative indicator to substantiate assessment of sub-indicator 5(d) Assessment criterion (a):
- Perception that the normative/regulatory institution is free from conflicts of interest (in % of responses).

Source: Survey.

Are there any conflicts of interest related to public procurement in the ESPPRA (Eswatini Public Procurement Regulatory Agency)?



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Gap analysis

Avoiding conflicts of interest at the ESPPRA: The ESPPRA does not have a clear system or policies in place to identify and risk manage conflicts of interest within the ESPPRA. The ESPPRA undertakes a number of activities which raise the possibility of actual or perceived internal conflicts of interest. These may be challenging to manage due to significant levels of staff vacancies making it harder to clearly ring-fence responsibilities and activities. Activities which could raise concerns of perceived, potential or actual conflicts of interest include, for example, where the ESPPRA has been involved in quality assurance of tender documents and contracts or in approving an application for deviation and then that procurement process is subject to an ESPPRA compliance audit or is the subject matter of a complaint considered by the IRC. Even the appearance of conflict of interest can undermine confidence in the system and so policies and organisational measures need to be put in place to identify and manage potential and actual conflicts of interest.

Recommendations

Avoiding conflicts of interest at the ESPPRA: The ESPPRA should review its activities to identify the possibilities for actual or perceived conflicts of interest in both its activities and in its organisational structure. It should then prepare and publish on its website a clear policy detailing how conflicts of interest will be identified and managed and how the organisational structure assists in minimizing the possibility of conflicts of interest.

Indicator 6. Procuring entities and their mandates are clearly defined

Sub-indicator 6(a)

Definition, responsibilities and formal powers of procuring entities

The legal framework provides for the following:

Assessment criterion 6(a)(a):

Procuring entities are clearly defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

Procuring entities are clearly defined in the Procurement Act s.31. Procuring entities fall within one of three categories: Central Government (Ministries, Correctional Services, Prime Minister's Office, Deputy Prime Minister's Office, Parliament, Royal Eswatini Police Service and Eswatini Broadcasting & Information Services), Local Government and Category A parastatals (enterprises which are majority Government owned or controlled). The ESPPRA's Annual Report 2020/2021 lists 91 procuring entities in total: 25 Central Government procuring entities, 13 Local Government procuring entities and 53 Category A parastatals.

The Procurement Act s.2 defines "procuring entity" as follows "means any entity designated to conduct public procurement activities, in accordance with section 31, whether on behalf of itself or another requesting entity, and may include the Technical Secretariat and any Ministry, Department, Agency, category A public enterprise or Local Government Authority;"

The Procurement Act s.2 also defines "requesting entity" which is "any Ministry, Department, Agency, category A public enterprise, Local Government Authority or other body initiating a procurement requirement". This term covers the situation where a procuring entity initiates a procurement requirement on its own behalf and also where it does so on behalf of another procuring entity in accordance with the provisions of the Procurement Act. The Procurement Act s.2 also defines "lead procuring entity" as "the procuring entity designated with responsibility for procuring a certain category of items or common use items on behalf of all or a group of requesting entities in accordance with section 31" [of the Procurement Act].

A "Category A public enterprise", commonly referred to as "Category A parastatal" is an enterprise listed in category A of the Schedule to the Public Enterprises (Control and Monitoring) Act 1989 (PE(CM)A) and is "a public enterprise

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or body which is either wholly owned by Government or in which Government has a majority interest or which is dependent upon Government subvention for its financial support..." (PE(CM)A s.2(a)).

The Public Enterprises Unit, established under the PE(CM)A monitors performance of Category A Public Enterprises as well as providing technical advice on their operations and policy management. The Public Enterprise Unit Quarterly Report (September-December 2021) lists Category A Public Enterprises in the following sectors: agriculture, transport, finance, utilities (electricity, post and telecommunications, water services), business promotion, education, tourism and environment, housing, labour, health, sports, disaster management and regulatory.

Gap analysis

Recommendations

Assessment criterion 6(a)(b):

Responsibilities and competencies of procuring entities are clearly defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.34 Functions of Procuring Entities, clearly defines the responsibilities and competencies of procuring entities covering the procurement lifecycle, from preparation of procurement plans to contract management.

The Procurement Act s.36 Functions of Requesting Entities, clearly lists the function of requesting entities in relation to public procurement. It also lists the additional functions of the lead procuring entity when procuring common use items.

The exercise of responsibilities and competencies by procuring entities is subject to a system which establishes a hierarchy of approvals for decision making (controlling officer/Chief Executive, Entity Tender Board/Entity Tender Board of a lead procuring entity and Government Tender Board), linked to value & complexity of contracts and a procuring entity's procurement capacity and workload. (See analysis at 6(a)(d))

Gap analysis

Recommendations

Assessment criterion 6(a)(c):

establish a designated, specialised procurement function with the necessary management structure, capacity and capability.*

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.35 Entity Procurement Units, provides that where a procuring entity's workload is sufficient it may establish an Entity Procurement Unit which shall be responsible for managing the procurement activities of the procuring entity. The functions of the Entity Procurement Unit shall include performing the functions of the procuring entity in accordance with the Procurement Act s.34 Functions of Procuring Entities, and obtaining all required approvals. A procuring entity must have an Entity Procurement Unit in order to act as lead procuring entity or establish its own Tender Board in accordance with the Procurement Act s.27.

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The Procurement Act s.35(4) Entity Procurement Units, requires that an Entity Procurement Unit “shall be staffed by professional procurement staff with appropriate training and experience in procurement and may hire such expertise as required from time to time.”

Quantitative analysis

// Minimum indicator // * Quantitative indicator to substantiate assessment of sub-indicator 6(a) Assessment criterion (c):

- procuring entities with a designated, specialised procurement function (in % of total number of procuring entities).

Source: Normative/regulatory function.

According to data collated by the MAPS Assessment Team, there are 22 procuring entities who are authorised to establish an Entity Tender Board: 18 Category A parastatals, 3 local government procuring entities and one central government body (HM Correctional Services). The ESPPRA also has an Entity Tender Board.

Data sources: Circulars 1.2020, 2/2022, 3/2022 plus excel spreadsheets provided by ESPPRA.

Gap analysis

Recommendations

Assessment criterion 6(a)(d):

Decision-making authority is delegated to the lowest competent levels consistent with the risks associated and the monetary sums involved.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

Approvals authority: The Procurement Act s.24 Approvals Authorities and Procurement Authorisations, and s.27 Establishment of Entity Tender Boards and Levels of Authority, establishes a hierarchy of approvals for authorised decision making using the concept of “approvals authority”. The approvals authorities are:

- the controlling officer or Chief Executive office where the value of the procurement does not exceed Emalangeni 20,000 (twenty thousand) for goods and services and Emalangeni 50,000 (fifty thousand) for works (PPR First Schedule, Part I);
- the Entity Tender Board where the value of the procurement does not exceed the level of authority of that Entity Tender Board;
- Government Tender Board (GTB) (or sub-committee of the GTB) where the value exceeds the levels of authority of all lower approvals authorities. The Procurement Act s.25 Establishment and Composition of [Government Tender Board] provides that the GTB has unlimited level of authority but has no authority over any procurement which fall within the level of authority of any subsidiary Tender Board or officer.

Procuring entities do not automatically have an Entity Tender Board. The ESPPRA is responsible for assessing the procurement capacity and workload of each procuring entity to determine the need for an Entity Tender board and level of authority of that board. Twenty-two procuring entities are authorised by the ESPPRA to have their own Entity Tender Board.

When a procuring entity does not have an Entity Tender Board, the procuring entity’s accounting office/CEO is authorized to approve contracts up to Emalangeni 20,000 (twenty thousand) for goods and services and Emalangeni 50,000 (fifty thousand) for works. For contracts exceeding those financial thresholds, the approvals authority is the Government Tender Board (or sub-committee).

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In addition, according to PPR Schedule Part III, prior approval is required from an Entity Tender Board (where a Procuring Entity has an Entity Tender Board) or the Government Tender Board, for use of single source procurement, regardless of the value of the transaction.

In discussions with the MAPS Assessment Team, stakeholders frequently referred to the negative impact of the low contract values for authority for approval by the controlling officer or CEO of procuring entities without an entity tender board (Emalangeni 20,000 (twenty thousand) for goods and services and Emalangeni 50,000 (fifty thousand) for works). Where the procuring entity does not have its own entity tender board the approval authority is the Government Tender Board. The Government Tender Board itself commented that the threshold values are too low. This view was endorsed by procuring entity stakeholders.

The MAPS Assessment Team also received negative feedback on the cost, process and time taken by ESPPRA to conduct Workload Capacity Assessments which are a pre-requisite to authorization of an entity tender board with designated levels of approvals. Some stakeholders observed that these factors limit the likelihood of procuring entities applying.

Gap analysis

Financial thresholds for approvals authorities: There is a clear scheme of approval authorities intended to delegate to the lowest competent level but the current financial thresholds for approval at the lowest level, by the controlling officer or Chief Executive are too low. This creates inefficiencies in the system as currently structured as it requires low value procurement to be handled by the Government Tender Board in many cases. The cost, process and time involved in seeking and obtaining authorisation from ESPPRA for establishment of an Entity Tender Board is prohibitive in some cases.

Recommendations

Financial thresholds for approvals authorities: Consider raising the thresholds for approval by the controlling officer or Chief Executive of a procuring entity, subject to proper operation of appropriate safeguards to ensure transparency and accountability.

Assessment criterion 6(a)(e):

Accountability for decisions is precisely defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act s.34 Functions of Procuring Entities, clearly defines the responsibilities and competencies of procuring entities covering the procurement lifecycle, from preparation of procurement plans to contract management. There is also a clear hierarchy of approvals authorities.

Gap analysis

Recommendations

Sub-indicator 6(b) Centralized procurement body

Assessment criterion 6(b)(a):

The country has considered the benefits of establishing a centralised procurement function in charge of consolidated procurement, framework agreements or specialised procurement.

Conclusion: No gap

Red flag: No

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Qualitative analysis

Centralised procurement in various forms has been considered and is provided for in the legal and regulatory framework. Central Government Stores are designated to procure common use items for central government using framework contracts. For specialised items or categories of procurement there are designated lead procuring entities (Ministries). The Micro Projects Unit, a department under the Ministry of Economic Planning and Development runs tender processes, mainly for construction related activities, to support the delivery of the Micro-projects Programme at community level. The overall picture is thus highly fragmented.

Common use items: The Procurement Act s.37 requires common use items to be purchased centrally by designated procurement entities. Common use items are defined in the Procurement Act as “...any goods, works or services required by more than one requesting entity, for which the Government can obtain greater efficiency and value for money through centralized purchasing.” PPR R.9(2) provides that Central Government Stores shall arrange for procurement of common use items and services through framework contracts, which shall be not less than one year and may be extended for a period not exceeding one year.

Specialised items or categories of procurement: The legal framework also sets out a non-exhaustive list of designated lead procuring entities for procurement of specialised items or categories of procurement, as follows (PPR R.6): (a) ministry responsible for health for medical and pharmaceutical products and related services; (b) ministry responsible for agriculture for drugs and related services for use by the Veterinary Department;³⁵ (c) ministry responsible for transport for vehicles and mechanical plant, including heavy earth moving equipment, spare parts for vehicles and mechanical plant and services; (d) ministry responsible for public works for all building, engineering and other works and for all consultancy services related to works procurement.

The Technical Secretariat may designate other lead procuring entities with responsibility for managing the procurement of common use items and certain specialized items or categories of procurement. In practice the Technical Secretariat conducts a limited amount of centralized procurement itself and has designated some specialized procurements to Ministries. For example, the Technical Secretariat has issued to Ministries a prequalified list of suppliers of catering services. Ministries requiring catering services must then invite all suppliers on that list to submit proposals. The Technical Secretariat has delegated specialist procurement, for example: procurement of security services is delegated to the Prime Minister’s Office; photocopiers to the Ministry of ICT; cleaning services to the Ministry of Public Services, and; building materials and vehicle hire to the Ministry of Public Works.³⁶ The Micro Projects Unit, a department under the Ministry of Economic Planning and Development runs tender processes, mainly for construction related activities, to support the delivery of the Micro-projects Programme at community level.

Gap analysis

Recommendations

Assessment criterion 6(b)(b):

In case a centralised procurement body exists, the legal and regulatory framework provides for the following:

- Legal status, funding, responsibilities and decision-making powers are clearly defined.
- Accountability for decisions is precisely defined.
- The body and the head of the body have a high-level and authoritative standing in government.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

³⁵ Information provided by Technical Secretariat in discussion with MAPS Assessment Team, August 2023.

³⁶ Information provided by Technical Secretariat to MAPS Assessment Team, August 2023.

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For the purposes of assessment of criteria 6(b)(b) and 6(b)(c) the MAPS Assessment team has considered the establishment and activities of the Central Government Stores because it has responsibility for procurement of common use items across central government.

Central Government Stores sits within Ministry of Finance “Treasury and Stores” and it has responsibility for procurement of common use items across central government. Central Government Stores activities are limited and it does not have high level and authoritative standing in government.

As noted in the analysis at 6(b)(a) the Procurement Act s.37 requires common use items to be purchased centrally by designated procurement entities and PPR R.9(2) provides that Central Government Stores shall arrange for procurement of common use items and services through framework contracts. Parts of the old Government Stores Regulations 1975³⁷ continue to apply to the activities of Central Government Stores and are not well aligned with more modern procurement practices.

PPR included provisions requiring active cooperation between Ministries and Central Government Stores, with Ministries providing Central Government Stores with their estimated requirements for common use items on an annual basis. Central Government Stores should then use this information in the procurement of frameworks for common use items. In practice, Ministries do not provide the required information to Central Government Stores who thus rely on historical information for estimated quantities.

Central Government Stores run tender processes for common use items, advertising in newspapers and on the ESPRA and Government website, conducting pre-qualification, shortlisting and accepting prices against (sometimes outdated) specifications. Technical Secretariate and Government Tender Board are involved. The list of bidders appointed to each framework is published, together with agreed prices. The 2022/2023 shortlist of eligible suppliers lists for the following common use items: grocery, meat & meat products, computer consumables and accessories, fresh fruit and vegetables, office furniture and fittings, liquified petroleum gas, office stationery, protective clothing and uniforms, pre-printed stationery, blinds and curtaining materials, and cleaning materials and chemicals. Ministries can place orders direct under the framework and suppliers are obliged to supply. No monthly sales reports are provided by suppliers and there is no feedback loop from procuring entities in terms of supplier performance.

Gap analysis

Government Central Stores functions and activities: Government Central Stores is of relatively low level standing institutionally, with a limited remit.

It is unlikely that the current framework arrangements for common use items are achieving best value for money outcomes, due to lack of data on which to base procurement decisions and with which to review supplier performance.

This Gap is assigned a Red flag because the current arrangements are unlikely to be achieving the objectives of efficiency and value for money outcomes. It also requires measures which cannot immediately be mitigated through actions solely in the public procurement sphere. Current arrangements need to be reviewed at a high government level, involving more than one institution, to address both current shortfalls and also consider an alternative structure and methods to fully take advantage of the benefits which can be derived from a variety of different forms of centralized procurement and specialised procurement.

Recommendations

Government Central Stores functions and activities: See combined Recommendations for conduct of an institutional review at 5(a).

Assessment criterion 6(b)(c):

The centralised procurement body’s internal organisation and staffing are sufficient and consistent with its responsibilities.

³⁷ Prior to 1 December 2008, when conducting procurement government Ministries and Departments applied the Stores Regulations 1975, issued pursuant to s.26 Finance and Audit Act 1967. The Public Procurement Regulations 2008 repealed Chapters 3 and 14 of Part I of the Stores Regulations 1975, with the rest of the provisions remaining in place.

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Conclusion: Substantive gap
Red flag: No
Qualitative analysis <p>The roles and responsibilities of Central Government Stores have gradually eroded over many years. There is a residual small team whose knowledge and skills lie primarily in the sphere of inventory management rather than procurement.</p>
Gap analysis <p>Knowledge and skills of Government Central Stores: Knowledge and skills of most staff at Government Central Stores lies primarily in the sphere of inventory management and this is not consistent with wider responsibilities which include procurement.</p> <p>The lack of relevant knowledge and skills means that the current arrangements are unlikely to be achieving the objectives of efficiency and value for money outcome. It also requires measures which cannot immediately be mitigated through actions solely in the public procurement sphere. Current arrangements need to be reviewed at a high government level, , involving more than one institution, to address both current shortfalls and also consider an alternative structure and methods to fully take advantage of the benefits which can be derived from a variety of different forms of centralized procurement and specialized procurement.</p>
Recommendations <p>See combined Recommendations for conduct of an institutional review at 5(a).</p>

Indicator 7. Public procurement is embedded in an effective information system

<p align="center">Sub-indicator 7(a)</p> <p align="center">Publication of public procurement information supported by information technology</p> <p align="center">The country has a system that meets the following requirements:</p>
<p>Assessment criterion 7(a)(a):</p> <p>Information on procurement is easily accessible in media of wide circulation and availability. Information is relevant, timely and complete and helpful to interested parties to understand the procurement processes and requirements and to monitor outcomes, results and performance.</p>
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis <p>The information available to the public is piecemeal and not available from a single data source. Annual procurement plans are not published, although there is a facility for this on the ESPPRA website. Appeals decisions are published and available on-line through the ESPPRA website.</p> <p>As a consequence of the operation of two “parallel systems” as described in 5(a)(a), information about procurement opportunities is published on-line in two different locations, the ESPPRA website and Government website, as well as in newspapers where relevant. The Government website in particular is not easily searchable. There is also no single on-line public resource providing information on contract awards including amendments or payments.</p> <p>The current use of e-procurement is disjointed and inconsistent. This because, in practice, central government procuring entities defer to the Ministry of Finance & Technical Secretariat for advertising, quality assurance and general advisory purposes whereas ESPPRA is the institution to which local government and Category A parastatals turn for much the same activities. These <i>de facto</i> parallel systems result in, for example, the use of two separate locations for on-line advertising: (1) procurement by central government is advertised on the central government</p>

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website (and sometimes on ESPPRA website) accessed following the “tender” tab;³⁸ and (2) procurement by Category A parastatals and local government is advertised on ESPPRA website tender page³⁹ but not on the central government website (see analysis on institutional set up at Indicator 6).

In the case of the Register of suspended tenderers, invitation notices, and publication of results of tender award and publication of results of tender award and notice of intention to award, the PPR designates the online location for publication as the “Eswatini Government website”. In practice, the Register of suspended tenderers is located on the ESPPRA website. Central Government procuring entities, in most cases, use the Government Website to publish invitation notices and award stage notices, while local government and Category A parastatals publish invitation notices and award stage notices on the ESPPRA website, effectively creating two parallel systems. The “Eswatini Government website” is not defined or described in the PPR.

Gap analysis

Public availability of information on procurement: Comprehensive information on procurement is not available to the public or easily accessible at one location, to help interested parties to understand procurement processes and requirements or to provide a basis for social audit by stakeholders.

This Gap is assigned a Red flag because lack of easily available relevant information severely limits both transparency and accountability of the procurement system. Resolution of this Gap will require system-wide changes, including behavioural change, involving pro-active coordinated cooperation between a large number of stakeholder institutions, such as the ESPPRA, MoF and all procuring entities, which is currently lacking. The availability of reliable data will also be closely dependent on parallel developments to substantially improve public finance management data, linked to introduction and roll out of IFMIS and thus does not lie solely in the procurement sphere.

Recommendations

The implementation of a new end-to-end e-GP system to be used by all procuring entities with publicly accessible data should significantly improve access to and availability of relevant information to enhance transparency and accountability of public procurement. It is envisaged that the new e-GP system is to be rolled out in phases over a period of several years. Improved transparency and accountability for the whole procurement cycle cannot wait until full roll out of the new e-GP system. It is critically important to start immediately to put into place measures to drive changes in behaviours, particularly in relation to publication at a single on-line location of information on procurement opportunities, improvements in general record keeping and reporting of procurement related information to ESPPRA.

Reliable and consistent submission of procurement information to ESPPRA significantly enhances possibilities for data-based evaluation of policies, operation and monitoring of the procurement system or for use of reliable data in procurement planning and market analysis. An improved culture of compliance on these matters will also assist in the successful roll-out of the e-GP system which will be dependent on consistent submission of good quality information and data.

Parallel developments with the introduction of IFMIS to ensure availability of comprehensive and reliable finance and budget data complementing procurement data are an integral element in delivering high quality comprehensive information on procurement.

See also Combined recommendation at 7(a)(b).

Assessment criterion 7(a)(b):

There is an integrated information system (centralised online portal) that provides up-to-date information and is easily accessible to all interested parties at no cost.

Conclusion: **Substantive gap**

³⁸ <https://www.gov.sz/>

³⁹ <https://esppra.co.sz/sppra/tender.php>

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Red flag: **Yes**

Qualitative analysis

The tender page on the ESPPRA website is accessible to all parties at no cost. It is not an e-GP system and its scope is limited, but it has the functionality to provide up-to-date procurement information in relation to advertisement of procurement opportunities and contract award. It provides current information on and links to relevant laws, rules and regulations. The ESPPRA website tender page cannot, however, be classified as a centralised or integrated system for the purposes of this MAPS Assessment criterion, as it is generally not used by central government procuring entities for advertising, and thus has only partial coverage within its already limited scope.

See analysis at 1(c)(d) for further information on advertising and information available from the Government Website tender tab and ESPPRA tender page.

Gap analysis

Integrated information system providing consolidated up-to-date information: There is no single integrated information system providing consolidated up-to-date information.

This Gap is assigned a Red flag because lack of easily available relevant information severely limits both transparency and accountability of the procurement system. System-wide changes, including behavioural change, with far-reaching impact on the current activities of a significant number of stakeholders, will be necessary, requiring proactive measures by a number of institutions. The availability of up-to-date information will also be closely dependent on parallel developments to substantially improve public finance management data, linked to introduction and roll out of IFMIS and thus does not lie solely in the procurement sphere.

Recommendations

Combined recommendation for 7(a)(b), (c), (d) & (e)

Integrated information system providing consolidated up-to-date information: It is important to ensure that sufficient resources, both human and financial, are in place and guaranteed for all phases of roll-out of the e-GP system so that a full end-to-end solution is delivered on time.

The public interface of the e-GP system should be user-friendly and easily interrogated to provide information of relevance to interested parties to understand the procurement processes and requirements and to monitor outcomes, results and performance of the system as a whole.

As a minimum, the e-GP system should include linkages to all relevant rules and regulations and provide for the publication of information listed in the MAPS methodology: annual or multi-annual procurement plans; information related to specific procurements, at a minimum, advertisements or notices of procurement opportunities, procurement method, contract awards and contract implementation, including amendments, payments and appeals decisions.

Ideally, all on-line Information should be published in an open and structured machine-readable format, using identifiers and classifications (open data format). Information on specific procurement should include the full set of bidding documents, evaluation reports, full contract documents including technical specification and implementation details (in accordance with legal and regulatory framework).

Assessment criterion 7(a)(c):

The information system provides for the publication of: *

- procurement plans
- information related to specific procurements, at a minimum, advertisements or notices of procurement opportunities, procurement method, contract awards and contract implementation, including amendments, payments and appeals decisions
- linkages to rules and regulations and other information relevant for promoting competition and transparency.

Conclusion: Substantive gap

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Red flag: **Yes**

Qualitative analysis

Information related to specific procurements is incomplete, not consistent and requires accessing two separate on-line locations (see qualitative analysis at 7(a)(a)).

The ESPPRA website has a dedicated tab for publication of annual procurement plans. PPR R.31 requires all requesting entities (this term covers all procuring entities) to send their annual procurement plans to the ESPPRA not later than 30 days after budget approval, but no annual procurement plans are available on-line from the ESPPRA website. Advertisements/notices of procurement opportunities related to specific procurements include reference to the procurement method and are published either on the ESPPRA website, which has a searchable interface, or the Government Website which is not easily searchable. Procuring entities using the ESPPRA website publish notices of intention to award and there is a dedicated tab for Notices of Intention to award, searchable by procuring entity name. Procuring entities using the Government Tender page do not appear to consistently publish notices of intention to award, although this is difficult to verify as the pages are not searchable. The ESPPRA website has links to relevant rules and regulations and decisions of the Independent Review Committee are also available to download from a dedicated tab. The ESPPRA website has other relevant information including the list of suspended suppliers and some standard templates.

Procurement plans: The ESPPRA website has a tab for publication of annual procurement plans but currently no plans are published and available through the link provided.

Information related to specific procurements: Information on current tender opportunities published on the ESPPRA website is searchable by category (works, supplies or services, procuring entity name, tender title or procurement method. Procuring entities using the ESPPRA website publish tender documents which can be reviewed on-line. Information on current tender opportunities published on the Government website tenders page is not searchable and requires users to click on further links to named ministries and then look at each advertised opportunity separately. Procuring entities using the Government Tender page do not always include tender documents, sometimes only publishing the advertisement which contains information on where tender documents can be obtained.

Procuring entities using the ESPPRA website publish notices of intention to award and there is a dedicated tab for Notices of Intention to award, searchable by procuring entity name. Procuring entities using the Government Tender page do not appear to consistently publish notices of intention to award, although this is difficult to verify as the pages are not searchable.

The MAPS Assessment team was unable to find information on the ESPPRA website or Government Tender page on procurement specific contract implementation including amendments or payments.

Linkages to rules and regulations and other relevant information: The ESPPRA website has a "Legislation" tab with active links through to legislation (the Procurement Act and PPR) and ESPPRA Circulars. The ESPPRA website also provides other information such as: list of suspended suppliers; downloadable templates for application for deviations, intention to award and procurement plan; information on scheduled training; ESPPRA Annual Reports (most recent for financial year 2020/2021).

Decisions by the Independent Review Committee are published on the ESPPRA website where there is a dedicated tab for Reviews and Appeals.

The ESPPRA website does not include public procurement related circulars or other similar information issued by Ministry of Finance and Technical Secretariat to Ministries

Reliable, consolidated data is not available to apply the quantitative analysis for this criterion.

Quantitative analysis

Consolidated data is not available to fully assess this quantitative indicator.

// Minimum indicator // Quantitative indicators to substantiate assessment of sub-indicator 7(a) Assessment criterion (c):

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- *procurement plans published (in % of total number of required procurement plans)*

Note: No procurement plans are published on the ESPPRA website

- *key procurement information published along the procurement cycle (in % of total number of contracts):*
- *invitation to bid (in % of total number of contracts)*
- *contract awards (purpose, supplier, value, variations/amendments)*
- *details related to contract implementation (milestones, completion and payment)*
- *annual procurement statistics*

Note: Consolidated data is not available to assess the above elements of this quantitative indicator

- *appeals decisions posted within the time frames specified in the law (in %).*

Note: Appeals decisions are posted promptly on the ESPPRA website. There is no statutory time frame for publication of appeals decisions on the ESPPRA website (see analysis at 1(h)(e))

Source: Centralised online portal.

Gap analysis

Annual Procurement Plans: There is no single integrated information system providing comprehensive, consolidated up-to-date information. Annual procurement plans are not published, information relating to specific procurements is not consistent and not available from a single source. The lack of publicly available procurement information reduces transparency and limits opportunities for social audit by interested parties.

This Gap is assigned a Red flag because lack of easily available relevant information severely limits both transparency and accountability of the procurement system. In addition, resolution of this Gap will require pro-active inter-institutional co-operation and system-wide changes. This issue needs to be understood in the wider context of lack of publicly available data and an integrated information system and the need for parallel developments in the introduction of both e-GP and IFMIS, with the latter mitigation measure falling outside the procurement sphere.

Recommendations

Annual Procurement Plans: Consider measures to enforce the obligation on procuring entities to submit procurement plans to the ESPPRA and ensure publication of all annual procurement plans on the ESPPRA website which already has a dedicated page for this purpose. As Technical Secretariat already receives annual procurement plans from Ministries, it is recommended that, pending implementation of e-GP system (which should include publication of procurement plans), Technical Secretariat arranges to send copies of annual procurement plans it receives to ESPPRA as part of a process of increased cooperation.

See also the combined recommendations at 7(a)(b).

Assessment criterion 7(a)(d):

In support of the concept of open contracting, more comprehensive information is published on the online portal in each phase of the procurement process, including the full set of bidding documents, evaluation reports, full contract documents including technical specification and implementation details (in accordance with legal and regulatory framework).

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

Full sets of bidding and contract documents are published and available on-line for inspection when the opportunity is published on the ESPPRA website tender page. This is not the case with opportunities published on the Government Website where practices are inconsistent.

Gap analysis

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Publication of documents relating to specific procurements: Full sets of bidding documents, evaluation reports and contract documents are not consistently available on-line and due to the operation of parallel systems, there is no single online portal, thus reducing the visibility of flow of public funds. This severely limits both transparency and accountability of the procurement system.

Recommendation

See Combined recommendations at 7(a)(b).

Assessment criterion 7(a)(e):

Information is published in an open and structured machine-readable format, using identifiers and classifications (open data format).*

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

Information available from the ESPPRA website is not all in an open and structured machine-readable format. Information on procurement opportunities on the Government Website is not in a machine-readable format.

Reliable, consolidated data is not available to apply the quantitative analysis for this criterion.

Quantitative analysis

Note: Consolidated data is not available to assess this quantitative indicator.

** Recommended quantitative indicator to substantiate assessment of sub-indicator 7(a) Assessment criterion (e):
- Share of procurement information and data published in open data formats (in %).
Source: Centralised online portal.*

Gap analysis

Machine-readable procurement information: In most cases, information available online is not published in an open and structured machine-readable format.

The inability to fully interrogate available information limits both transparency and accountability of the procurement system.

Recommendation

See Combined recommendations at 7(a)(b).

Assessment criterion 7(a)(f):

Responsibility for the management and operation of the system is clearly defined.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The ESPPRA has a statutory responsibility for examining and recommending ways introducing information and communications technology in public procurement, issuing supporting circulars and instructions and identifying relevant additions or amendments to the public procurement legal and regulatory framework. The e-GP Strategy mandates ESPPRA to lead the e-GP initiative, with policy level support from the Ministry of Finance. There is, however, no clear assignment in the Procurement Act of the responsibility for the specific functions of managing and operating the e-GP system, when it is introduced.

The Procurement Act s.8 Introduction of Information and Communication Technology, (ICT) provides that the

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ESPPRA “shall examine and recommend ways of introducing in public procurement, at appropriate stages, the use of information and communications technology, and other technical innovations, where such technology promotes the objectives of this Act.” It goes on to provide that the ESPPRA may issue circulars and instructions on measures and programmes to introduce ICT in public procurement and identify additions or amendments to the public procurement legal and regulatory framework to support the application of ICT and shall promote their introduction. The e-GP Strategy mandates ESPPRA to lead the e-GP initiative, with policy level support from the Ministry of Finance.

Gap analysis

Allocation of functions of managing and operating the e-GP system: The specific functions of managing and operating the e-GP system when it is introduced is not clearly assigned. The lack of clarity on the assignment of the specific function of managing and operating the e-GP system, which requires high level Government decision making, is likely to perpetuate the silos of practice and limits the overall intelligibility and effective functioning of both the system and the involved institutions. Ultimately resulting in a lack of coherence in the operation of the procurement system.

Recommendations

Allocation of functions of managing and operating the e-GP system: Include in relevant legislation clear assignment of the specific function of managing and operating the e-GP system. Ideally this should be expressed to also include assignment of ongoing responsibility for review of the operation of the e-GP system, to identify issues including required changes, improvements and additional functionalities and to carry through necessary implementation.

Sub-indicator 7(b) Use of e-Procurement

Assessment criterion 7(b)(a):

E-procurement is widely used or progressively implemented in the country at all levels of government.*

Conclusion: No gap

Red flag: No

Qualitative analysis

Use of electronic procurement is limited, with on-line activity primarily focused on advertisement of competitive procurement opportunities and notification of award. It appears that online advertisement is widely used, but information on procurement opportunities is advertised in two separate locations and consolidated data is not available. There is evidence of some progression of implementation of electronic methods in procurement, with publication of bidding and contract documents on-line in many, but not all, cases (see 7(a)(d)).

Reliable, consolidated data is not available to apply the quantitative analysis for this criterion.

Quantitative analysis

Note: Consolidated data is not available to assess the quantitative analysis for this indicator.

// Minimum indicator // * Quantitative indicators to substantiate assessment of sub-indicator 7(b) Assessment criterion (a):

uptake of e-Procurement

- number of e-Procurement procedures in % of total number of procedures
- value of e-Procurement procedures in % of total value of procedures

Source: e-Procurement system.

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Gap analysis

Recommendations

Assessment criterion 7(b)(b):

Government officials have the capacity to plan, develop and manage e-Procurement systems.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

If sufficient resources, both human and financial, are allocated and guaranteed to support the roll-out of the e-GP system, in accordance with the e-GP strategy, this will include building of capacity to plan, develop and manage the e-GP system. The MAPS Assessment team has consistently observed unfilled staff positions due to the Government-wide staffing freeze (since 2018 and only recently lifted) and availability of suitably qualified procurement professionals has been flagged as a general issue at various points in engagement with stakeholders. It is therefore not possible to conclude that this criterion is currently met.

The 2019 e-GP Readiness Assessment Report scored Component 1 Government Leadership at 2.72/4 (moderately satisfactory) on the Likert scale. That report recommended development of the e-GP Strategy and action plan, and allocation of required budget to ensure improvement in this readiness level. Government leadership in this context refers to high level Government endorsement of the e-procurement strategy, a national vision and objectives for e-procurement and authorising and resourcing of the implementing lead agency to drive the required changes. The 2020 e-GP strategy s.3.1 notes that governance structures with clear management model defining roles and responsibilities of various institutional players is critical to successful implementation of the Strategy and sets out the e-Government Procurement Governance Structure.

Gap analysis

Capacity to plan, develop and manage e-GP system: The e-GP system will be a new system requiring significant investment including in capacity building of Government officials to ensure that they are able to plan, develop and manage the system on an ongoing basis. It is important to ensure that a network of relevant national expertise is developed and retained, to avoid over reliance on external third-party providers in the medium to long term.

Recommendations

Capacity to plan, develop and manage e-GP system: Prioritise capacity building of Government officials prior to and during roll-out of the e-GP system. It is important to ensure that a sufficiently wide network of relevant national expertise is developed and retained, to avoid over reliance on external third-party providers in the medium to long term.

Assessment criterion 7(b)(c):

Procurement staff is adequately skilled to reliably and efficiently use e-Procurement systems.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The e-GP system is not yet introduced and thus procurement staff are not yet in a position to be adequately skilled in the use of the system. Building capacity and skills of procurement staff to use the new e-GP system is a specific recommendation in the e-GP strategy. This will be dependent on reliable, ongoing allocation of sufficient financial and other resources throughout the period of implementation and roll out of the e-GP system. As noted

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at 7(b)(a) there is also a lack of sufficient qualified procurement professionals which presents a risk to effective roll out of the e-GP system.

The 2019 e-GP Readiness Assessment Report scored Component 2 Human Resources at 2.18/4 (moderately satisfactory) on the Likert scale. That recommended that Eswatini prepare a comprehensive capacity building and change management programme, including internet-based training content leveraging ICT and to develop an online learning platform to bridge the capacity gap in public procurement.

The 2020 e-GP strategy notes that there are varying levels of readiness of procuring entities for introduction of e-GP system and made specific recommendations on training and capacity building programmes to support implementation of e-GP as well as a call centre facility.

Gap analysis

Skills to reliably and efficiently use e-GP system: The e-GP system is not yet introduced and thus procurement staff are not yet in a position to be adequately skilled in the use of the system. There is a lack of sufficient qualified procurement professionals which presents a risk to the reliable and efficient use of the e-GP system.

Recommendations

Skills to reliably and efficiently use e-GP system: Ensure that capacity building of procurement staff in use of the e-GP system is implemented in a timely manner, in accordance with the e-GP strategy.

Assessment criterion 7(b)(d):

Suppliers (including micro, small and medium-sized enterprises) participate in a public procurement market increasingly dominated by digital technology.*

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

Use of electronic procurement is limited and is currently primarily used for advertisement of procurement opportunities and on-line review of tender documents in some, but not all cases. Bids are not submitted online through an e-procurement system. Reliable, consolidated data is not available to apply the quantitative analysis for this criterion.

One of the key observations of the 2019 e-GP Readiness Assessment Report was that suppliers do not have easy access to procurement training programmes except ad-hoc workshops and seminars. This MAPS Assessment confirms that this continues to be the case (see 8(a) and 8(d)).

The 2020 e-GP strategy flags the importance of capacity building of suppliers and other stakeholders, noting that failure to do so leading to lack of confidence in adopting e-procurement which could result in delayed implementation.

Quantitative analysis

Note: Consolidated data is not available to assess this quantitative indicator.

* Recommended quantitative indicators to substantiate assessment of sub-indicator 7(b) Assessment criterion (d):

- bids submitted online (in %)

- bids submitted online by micro, small and medium-sized enterprises (in %)

Source: e-Procurement system.

Gap analysis

Supplier participation in public procurement market using digital technology: Suppliers do not have easy access to procurement training programmes except ad-hoc workshops and seminars. They are currently not fully

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supported or enabled to participate in the public procurement market. There is a risk that MSME suppliers in particular may be further marginalised if insufficient time and resources are given to capacity building on the new e-GP system.

Recommendations

Supplier participation in public procurement market using digital technology: Ensure that capacity building of suppliers, including MSME suppliers, is implemented in a timely manner and on a regular and ongoing basis, in accordance with the e-GP strategy.
See also, recommendations at 8(a)(d).

Assessment criterion 7(b)(e):

If e-Procurement has not yet been introduced, the government has adopted an e-Procurement roadmap based on an e-Procurement readiness assessment.

Conclusion: No gap

Red flag: No

Qualitative analysis

In 2019, ESPPRA, with technical assistance from the World Bank, conducted an e-Government Procurement (e-GP) Readiness Assessment. The ESPPRA published the resulting e-GP Readiness Assessment Report and an e-GP Strategy, aimed at providing information on the e-GP System as well as guidance on its implementation. The e-GP Strategy for an end-to-end procurement platform was approved by Cabinet in 2021. The e-GP Strategy included and implementation plan and envisaged rollout over the period 2020 to 2023, but implementation has been delayed.

At the end of 2023, the Government of Eswatini concluded negotiations with the Rwanda Corporation (a government owned company) for system development, hardware and advisory services for implementation of both an Integrated Financial Management System and an end-to-end e-Government Procurement system. Roll out is planned over a four-year period.

Gap analysis

Recommendations

Sub-indicator 7(c)

Strategies to manage procurement data

Assessment criterion 7(c)(a):

A system is in operation for collecting data on the procurement of goods, works and services, including consulting services, supported by e-Procurement or other information technology.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

There is no single system in operation for reliable collection of consolidated data on procurement of goods, works and services including consulting services and use of technological solutions is fragmented.

ESPPRA collects limited data through its website in respect of procurement by Category A parastatals, Local Government and some central government procuring entities who cooperate with ESPPRA. ESPPRA also collects data on performance through its procurement audit function. Technical Secretariat collects some data from documents submitted to it in respect of procurement activities of central government procuring entities, but this is not published. Government Tender Board collects data from procurement documents in respect of procurements which the Government Tender Board reviews but this is not easily available. There is significant potential for overlap of data which is collected. There is no mechanism in operation for pooling data or ensuring that data is collected in a consistent manner.

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Gap analysis

System for collecting data on procurement: There is no system in operation collecting consolidated and consistent data on procurement of goods, works and services, including consulting services. There are therefore very limited possibilities for data-based evaluation of policies, operation and monitoring of the procurement system or for use of reliable data in procurement planning and market analysis.

This Gap is assigned a Red flag because lack of a system for collecting data severely limits opportunities for analysis, to identify issues and areas for improvement in the operation of the procurement system as a whole. In addition, resolution of this Gap will require pro-active inter-institutional co-operation and system-wide changes. This issue needs to be understood in the wider context of lack of publicly available data and an integrated information system and the need for parallel developments in the introduction of both e-GP and IFMIS, with the latter mitigation measure falling outside the procurement sphere.

Recommendations

See Combined Recommendations at 7(a)(a).

Assessment criterion 7(c)(b):

The system manages data for the entire procurement process and allows for analysis of trends, levels of participation, efficiency and economy of procurement and compliance with requirements.

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

Available data is incomplete, from more than one source and does not consistently cover the entire procurement process (see 7(c)(a)).

Gap analysis

Completeness of data on procurement: Available data is incomplete, from more than one source and does not consistently cover the entire procurement process.

This Gap is assigned a Red flag because incomplete data severely limits opportunities for analysis, to identify issues and areas for improvement in the operation of the procurement system as a whole. In addition, resolution of this Gap will require pro-active inter-institutional co-operation and system-wide changes. This issue needs to be understood in the wider context of lack of publicly available data and an integrated information system and the need for parallel developments in the introduction of both e-GP and IFMIS, with the latter mitigation measure falling outside the procurement sphere.

Recommendations

See Combined Recommendations at 7(a)(a).

Assessment criterion 7(c)(c):

The reliability of the information is high (verified by audits).

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

Available data is unreliable (see 7(c)(a)).

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Gap analysis

Reliability of data on procurement: Available data is unreliable.

This Gap is assigned a Red flag because lack of reliable data severely limits opportunities for analysis, to identify issues and areas for improvement in the operation of the procurement system as a whole. In addition, resolution of this Gap will require pro-active inter-institutional co-operation and system-wide changes. This issue needs to be understood in the wider context of lack of publicly available data and an integrated information system and the need for parallel developments in the introduction of both e-GP and IFMIS, with the latter mitigation measure falling outside the procurement sphere.

Recommendations

See Combined Recommendations at 7(a)(a).

Assessment criterion 7(c)(d):

Analysis of information is routinely carried out, published and fed back into the system. *

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

Routine analysis of information which can provide the basis for evaluation and monitoring of operation of the system as a whole is not possible in practice, due to significant data gaps.

The most recent annual report published by ESPPRA is for financial year 2020/2021. No annual report has been published for 2021/2022. Statistical Information presented in that annual report cannot be relied upon to present an accurate picture of the operation of public procurement in Eswatini as a whole. The data presented by ESPPRA is incomplete in terms of national coverage due to reporting failures by procuring entities and, in particular, significant lack of data provision by Ministries. Reliable data is not available from other sources.

Reliable, consolidated data is not available to apply the quantitative analysis for this criterion.

Quantitative analysis

Note: Consolidated data is not available to assess this quantitative indicator.

// Minimum indicator // * Quantitative indicators to substantiate assessment of sub-indicator 7(c) Assessment criterion (d):

- total number and value of contracts
- public procurement as a share of government expenditure and as share of GDP
- total value of contracts awarded through competitive methods in the most recent fiscal year.

Source: Normative/regulatory function/E-Procurement system.

Gap analysis

Analysis of procurement information: Routine analysis of information which can provide the basis for evaluation and monitoring of operation of the system as a whole is not possible in practice, due to significant data gaps.

This Gap is assigned a Red flag because it severely limits opportunities for analysis, to identify issues and areas for improvement in the operation of the procurement system as a whole. In addition, resolution of this Gap will require pro-active inter-institutional co-operation and system-wide changes. This issue needs to be understood in the wider context of lack of publicly available data and an integrated information system and the need for parallel developments in the introduction of both e-GP and IFMIS, with the latter mitigation measure falling outside the procurement sphere.

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Recommendations

See Combined Recommendations at 7(a)(a).

Indicator 8. The public procurement system has a strong capacity to develop and improve

Sub-indicator 8(a)

Training, advice and assistance

There are systems in place that provide for:

Assessment criterion 8(a)(a):

Substantive permanent training programmes of suitable quality and content for the needs of the system.

Conclusion: No gap

Red flag: No

Qualitative analysis

ESPPRA has a programme of annual training plans based on a training needs analysis. The analysis was conducted in 2021 ("2021 Training Needs Analysis"). In addition, training is provided on a responsive basis, according to needs to respond to internally identified gaps.

ESPPRA provides three types of training:

Training on public procurement reforms - free of charge: This training is initiated by ESPPRA. The target stakeholders are mainly central government, media and other key stakeholders. There is budget allocation for this training which is provided at no cost to procuring entities. (Budget at November 2023 was SZL 360 000.00)

In the period 2021-2022-2023 ESPPRA delivered 12 training events on reform issues, offered to participants from procuring entities, private sector, the media and NGO/CSO sector, with a total of 580 participants. Training varied according to the participants and covered a range of topics including regulatory framework, roles and responsibilities of evaluation committees, procurement methods, evaluation, emergency procurement, standard bidding documents, professionalization of public procurement system, positioning and business opportunities, promoting social inclusion through public procurement.

There are two types of commercial training delivered by ESPPRA:

Commercial – internal: This is usually initiated by an individual procuring entity, institution or other stakeholder and is tailored to the needs of that particular organisation. There is currently no standard curriculum for training provided to procuring entities but there is a template used for a thorough three-day training programme, which covers the procurement regulatory framework, processes and evaluation procedures, including ethical practices.

Commercial – group training: The ESPPRA initiates training on specific issues of practical relevance, informed by the 2021 Training Needs Analysis, aimed at participants from different procuring entities, institutions or other stakeholders.

In the period 2021-2022-2023 ESPPRA delivered 15 training events on a commercial basis to participants from procuring entities, private sector and NGO (1 example), including induction for new Entity Tender Boards.

Topics included, regulatory framework, roles and responsibilities of evaluation committees, tender specifications, and framework contract, procurement methods, evaluation, doing business with the public sector (jointly with University of Eswatini).

Training delivered by ESPPRA ranges from half day events to longer sessions, including the three-day programme referred to above. Format for training is mixed, using presentations, group exercise and work-based assessments. The Technical Secretariat also provides training to Ministries, where requested. There are a number of private providers who also deliver procurement related training.

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The ESPPRA Capacity Building and Advisory Team is working below capacity. It current has 3 staff members, with 4 vacancies.⁴⁰

Gap analysis

Recommendations

Assessment criterion 8(a)(b):

Routine evaluation and periodic adjustment of training programmes based on feedback and need.

Conclusion: No gap

Red flag: No

Qualitative analysis

The ESPPRA actively seeks feedback from training participants, using training evaluation forms. The ESPPRA reviews the feedback received and adjusts training content to take on board feedback received. The ESPPRA also adjusts content, as necessary to reflect the particular needs of procuring entity. MAPS Assessment team was provided with template feedback form and discussed the review and adjustment process with ESPPRA Capacity Building Team.

Gap analysis

Recommendations

Assessment criterion 8(a)(c):

Advisory service or help desk function to resolve questions by procuring entities, suppliers and the public.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The ESPPRA Capacity Building and Advisory Team receives and provides advice to questions raised by procuring entities through e-mails, phone calls, on-line through the ESPPRA website and social media pages. There is also a FAQ page on the ESPPRA website which is due for an update. The Team also provides assistance to private sector suppliers through the above media.

The ESPPRA responds to enquiries on a wide range of topics. The number of enquiries handled by ESPPRA over financial years was as follows: 2020/2021- 174, 2021/2022 - 297, 2022/2023 – 166.

Technical Secretariat also provide advisory support to Ministries, on an ad-hoc basis.

Gap analysis

Recommendations

Assessment criterion 8(a)(d):

A strategy well-integrated with other measures for developing the capacity of key actors involved in public procurement.

Conclusion: Substantive gap

Red flag: No

⁴⁰ Information provided by ESPPRA to MAPS Assessment Team, November 2023.

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Qualitative analysis

There is currently no training and development (capacity building) strategy in place. In 2021/2022, the ESPPRA conducted a procurement to source consultants to develop a capacity building strategy, but the procurement was unsuccessful. ESPPRA's current programme of annual training plans is based on the 2021 Training Needs Analysis.

Gap analysis

Training strategy: There is a comprehensive training needs analysis but currently there is no training strategy.

Recommendations

Training strategy: ESPPRA to lead on the preparation of a training strategy for developing the capacity of key actors in public procurement including procuring entities, the private sector (including MSME businesses) and civil society. This will require active cooperation both in terms of consultation with stakeholders to ensure that specific needs to be addressed are built into the strategy and with institutional stakeholders including the Ministry of Finance, to ensure that the strategy is well integrated with other developments, not least the introduction and roll out of the e-GP system.

Sub-indicator 8(b)

Recognition of procurement as a profession

The country's public service recognises procurement as a profession:

Assessment criterion 8(b)(a):

Procurement is recognised as a specific function, with procurement positions defined at different professional levels, and job descriptions and the requisite qualifications and competencies specified.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The overall picture is mixed, reflecting the difference in operation and governance of the three categories of procuring entities. In practice, due to financial constraints at national level, there has been a long-term public sector staff recruitment freeze (Circular No.3 of 2018 and only recently lifted) which has had a significant impact on all procuring entities.

In practice, although there are schemes of service and job descriptions with requisite qualifications and competencies specified, there are very few professional procurement officers within Ministries. This was frequently raised by stakeholders in discussions with the MAPS Assessment team as a factor contributing to poor procurement practice. It is more common to find procurement professionals in Category A parastatals and larger local government procuring entities. Based on assessment of the wider picture, the MAPS Assessment team has concluded that there is insufficient evidence to demonstrate that procurement is consistently recognized as a profession and the situation does not meet all of the above assessment criteria.

Central government procuring entities (including Ministries): Staff undertaking procurement roles are civil servants, with the recruitment process conducted by the Civil Service Commission. Most Ministries do not have a specialist procurement officer. It is common across government that the procurement role is fulfilled by finance/accounting staff under delegated functions and not procurement professionals. There are job descriptions with specified qualifications and competencies and there are comprehensive job descriptions for the Supply Chain Management Department within the Ministry of Finance. There are some schemes of service which articulate career progression within central government. In practice there has been a long-term staff recruitment freeze.

Local government procuring entities: staff are appointed directly by the local government entity. Some local government entities have procurement professionals but in the smaller entities, in particular, the procurement role is often fulfilled by finance/accounting staff.

Category A parastatals: staff are appointed directly by the Category A parastatal. It is much more common to find procurement professionals within Category A parastatals. Job descriptions are used but are not standardized and opportunities are advertised.

The ESPPRA has published a concept note on Development of a Community of Practice, July 2022.

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Gap analysis

Procurement as a profession in procuring entities: Procurement is not consistently recognized as a professional function and there is a lack of procurement professionals conducting public procurement. In practice, although there are schemes of service and job descriptions with requisite qualifications and competencies specified, there are very few professional procurement officers within Ministries and this is a factor contributing to poor procurement practice.

Recommendations

Procurement as a profession in procuring entities: ESPPRA to prioritise and provide increased leadership on the developing procurement as a profession, including working with all relevant institutional stakeholders and procuring entities (all types) to ensure that procurement positions are consistently and clearly defined at different professional levels, to support the development and use of comprehensive job descriptions and to promote and develop schemes for procurement qualifications and competencies for those with procurement responsibilities at all procuring entities.

Assessment criterion 8(b)(b):

Appointments and promotion are competitive and based on qualifications and professional certification.

Conclusion: No gap

Red flag: No

Qualitative analysis

For central government procuring entities (including Ministries), staff undertaking procurement roles are civil servants, with the recruitment process conducted by the Civil Service Commission working in collaboration with the recruiting Ministry. Internal government processes apply including consideration of suitability of internal candidates. In local government and Category A parastatals appointments and promotions are based on the internal rules of the organisations which require competition and specified competencies.

Gap analysis

Recommendations

Assessment criterion 8(b)(c):

Staff performance is evaluated on a regular and consistent basis, and staff development and adequate training is provided.

Conclusion: No gap

Red flag: No

Qualitative analysis

For central government procuring entities (including Ministries), staff undertaking procurement roles are civil servants to whom a staff evaluation regime applies. In local government and Category A parastatals staff performance schemes are based on the internal rules of the organisations. Procurement staff who the MAPS Assessment Team spoke to referred to adequate training being provided by the ESPPRA on a range of procurement issues.

Gap analysis

Recommendations

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Sub-indicator 8(c) Monitoring performance to improve the system
Assessment criterion 8(c)(a): The country has established and consistently applies a performance measurement system that focuses on both quantitative and qualitative aspects.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis There is no comprehensive procurement system performance management framework in place and the lack of both quantitative and qualitative national level data currently prevents initial steps in this direction.
Gap analysis Performance measurement system for procurement: The legal framework provides for the initial steps in establishment of a performance management framework by requiring submission of data related to conduct of individual procurement processes to the ESPPRA. Poor compliance with statutory reporting requirements means that in practice there is no performance measurement system in operation, to the detriment of both procuring entities and the system as a whole.
Recommendations Performance measurement system for procurement: ESPPRA and the Ministry of Finance should work together to identify priority measure to be put into place to facilitate the introduction of a performance measurement system. ⁴¹ The introduction of the e-GP system provides an opportunity to improve this situation but this is not a complete. As highlighted in the Recommendations at 1(j) the introduction of e-GP system will need to be combined with other measures and changes in practices, including in record keeping, at procuring entity level.
Assessment criterion 8(c)(b): The information is used to support strategic policy making on procurement.
Conclusion: Choose an item. Not assessed as there is no performance framework
Red flag: Choose an item.
Qualitative analysis
Gap analysis
Recommendations
Assessment criterion 8(c)(c): Strategic plans, including results frameworks, are in place and used to improve the system.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis There is no strategic plan, including results frameworks, which are in currently in place and used to improve the system.

⁴¹ See OECD (2023), "Public procurement performance: A framework for measuring efficiency, compliance and strategic goals", *OECD Public Governance Policy Papers*, No. 36, OECD Publishing, Paris, <https://doi.org/10.1787/0dde73f4-en>.

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Gap analysis

There is no strategic plan, including results frameworks, which are in currently in place and used to improve the system.

Recommendations

ESPPRA to lead on the preparation of a strategic plan, to include a results framework, to structure reform initiative and to monitor the implementation of planned reforms.

Assessment criterion 8(c)(d):

Responsibilities are clearly defined.

Conclusion: Choose an item.

Not assessed as there is no performance framework

Red flag: Choose an item.

Qualitative analysis

Gap analysis

Recommendations

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Indicator 9. Public procurement practices achieve stated objectives

General note on data limitations: The MAPS Assessment Team encountered significant problems in obtaining necessary data from some procuring entities to be used for selection of procurement files for the sampling process and also, in some cases, in accessing procurement files for analysis. In the case of procurements which were analysed for the sampling process, the MAPS Assessment Team frequently encountered poor quality, fragmented and incomplete records, information stored in multiple locations or not available at all.

Poor record keeping is identified as a substantive Gap and assigned a Red flag at sub-indicator 1(k). The limitations of the data gathered from the sampled procurement files means that in some cases the MAPS Assessment team has combined data from sampling, information drawn from analysis elsewhere in the in order to come to a conclusion on whether and to what extent the criteria under Indicator 9 have been met.

Sub-indicator 9(a) Planning
Assessment criterion 9(a)(a): Needs analysis and market research guide a proactive identification of optimal procurement strategies.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis The Assessment Team found no evidence of needs analysis or market research.
Gap analysis Needs analysis and market research: The MAPS Assessment Team found no evidence of needs analysis or market research. Absence of these mechanisms to inform the development of optimal procurement strategies hinders the achievement of public procurement objectives.
Recommendations Needs analysis and market research: Procuring Entities should conduct needs analysis and market research which, combined with policy documents and well-defined procurement strategies, should enable the preparation of annual operational plans capable of informing the different stakeholders and thereby achieving public procurement objectives. ESPPRA should promote the training and capacity building of procuring entities in relation to methods for conducting, and recording the conduct of, relevant, tailored and effective needs analysis and market research. ESPPRA should prioritize publication of the standard tender document, documents to facilitate the market consultation process. In order to mitigate this Gap, inter-institutional cooperation will also be required to ensure that all procuring entities receive the same training and adopt consistent approaches.
Assessment criterion 9(a)(b): The requirements and desired outcomes of contracts are clearly defined.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis The MAPS Assessment Team detected examples in the sample cases where the tender documents were incomplete, with, variously the General Conditions of Contract (GCC), the Special Conditions of Contract (SCC) or the Terms and

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Conditions missing. There were also cases of procedures being cancelled due to "technical issues", but there is no record of what the technical issues for cancellation are, which may indicate unclear objectives. The MAPS Assessment Team also experienced cases in which the tender documents could no longer be found, which reveals poor record-keeping practices. (See general note at start of Indicator 9 and Gap and Red flag at indicator 1(k)).

Gap analysis

Requirements and outcomes of contracts: Incomplete procurement documents are published and this prevents economic operators from knowing the contractual outcomes to which they are obliged, even if these are defined, which does not seem to be the case.

Recommendations

Requirements and outcomes of contracts: Procuring Entities must ensure a clear definition of their requirements and desired outcomes. They must also ensure that the tender documents include all the essential elements for a good understanding of all the contractual obligations.

An effective step to facilitate the objective of ensuring clarity and understanding of requirements, desired outcomes and contractual obligations, is to prioritize the finalization and adoption of (1) a set of standard bidding and contract documents; and (2) standard contract conditions; and mandate their use by all procuring entities (Central government, local government and Category A parastatals), as detailed in the Combined recommendation for 2(b) and 2(c). This recommendation is also set out below, for clarity:

Related recommendations - combined recommendations for 2(b) and 2(c): Standard tender documents and standard contract documents: In order to ensure consistency and enhance understanding and application for all stakeholder, prioritise the finalization and adoption of: (1) a set of standard tender documents, and (2) standard contract conditions, and mandate their use by all procuring entities (Central government, local government and Category A parastatals). Core standard contract conditions should be fair and balanced and reflect national laws which impact on contracts and their performance.

Consider measures to enforce appropriate use of the standard tender documents and standard contract conditions by all procuring entities. New standard tender documents and standard contract conditions should be supported by clear instructions and guidance on their use which should be issued at the same time as the standard tender documents and standard contract conditions. In order to further ensure correct use of the documents their launch should be tied in with a programme of training to support procuring entities as well as public dissemination so that suppliers are also aware of the changes. To increase legal certainty, responsibility for review and updating the standard tender documents and standard contract conditions, including mandatory clauses or templates, must be clearly assigned. In order to ensure consistency of use of appropriate procurement documents where standard tender documents are not available or standard contract conditions are inappropriate, responsibility for advising procuring entities on which documents to use should be provided to all procuring entities by a single authority with relevant expertise.

Assessment criterion 9(a)(c):

Sustainability criteria, if any, are used in a balanced manner and in accordance with national priorities, to ensure value for money.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Context: The analysis under 3(a) establishes that there is currently no sustainable public procurement (SPP) policy/strategy in place to support broader national policy objectives and there are no provisions in the Procurement Act specifically referencing use of economic, environmental and social criteria in the procurement

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cycle. The PPR include high-level provisions on environmental issues in procurement at all stages of the procurement lifecycle but no specific references to economic or social issues.

The use of sustainability criteria was not detected in the sample cases.

Gap analysis

Sustainability criteria in public procurement: The use of sustainability criteria was not detected in the sample cases and thus value for money is not ensured where sustainability considerations are of particular relevance. Sustainability is a cross-cutting issue with wide impact.

Recommendations

Sustainability criteria in public procurement: Procuring entities should include sustainability criteria in both their specified requirements and criteria for evaluation of tenders, as appropriate, to ensure value for money. There are various measures and practices which may be introduced in the short term, pending development and implementation of a sustainable public procurement (SPP) policy/strategy.

In the longer term, provisions for, and use of, sustainability criteria needs to tie in with the development and implementation of a sustainable public procurement (SPP) policy/strategy aligned with national priorities, related amendment to the legal/regulatory framework and embedding of sustainability in model procurement documents (standard tender documents), contract conditions and practice. An SPP policy/strategy does not currently exist and developing it will require inter-institutional cooperation. See full Recommendations on SPP at Indicator 3.

Related recommendations

The recommendations under this criterion are closely tied in with prior implementation of the recommendations under 1(f)(b) and combined recommendations for 3(a) which are as follows:

1(f)(b): Introduce additional provisions in the legal and regulatory framework to promote the use of life cycle costing or total cost of ownership, as appropriate in relevant procurements to ensure value for money decisions. All legal provisions must be supported by clear, practical guidelines on how to incorporate life cycle costing or total cost of owner into the entire procurement cycle, from planning to delivery. This should be tied in with measures to address sustainable public procurement more widely and recommendations at sub-indicator 3(a) Sustainable Public Procurement.

3(a): Develop a sustainable public procurement policy/strategy to implement SPP (economic, environmental (including climate considerations) and social (including gender equality)) in support of broader national policy objectives and reflecting national priorities. This should include a clear implementation plan/road map to cover introduction of systems and tools to operationalize, facilitate and monitor the application of SPP in priority areas in particular. It should also identify and provide for any amendments necessary to the legal/regulatory framework to allow for sustainability to be fully incorporated at all stages of the procurement cycle ensuring well-balance application of sustainability criteria from planning through to contract delivery and monitoring. SPP requirements embedded in the legal and regulatory framework should be reflected in model procurement documents (standard tender documents), contract conditions and in supporting practical guidelines for implementation and related training.

Sub-indicator 9(b) Selection and contracting

Assessment criterion 9(b)(a):

Multi-stage procedures are used in complex procurements to ensure that only qualified and eligible participants are included in the competitive process.

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Conclusion: Substantive gap
Red flag: No
Qualitative analysis The MAPS Assessment Team did not identify an established practice of using a prequalification phase in open tendering.
Gap analysis Multi-stage procedures: The use of the prequalification phase in open tendering is not observed.
Recommendations Multi-stage procedures: Procuring entities should consider using a pre-qualification phase for complex procurements. The choice of this possibility should be made in line with the needs analysis and market studies recommended in 9(a)(a).
Assessment criterion 9(b)(b): Clear and integrated procurement documents, standardised where possible and proportionate to the need, are used to encourage broad participation from potential competitors.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis There is no single set of model procurement documents provided for use by all procuring entities. In more than one sample case, the procurement documents were found to be incomplete, missing critical elements such as the GCC, STC or Terms and Conditions, to have important provisions lacking such as those covering requests for clarification and unclear award criteria were detected.
Gap analysis Clear, standardised & integrated procurement documents: Procurement documents lack standardisation and are not always clear or integrated, with examples of incomplete documents identified.
Recommendations Clear, standardised & integrated procurement documents: All procuring entities should ensure that they prepare and use clear and integrated procurement documents. An effective step to facilitate the objective of ensuring use of clear and integrated procurement documents, standardized where possible, is to prioritize the finalization and adoption of (1) a set of standard bidding and contract documents; and (2) standard contract conditions; and mandate their use by all procuring entities (Central government, local government and Category A parastatals), as detailed in the Combined recommendation for 2(b) and 2(c)), also set out at 9(a)(b), for clarity.
Assessment criterion 9(b)(c): Procurement methods are chosen, documented and justified in accordance with the purpose and in compliance with the legal framework.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis

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There are limited records of choice of procurement methods. Some cases were identified where the choice of procurement method did not follow the legal provisions. There were also cases where a Request for Deviation should have been initiated but this was not done.

The lack of documented decisions on choice of procurement method ties in with concerns identified by the MAPS Assessment Team under 1(b)(c) in relation to specified standards for competitive procedures and high levels of use of emergency single source/single source as a method of procurement and the linked Gap and recommendations.

Gap analysis

Choice of procurement methods: There is limited evidence of correct choice and justification of procurement methods and cases were identified where legal requirements were not followed.

The failure to properly document choice and reasons for use of a procurement method in compliance with the legal framework has a negative impact on achieving the objectives of transparency and accountability and achieving competition and value for money sought through public procurement.

Recommendations

Choice of procurement methods: Compliance verification mechanisms should be strengthened to ensure that the choice of procurement method is clearly documented in every case and complies with the legislation.

This recommendation ties in with the following recommendation at indicator 1(b)(d):

Consider enhanced measures to ensure that the choice of procurement procedure is, in all cases, clearly documented and justified in accordance with the legal framework. Implement measures to ensure that use of emergency single source procurement/single source method is permitted only in exceptional circumstance. Key stakeholders (Ministry of Finance Technical Secretariat, ESPPRA and Government Tender Board) should collaborate and jointly issue policy and/or guidelines to apply to all procuring entities. This should stress the importance of documenting and justifying choice of procurement methods and emphasise the limited and prescribed circumstances where emergency single source may be used. The policy and/or guidelines should confirm that the circumstances and conditions permitting use of single source procurement/single source method must be interpreted narrowly. Consider amending the PPR accordingly.

Assessment criterion 9(b)(d):

Procedures for bid submission, receipt and opening are clearly described in the procurement documents and complied with. This means, for instance, allowing bidders or their representatives to attend bid openings, and allowing civil society to monitor bid submission, receipt and opening, as prescribed.

Conclusion: **Minor gap**

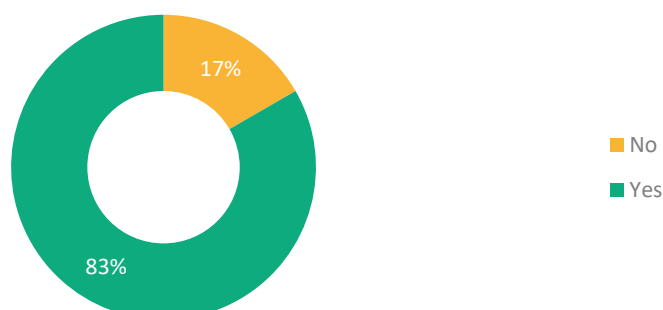
Red flag: No

Qualitative analysis

The MAPS Assessment Team found some cases where procurement documents were complete and provided the necessary instructions. In many cases the procurement documents were not available to assess compliance with this requirement. However, 83% of the respondents to the private sector survey find that procedure for bid submission, receiving and opening are clearly described in the tender documents.

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Are the procedures for bid submission, receiving and opening clearly described in the tender documents and are they adhered to?



Source: Private Sector Surveys

Gap analysis

Procedures for bid submission, receipt and opening in the procurement documents: In many cases the procurement documents were not available, resulting in the assignment of a minor Gap on the basis of lack of reliable data and consequent uncertainty as to day-to-day practice.

Recommendations

Procedures for bid submission, receipt and opening in the procurement documents: Procurement documents must be kept and maintained as prescribed in the legal and regulatory framework.

This will ensure that there is transparency of process and clear evidence that procedures for bid submission, receipt and opening are described, including information on who is permitted to attend bid openings.

Related Recommendations

Recommendations on record keeping at 1(k)(a) and on engagement of civil society at 11(c) are relevant to this criterion and are repeated below, for clarity.

1(k)(a) Record keeping: Introduce measures to ensure that procurement records and documents, or where relevant copy documents, are collated and retained in a single file in one location at procuring entity level. These measures should not wait for roll out of e-GP but need to be considered and implemented immediately, both to address the current Gap and also to facilitate the implementation of e-GP. e-GP is usually introduced in a phased manner with initial focus on use of e-GP to publish contract opportunities and information on contract award. If the e-GP roll out in Eswatini follows this model, it is likely that some procurement records particularly those relating to the conduct of evaluation, remain paper based for some time. This means that proper record keeping at procuring entity level will remain a critical issue.

11(c) Engagement of civil society: Amend the legal/regulatory and policy framework to include provisions to allow citizens to participate in phases of the procurement process in order to encourage citizen involvement and enhance competition, transparency and accountability, in particular. A variety of measures may be considered. In order to ensure that the measures are appropriate, can be implemented in practice and are of true value, citizens/civil society must be fully engaged in meaningful consultation on proposed measures.

Assessment criterion 9(b)(e):

Throughout the bid evaluation and award process, confidentiality is ensured.

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Conclusion: No gap

Red flag: No

Qualitative analysis

Confidentiality is ensured throughout the process.

Gap analysis

Recommendations

Assessment criterion 9(b)(f):

Appropriate techniques are applied, to determine best value for money based on the criteria stated in the procurement documents and to award the contract.

Conclusion: Substantive gap

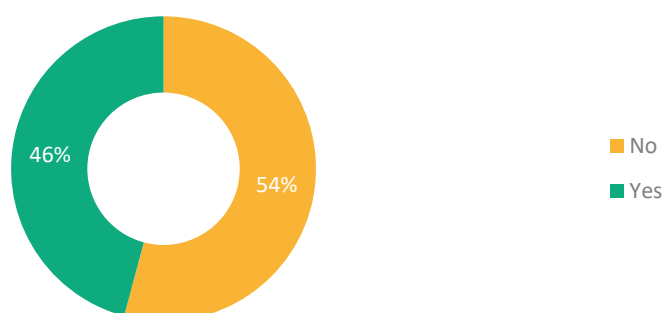
Red flag: No

Qualitative analysis

The sampling process resulted in limited information for analysis by the MAPS Assessment Team to conclude, solely on the basis of that data, the extent to which appropriate techniques are applied to determine the best value for money.

Taking a broader view: There is no evidence of conduct of market research which should inform the techniques and criteria to be applied. The sampling process identified different situations where the selection was purely based on cost which, combined with poor specifications/requirements observed by the MAPS Assessment team as well as lack of sustainability criteria, is highly likely to prevent the realisation of best value for money. In addition, 54% of the respondents to the private sector survey claim that procuring entities do not apply appropriate techniques to determine the best evaluated tender.

Are appropriate techniques applied to determine the best evaluated tender based on the criteria indicated in the tender documents?



Source: Private sector surveys

Gap analysis

Techniques to determine best value for money: Appropriate techniques are not always applied to determine best value for money.

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Recommendations

Techniques to determine best value for money: Introduce measures to ensure that appropriate techniques for a particular procurement are selected and applied to determine best value for money. This requires a combination of activities implementing recommendations identified elsewhere in this assessment, in particular: use of market research (see recommendation at 9(a)(a), finalization and adoption of (1) a set of standard bidding and contract documents; and (2) standard contract conditions; and mandate their use by all procuring entities (see recommendations at 9(b)(d)); and preparation of a practical user manual and training in particular on preparation of tender documents and evaluation to support implementation (see recommendation at 2(c)).

Assessment criterion 9(b)(g):

Contract awards are announced as prescribed

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

Publishing contract awards is not a consistent practice.

In fact, as shown in the analysis of Indicator 7, the use of Information Systems to support procurement including to publish contract awards is fragmented and incomplete.

Gap analysis

Announcement of contract awards: Contract awards are not always announced as prescribed.

This Gap is assigned a Red flag because announcement of contract awards is essential to achieve procurement objectives including transparency and effective monitoring. In practice, the most reliable and effective means to ensure publication of announcement of contract awards is automatic publication through electronic means. This issue needs to be understood in the wider context of the need for roll out of both e-GP and IFMIS, appropriately integrated, with the latter mitigation measure falling outside the procurement sphere (see indicator 7).

Recommendations

Announcement of contract awards: To promote transparency and effective procurement monitoring, put into place measures that mandate and enforce the publication of announcement of contract awards in a single national location.

For additional context, see sub-indicator 7(a).

Assessment criterion 9(b)(h):

Contract clauses include sustainability considerations, where appropriate

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

Sustainability considerations are not included in the procurement process.

The analysis under 3(a) concludes that there are no provisions in the Procurement Act specifically referencing use of economic, environmental and social criteria in the procurement cycle. The PPR include high-level provisions on environmental issues in procurement at all stages of the procurement lifecycle but no specific references to economic or social issues. The analysis at 2(b) and (c) confirms that there is no single set of model procurement documents provided for use by all procuring entities. This significantly reduces the likelihood of consistent use of sustainability related contract clauses, where appropriate.

Gap analysis

Sustainability in contracts clauses: Sustainability considerations are not included in the contract clauses.

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Recommendations

Sustainability in contracts clauses: Include sustainability related contract clauses in standard contract terms, with supporting guidance for use.

See also, Recommendations at 9(a)(c)

Assessment criterion 9(b)(i):

Contract clauses provide incentives for exceeding defined performance levels and disincentives for poor performance

Conclusion: Minor gap

Red flag: No

Qualitative analysis

The contracts reviewed by the Assessment Team did not include measures to incentivise performance. They do include penalties for non-compliance with agreed service levels.

Gap analysis

Contractual incentive for exceeding defined performance levels: There were no contracts identified in the sample with clauses that provide incentives for exceeding defined performance levels.

Recommendations

Contractual incentive for exceeding defined performance levels: Contract clauses should be included in standard contract conditions, that promote positive performance and discourage negative performance, for use when appropriate.

Assessment criterion 9(b)(j):

The selection and award process is carried out effectively, efficiently and in a transparent way*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The selection and award process is not carried out effectively, efficiently and in a transparent way.

It is concluded at 9(a)(b) that procurement objectives/outcomes are not clearly defined in the procurement documents, therefore, procurement is not always effective. Some sample cases were identified in which the procurement had to be repeated and thus procurement is not efficient.

The average and median times to procure are high, particularly in the case of procurement of goods, with a median time of 287.5 days.

The number of responsive bids, other than for works, is 3.

The level of compliance with publication requirements is 71% (8% non-compliance) but data to fully assess this criterion was not available in 21% of cases sampled.

The percentage of contracts successfully awarded is high.

65% of the respondents to the private sector survey consider feel that they are not given visibility over reasoning behind decisions throughout the procurement process.

Quantitative analysis

**Recommended quantitative indicators to substantiate assessment of sub-indicator 9(b) Assessment criterion (j):*

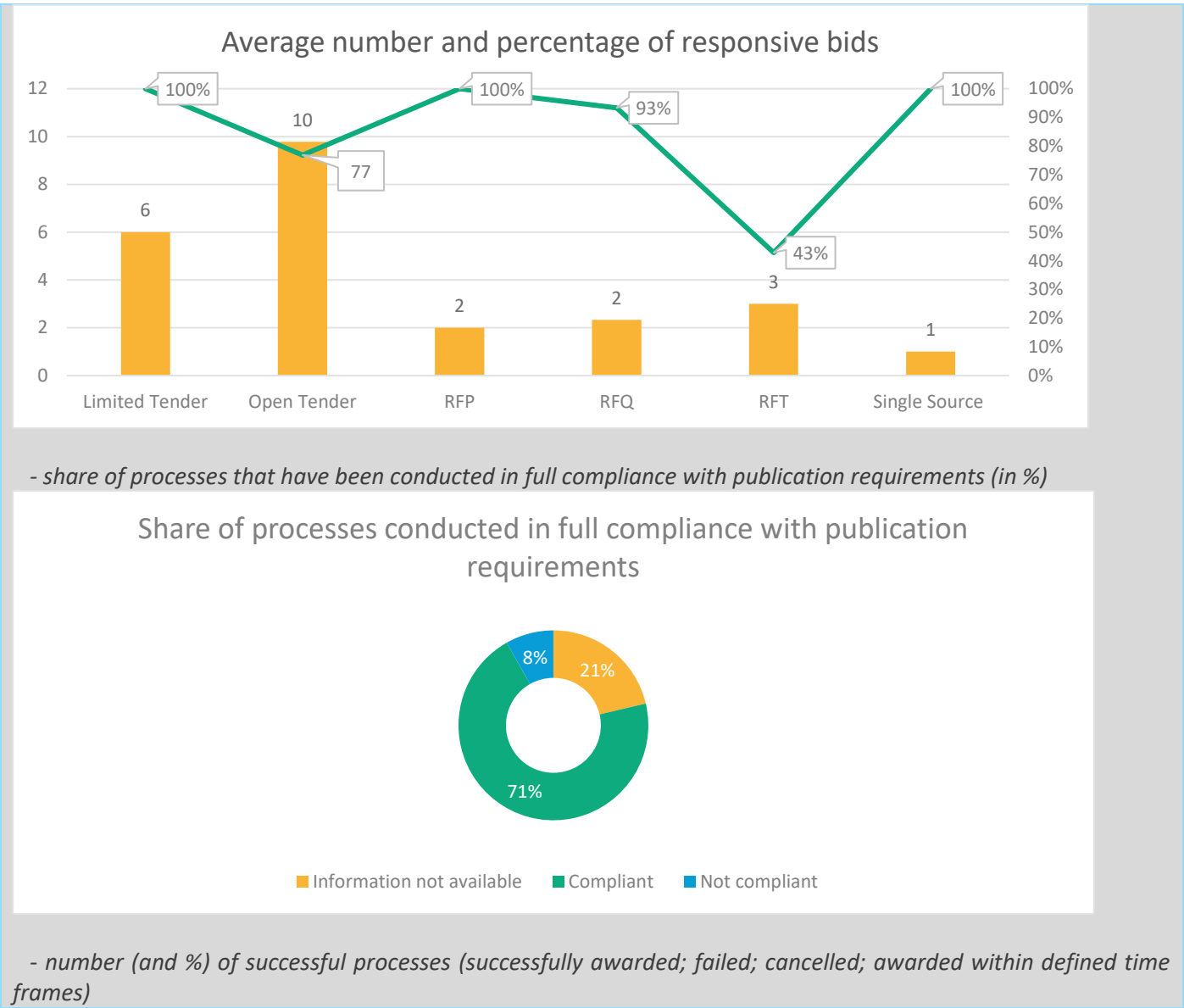
- average time to procure goods, works and services

number of days between advertisement/solicitation and contract signature (for each procurement method used)

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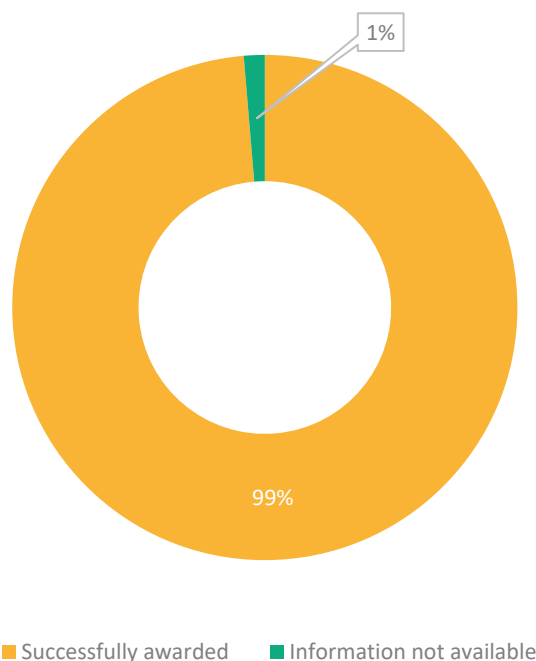


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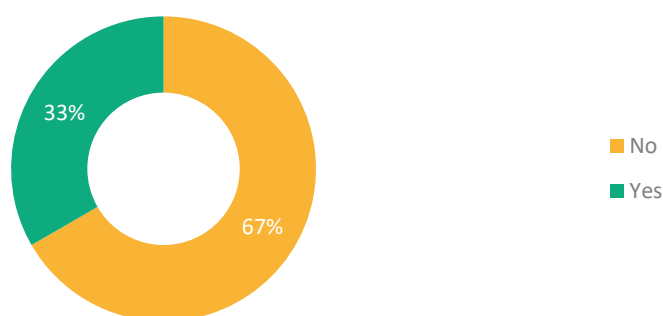
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Percentage of contracts successfully awarded



Source for all: Sample of procurement cases.

In your opinion, is sufficient visibility given to the reasoning behind decisions throughout the procurement process?



Source: Private sector survey

Gap analysis

Conduct of the selection and award process: The data available to assess this criterion is extremely limited and the quality/integrity of the information collected in the sampling process is very low due to non-compliance with requirements on record keeping. In considering this criterion, the MAPS Assessment team has adopted a broader view based on the limited data available and applying general insights gained from the sampling process such as long time frames for procurement, perception of bidders on reasons for decisions on award, and low responsiveness for bids for goods and services plus specific findings, including failure to clearly define procurement objectives and outcome in the procurement documents (9(a)(b)). This has led the MAPS Assessment Team to conclude that this criterion is not met.

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Recommendations

Conduct of the selection and award process: Improved record keeping is essential in demonstrating that the selection and award process is carried out in an effective, efficient and transparent way. The recommendations at 1(k) apply.

Sub-indicator 9(c) Contract management

Assessment criterion 9(c)(a):

Contracts are implemented in a timely manner.*

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

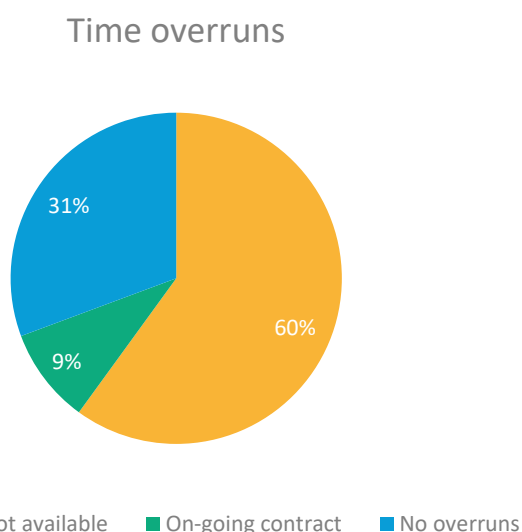
The poor quality of the records prevents an effective assessment of the sub-indicator based solely on results of sampling. Contracts and addenda to them were not always available. The limited data from sampling indicates that many contracts are not implemented in a timely manner and some contracts were extended.

In the Private Sector Survey, 30 per cent of respondents say they have experienced situations in which projects have been delayed and 83 per cent say that the implementation of contracts was delayed due to a shortage of supply on the market of essential goods/services.

Quantitative analysis

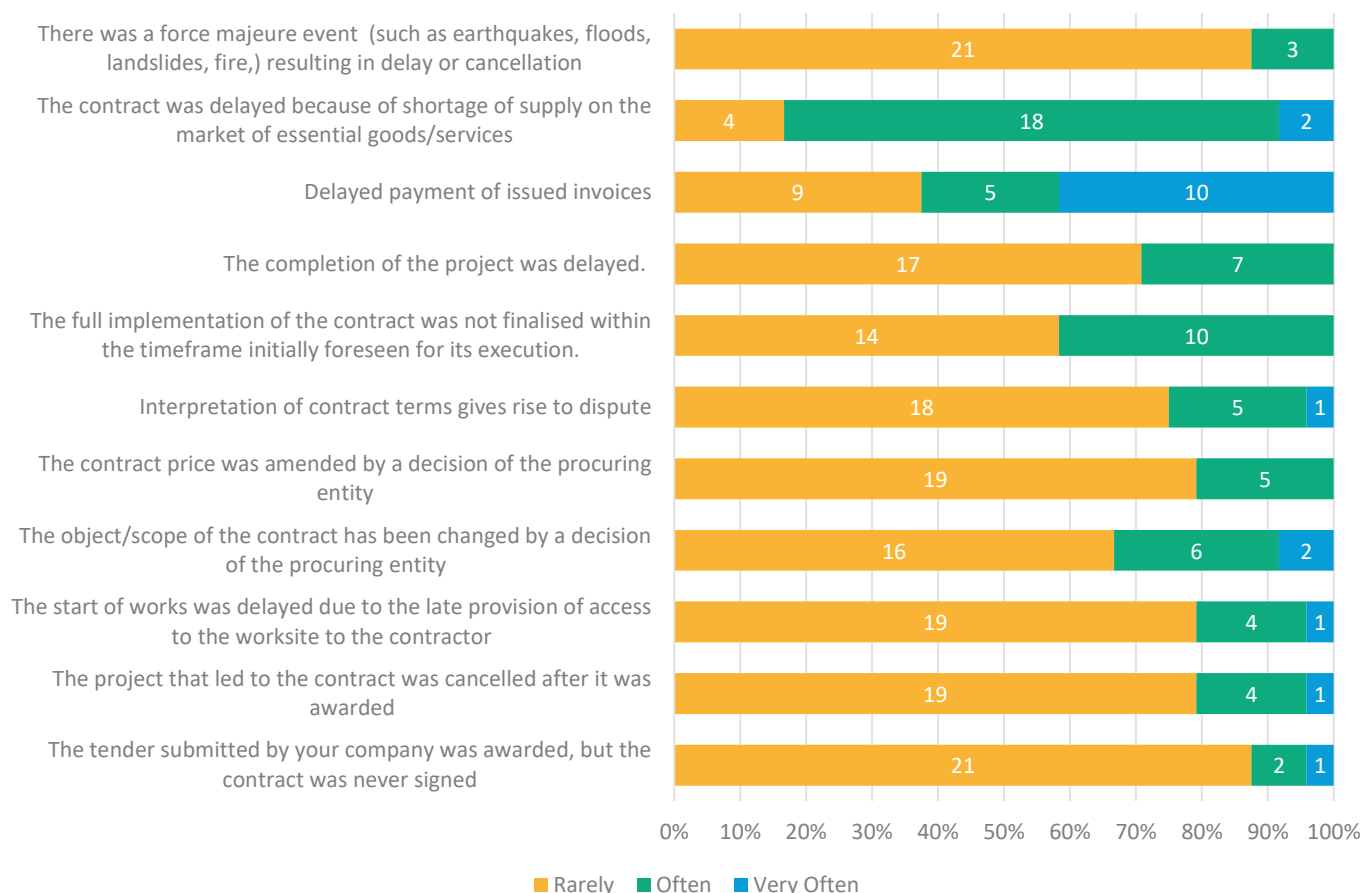
Recommended quantitative indicator to substantiate assessment criterion (a): time overruns (in %; and average delay in days).

Source: Sample of procurement cases.



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How often has your company/organization experienced the situations described below?



Source: Private Sector Surveys

Gap analysis

Timely implementation of contracts: Contracts are not always implemented in a timely manner.

Recommendations

Timely implementation of contracts: Records must be kept of the contracts and effective monitoring of their execution must be carried out. Addenda to contracts must be signed whenever changes occur (cost and time overruns and other deviations). The recommendations at 1(k) apply.

Assessment criterion 9(c)(b):

Inspection, quality control, supervision of work and final acceptance of products is carried out.*

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The MAPS Assessment Team identified 40 sample cases (53%) where quality control and final acceptance measures are followed, but it also found an unacceptably high number of cases where such information was not available.

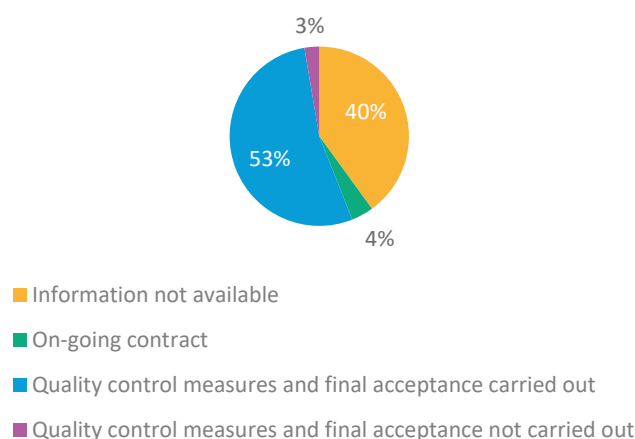
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Quantitative analysis

Recommended quantitative indicator to substantiate assessment criterion (b): quality-control measures and final acceptance are carried out as stipulated in the contract (in %).

Source: Sample of procurement cases.

Quality control and final acceptance



Gap analysis

Records of contract execution phase: There are a large number of cases where there is no record of quality control and final acceptance measures being carried out.

Recommendations

Records of contract execution phase: Records must be kept of the entire contract execution phase. The application of quality control and final acceptance measures should be monitored.

Assessment criterion 9(c)(c):

Invoices are examined, time limits for payments comply with good international practices, and payments are processed as stipulated in the contract.

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

In a considerable part of the sample, there were no records of the execution phase of the contracts or of payments. The officials in charge of managing contracts have no information on when the payments are made and the computation of interest on delayed payments is made based on the information provided by the contractor, supplier or service provider. In addition, and despite the low level of participation in the Private Sector Survey, it should be noted that 60 per cent of respondents said they had experienced delays in payment of invoices. Direct discussions with the private sector and with some procuring entities confirm that government cash flow has been poor, resulting in significant delays in payment with negative market impacts. No proper records of the time it takes for processing and payment of invoices exist.

See 4(b)(b) above for additional analysis on budget and public finance management which are consistent with this finding.

Quantitative analysis

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Recommended quantitative indicator to substantiate assessment criterion (c): invoices for procurement of goods, works and services are paid on time (in % of total number of invoices).

Note: There is no data available that allows this quantitative indicator to be calculated.

Source: Sample of procurement cases.

Gap analysis

Inspection and payment of invoices: The process for authorisation of payments is disjointed, there is no comprehensive data and late payment of invoices is raised as a significant problem by the private sector and by some procuring institutions. (See also analysis at 4(a)(b)).

This Gap is assigned a Red flag because of the potential impact on the market confidence, price and competitiveness of bids, which is likely to hinder the achievement of value for money outcomes. This issue needs to be understood in the wider context of the need for roll out of both e-GP and IFMIS, appropriately integrated, with the latter mitigation measure falling outside the procurement sphere (see indicator 7) and also problems resulting from poor record keeping, as identified elsewhere in this assessment.

Recommendations

Inspection and payment of invoices: Payment deadlines for invoices issued by suppliers to procuring entities must be maintained and monitored. The planned implementation of the IFMIS may contribute to addressing these gaps.

Assessment criterion 9(c)(d):

Contract amendments are reviewed, issued and published in a timely manner.*

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The PRR require contract amendments to be prepared in writing and amendments are subject to prior authorization by the Government Tender Board or relevant approvals authority when the value is above specified thresholds.

The MAPS Assessment Team found, however, several cases in which contract amendments were not signed, even though there was justification. PRR requires contract amendments or variation to be included in procurement records. Publication of contract amendments is not mandated and is not a standard practice.

Quantitative analysis

Note: There is no data available that allows this quantitative indicator to be calculated.

Recommended quantitative indicator to substantiate assessment criterion (d): contract amendments (in % of total number of contracts; average increase of contract value in %).

Source: Sample of procurement cases.

Gap analysis

Contract amendments: There is no consistent general practice of issuing and publishing contract amendments and there are examples of contract amendments not being signed even where amendments were justified.

Recommendations

Contract amendments: Review the current provisions and processes for contract amendments to ensure fitness for purpose and consider measures to ensure better compliance with existing requirements and record keeping to

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facilitate monitoring. Ensure that the e-GP system function for notification and publication of contract amendments is prioritized for roll-out.

Assessment criterion 9(c)(e):

Procurement statistics are available and a system is in place to measure and improve procurement practices.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

There is no single integrated information system providing comprehensive, consolidated up-to-date information. For the purposes of producing statistics, there is no single source that covers all procurement operations in the country.

The most recent published information from ESPPRA dates back to FY20/21 with some additional information provided direct to the MAPS Assessment team. Government Tender Board has provided to the MAPS Assessment Team information in relation to procurements falling within its remit in an annual report for 2022/2023. There is a risk that some of the information from these two sources is double counted, reducing the reliability of the analyses. For additional context, see Sub-indicator 7(a) above.

Gap analysis

Procurement statistics: There is no single source of traceable and reliable data to provide procurement statistics. This Gap is assigned a Red flag because the absence of a single source of traceable and reliable data prevents procurement monitoring and improvement and, therefore, the achievement of procurement objectives. Mitigating this Gap will be hindered, in particular, by the lack of integrated information systems (e-GP and IFMIS), with implementation of IFMIS lying outside the procurement sphere, and poor record keeping, as identified elsewhere in this assessment.

Recommendations

Procurement statistics: The systems for collection of data should be revised to ensure enable its traceability and increase its reliability.

See also recommendations at Indicator 7.

Assessment criterion 9(c)(f):

Opportunities for direct involvement of relevant external stakeholders in public procurement are utilised.*

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The involvement of civil society in all phases of procurement operations is not common practice. During the meeting the MAPS Assessment Team held with CSOs, the attendees were not aware of the role they can play in the procurement process. For further context see analysis to indicator 11 (c).

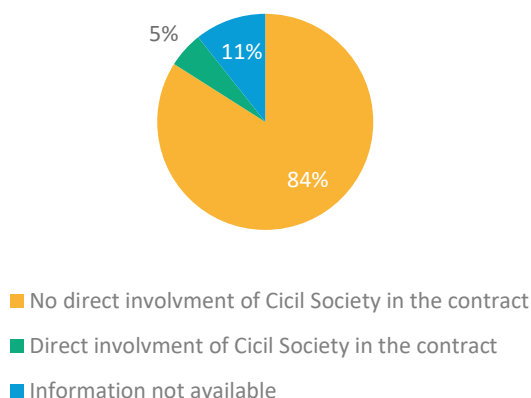
Quantitative analysis

Recommended quantitative indicator to substantiate assessment criterion (f): percentage of contracts with direct involvement of civil society: planning phase; bid/proposal opening; evaluation and contract award, as permitted; contract implementation)

Source: Sample of procurement cases.

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Involvement of relevant external stakeholders in public procurement



Gap analysis

Involvement of external stakeholders in public procurement: 84% of the contracts analysed did not involve civil society at any stage.

Recommendations

Involvement of external stakeholders in public procurement: A culture of civil society participation must be created, as this contributes to the achievement of procurement objectives.

Related recommendations

See recommendations at 11(c) repeated below, for clarity.

11(c) Engagement of civil society: Amend the legal/regulatory and policy framework to include provisions to allow citizens to participate in phases of the procurement process in order to encourage citizen involvement and enhance competition, transparency and accountability, in particular. A variety of measures may be considered. In order to ensure that the measures are appropriate, can be implemented in practice and are of true value, citizens/civil society must be fully engaged in meaningful consultation on proposed measures.

Assessment criterion 9(c)(g):

The records are complete and accurate, and easily accessible in a single file.*

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

PRR R.14 sets out a comprehensive list of information and documents to be retained as a record of procurement proceedings. In many cases, information on individual procurements are not retained by the procuring entity in a single location and so there is no single, physical or electronic procurement file. Collecting data on sample contracts proved extremely challenging for the MAPS Assessment Team. There were several cases in which the information was not available and/or complete. Additionally, some physical records are spread across several departments and/or buildings. In some procuring entities, the procurement is done by non-practitioners, leading to lack of accountability/knowledge, with the consequence that the records are not stored accordingly.

This is in line with general findings on record keeping described at 1(k).

Quantitative analysis

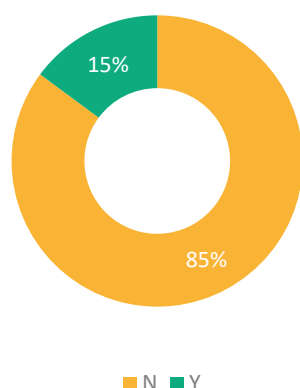
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// Minimum indicator // * Quantitative indicators to substantiate assessment of sub-indicator 9(c) Assessment criterion (g):

- share of contracts with complete and accurate records and databases (in %)

Source: Sample of procurement cases.

Share of contracts with complete and accurate records



Gap analysis

Accuracy of procurement records: In 85% of the sample cases the records were not complete and, in many cases, information was not available from a single source.

This Gap is assigned a Red flag because incomplete records, aggravated by the absence of single, physical or electronic procurement file makes it impossible to have full knowledge of the procurement and, as such, to achieve the objectives sought by the procurement. Mitigating this Gap will be hindered, in particular, by poor record keeping and the lack of integrated information systems (e-GP and IFMIS), with implementation of IFMIS lying outside procurement sphere, as identified elsewhere in this assessment.

Recommendations

Accuracy of procurement records: Introduce measures to ensure that the procurement records to be retained in accordance with the legislative framework are kept in a single, physical or electronic procurement file. The introduction of e-GP system should go some way to assist but pending roll out of all functionalities of an end-to-end e-GP system, measures to improve record keeping (paper based and electronic) must be prioritised.

Indicator 10. The public procurement market is fully functional

Sub-indicator 10(a)

Dialogue and partnerships between public and private sector

Assessment criterion 10(a)(a):

The government encourages open dialogue with the private sector. Several established and formal mechanisms are available for open dialogue through associations or other means, including a transparent and consultative process when formulating changes to the public procurement system. The dialogue follows the applicable ethics and integrity rules of the government.*

Conclusion: No gap

Red flag: No

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Qualitative analysis

In the case of changes to the procurement system, the feedback received from most stakeholders was that they have been consulted on proposed changes. In the case of the introduction of the PPR, the ESPPRA played a lead role in facilitating discussions. In a few cases, stakeholders commented that they had not been engaged or fully engaged and it appears that the list of stakeholders to be consulted may not always be comprehensive.

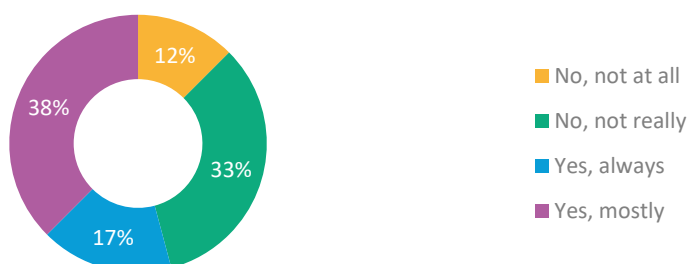
The Office of the Attorney General has developed guidance for Ministries on how to consult stakeholders and assists with guidance on the production of templates and development of questions for consultation on new or amended primary legislation as well as methods for fast tracking consultation. Changes to primary legislation involve publication of the proposals for formal public scrutiny. The Office of the Attorney General has also worked with Ministries to explain to them what instructions Ministries need to provide to ensure that information on legislative requirements is of sufficiently high standard and comprehensive and also to encourage internal consultation between Ministries. The process for discussions on changes to subordinate/secondary legislation including regulations does not involve a formal scrutiny stage although stakeholder consultation is required.

Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 10(a) Assessment criterion (a):
- perception of openness and effectiveness in engaging with the private sector (in % of responses).*

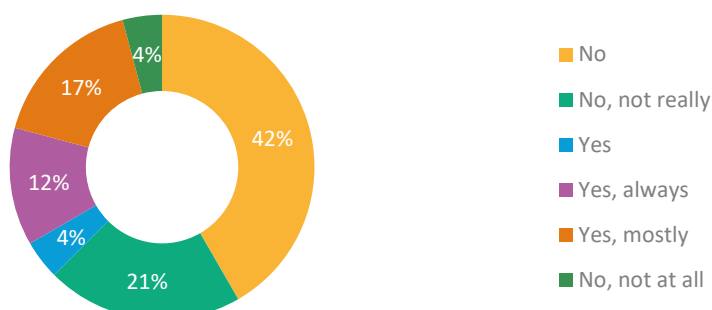
Source: Survey.

When changes are made to the legal and regulatory framework for public procurement, does the Government or ESPPRA contact private sector/MSME or representative associations to communicate the intended changes and obtain their views?



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Do you receive the necessary support from the Government and/or ESPPRA to fully understand changes to the legal and regulatory framework?



Gap analysis

Recommendations

Suggestions for improvement

Identification of and consultation with stakeholders: Ensure wide and meaningful engagement with stakeholders in future consultations on changes to the procurement legal framework, including changes to the PPR or introduction of new regulations. Care needs to be taken to draw up the list of stakeholders to be consulted, to include procuring entities, representatives from business (SMEs and micro enterprises as well as larger businesses) and also civil society.

Assessment criterion 10(a)(b):

The government has programmes to help build capacity among private companies, including for small businesses and training to help new entries into the public procurement marketplace.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

There is no comprehensive government programme to help build capacity among private companies, including small and micro businesses to help new entries into the public procurement market-place.

Gap analysis

Capacity building for the private sector: The ESPPRA does provide some training for the private sector, but there is no comprehensive government programme to help build capacity among private companies, including small and micro businesses to help new entries into the public procurement market-place.

Recommendations

Capacity building for the private sector: Develop regular information and training programmes to help build capacity of the private sector. These programmes should be free of charge and tailored to the needs of the private sector player who are engaged with, in particular smaller businesses whose participation in public procurement can help improve supplier diversity and promote local economic activity. The information and training should include

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modules on ethics and integrity in public procurement. These information and training programmes should be aligned with and/or be part of the activities associated with roll out of the e-GP system.

Sub-indicator 10(b)

Private sector's organisation and access to the public procurement market

Assessment criterion 10(b)(a):

The private sector is competitive, well-organised, willing and able to participate in the competition for public procurement contracts.*

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

In discussions between small businesses and the MAPS Assessment team it became clear that organisational and technical capacity of micro, small and micro enterprises is limited, hindering their abilities to active participation in the public procurement market. MSME businesses make up a significant proportion of businesses in Eswatini.

Quantitative analysis

Note: There is no data available that allows this quantitative indicator to be calculated.

* Recommended quantitative indicator to substantiate assessment of sub-indicator 10(b) Assessment criterion (a):

- number of registered suppliers as a share of total number of suppliers in the country (in %)
- share of registered suppliers that are participants and awarded contracts (in % of total number of registered suppliers)
- total number and value of contracts awarded to domestic/foreign firms (and in % of total)

Source: E-Procurement system/Supplier Database.

Gap analysis

Capacity of MSME businesses: MSME businesses, which make up a significant proportion of businesses in Eswatini, have limited organisational and technical capacity, hindering their ability to active participation in the public procurement market.

Recommendations

Capacity of MSME businesses: Implement measures to support practical skills based capacity building to increase organizational and technical capacity of suppliers, in particular MSMEs, to participate in the public procurement market.

See Recommendations at 10(a)(b).

Assessment criterion 10(b)(b):

There are no major systemic constraints inhibiting private sector access to the public procurement market.

Conclusion: **Substantive gap**

Red flag: Yes

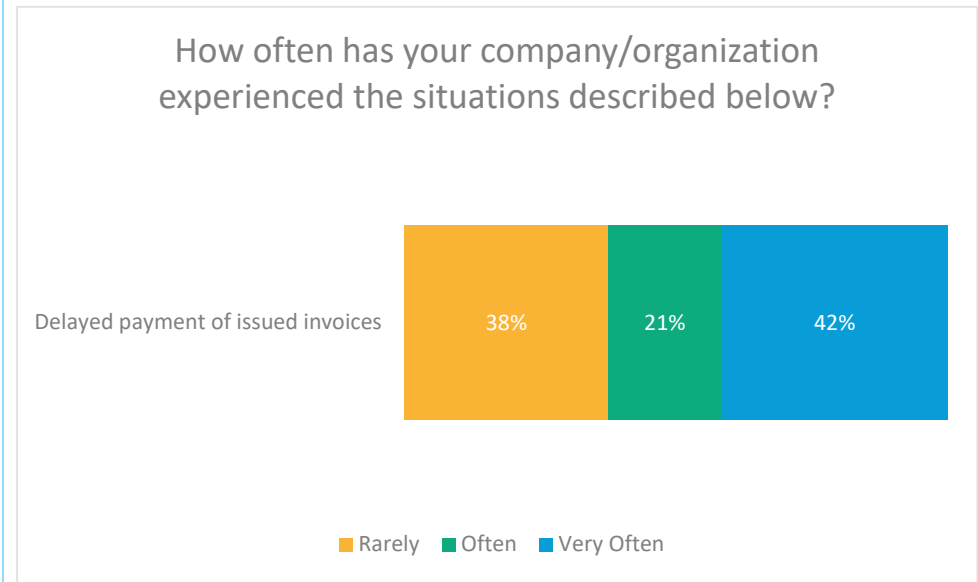
Qualitative analysis

In discussions between small businesses and the MAPS Assessment team, smaller suppliers flagged issues with the complexity of documents and processes, as well as access to financing as negative impacts on their ability to compete in the public procurement market. Most prominently, more than 90 per cent of respondents indicate that access to financing is not easy. This is followed by a disproportionate choice of different procurement methods in

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relation to the risk of a particular procurement. Payment provisions and the distribution of risks in contracts are also pointed out as constraints.

A particular problem faced by all suppliers, whatever size, is significant delays in payment of invoices exacerbated by recent national cash flow issues and this is addressed as a substantive Gap at 4(b)(b).



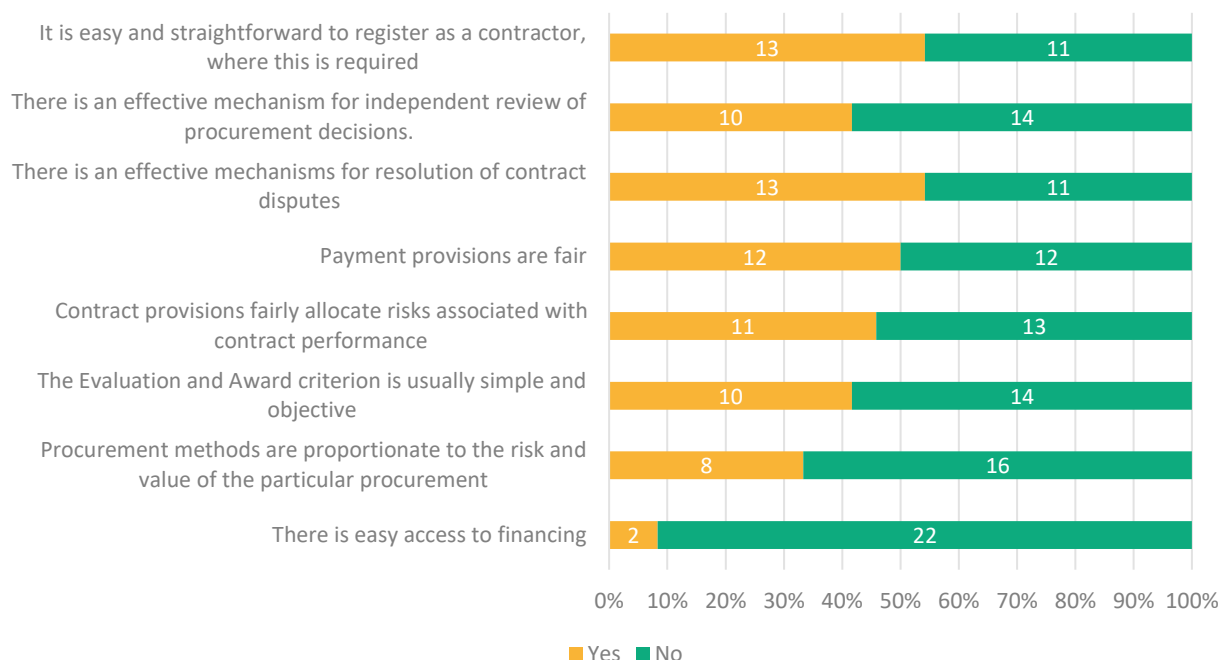
Source: survey

Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 10(b) Assessment criterion (b): - perception of firms on the appropriateness of conditions in the public procurement market (in % of responses). Source: Survey.*

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Do you think that the following conditions in the public procurement market are met for participation in the competition for public contracts?



Gap analysis

Systemic constraints inhibiting private sector access to the public procurement market: Private sector identify a number of constraints in accessing public markets. Most prominently in the survey, more than 90 per cent of respondents indicate that access to financing is not easy. A particular problem faced by all suppliers, whatever size, is significant delays in payment of invoices exacerbated by recent national cash flow issues. Use of procurement processes disproportionate to the risk and value of the contract was also flagged.

This Gap is assigned a Red flag because systemic constraints identified can significantly reduce competition with a negative impact on value for money outcomes. In addition, remedial action in respect of financing and cash flow issues lies beyond the sphere of public procurement.

Recommendations

Systemic constraints inhibiting private sector access to the public procurement market Consider undertaking a critical study to fully identify and assess systemic constraints inhibiting private sector access to the procurement market with the aim of identifying practical solutions to increase participation and effectiveness of participation.

Sub-indicator 10(c)

Key sectors and sector strategies

Assessment criterion 10(c)(a):

Key sectors associated with the public procurement market are identified by the government.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

According to discussions with institutional stakeholders and the private sector, there has been no systematic identification of key sectors

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Gap analysis

Identification of key sectors associated with the public procurement market: There has been no systematic identification by government of key sectors.

This Gap is assigned a Red flag because identification of key sectors is critical for the development of a comprehensive public procurement strategy and to address sector specific goals and issues. Failure to do so limits comprehensive understanding of the particularities of sectors and markets, for example the health and IT sectors, and prevents the achievement of procurement objectives including promotion of effective competition and value for money outcomes. In order to ensure full and effective engagement, high level Government leadership and action is required, which lies beyond the procurement sphere.

Recommendations

Combined recommendations for 10(c)(a) and 10(c)(b)

Identification of key sectors, risks and opportunities associated with the public procurement market: Government to undertake robust market analysis to identify key sectors based on the government's priority spending areas. The analysis should help to determine sector related risks, including in terms of expenditure, competition, environmental impact and socio-economic factors. It should also assist to identify the government's scope to influence specific market segments, in an appropriate, equitable, open and transparent manner, and to secure meaningful engagement with market participants to achieve aims such as strengthening integrity, sustainability and innovation in public procurement.

Assessment criterion 10(c)(b):

Risks associated with certain sectors and opportunities to influence sector markets are assessed by the government, and sector market participants are engaged in support of procurement policy objectives.

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

According to discussions with institutional stakeholders and the private sector, there has been no systematic assessment of risks associated with certain sectors by the government or comprehensive direct engagement with sector market participants in support of procurement policy objectives.

Gap analysis

Sectoral risk assessment by government: There is no formalized standard process for regular sectoral risk assessment by government and engagement of market participants in support of procurement policy objectives.

This Gap is assigned a Red flag because failure by government to risk assess sector markets and engage with market participants hinders achievement of procurement objectives including ensuring effective competition and delivery of appropriate outcomes with understanding and allocation of risk where it is best placed to be managed. In order to ensure full and effective engagement, high level Government leadership and action is required, and such action lies beyond the procurement sphere.

Recommendations

See combined recommendations at 10(c)(a).

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Indicator 11. Transparency and civil society engagement strengthen integrity in public procurement

Sub-indicator 11(a) Enabling environment for public consultation and monitoring	
Assessment criterion 11(a)(a):	A transparent and consultative process is followed when formulating changes to the public procurement system.
Conclusion:	No gap
Red flag:	No
Qualitative analysis	<p>The Office of the Attorney General has developed guidance on and templates for the conduct of consultation by Ministries on legislative proposals (primary legislation). The Office of the Attorney General insists that the Guideline is followed and advises on risk management issues. There are different steps designated in the consultation process, although Ministries often fail to conduct sufficient internal and inter-Ministry consultation.</p> <p>Ministries are responsible for preparing the list of stakeholders to be consulted. Consultation with external stakeholders may take different forms of engagement according to the subject matter of the type of legislation.⁴² Legislative proposals are published for public scrutiny. Regulatory Impact Assessments are not prepared.</p> <p>Consultation on Regulations takes a slightly different approach. Wide stakeholder consultation is required but once cleared and approved by Cabinet there is no formal publication for public scrutiny. Draft Regulations are introduced into Parliament immediately after approval and are then subject to the Parliamentary process.</p> <p>As noted at 10(a)(a). Feedback from stakeholders during the MAPS Assessment process reveals a mixed picture in terms of the level, nature and extent of consultation on formulation of the Public Procurement Regulations, with quite a few specifically mentioning engagement in a consultative process and some stakeholders from smaller businesses and civil society, flagging their non-involvement. 10(a)(a) includes, as a suggestion for improvement, the preparation of a more comprehensive list of stakeholders for use in future consultations and engagement.</p>
Gap analysis	
Recommendations	
Suggestion for improvement	
Assessment criterion 11(a)(b):	Programmes are in place to build the capacity of relevant stakeholders to understand, monitor and improve public procurement.
Conclusion:	Substantive gap
Red flag:	Yes
Qualitative analysis	<p>The ESPPRA delivers training programmes to build the capacity of procuring entities and business. In the period 2021-2023, despite limited resources, the ESPPRA delivered 27 training courses to various stakeholder groups. (See analysis at 8(a)(a). The focus is, however, on procuring entities and business. Participation by civil society in available training is limited.</p>

⁴² Information provided by Office of the Attorney General in discussions with the MAPS Assessment Team, October 2023.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Gap Analysis

Programmes to build capacity of civil society: The ESPPRA delivers training programmes to build capacity and with its very limited resources, its focus is on procuring entities and business. There is no comprehensive programme in place to build the capacity of civil society to understand, monitor and improve public procurement and to act as a safeguard against inefficient and ineffective use of public resources.

This Gap is assigned a Red flag because it significantly impedes the objectives of improving accountability and improving effectiveness and efficiency of the procurement system through meaningful civil society engagement. In order to be fully effective, it requires inter-institutional cooperation and allocation of resources which goes beyond the sole remit of the ESPPRA and lies outside the procurement sphere.

Recommendations

Combined recommendations for 11(a), (b) & (c)

Programmes to build capacity of and active engagement with civil society: The Government must provide resources and expertise to ensure that relevant authorities are able to prepare and delivery a comprehensive and ongoing training programme. This should start as soon as possible, to build the capacity of civil society to understand the public procurement regime, both the legal framework and operation in practice, to facilitate the role of civil society in monitoring public procurement activity. This must include provision of information and practical understanding of the implementation and roll out of the e-GP system and guidance on what information is available on-line, how it is accessed and how it can be analysed. This increased capacity building through engagement with civil society should be supported by introduction of a simple system to ensure that input, comments and feedback is sought from civil society on a regular basis and no less than once a year. To increase accountability and transparency, the Government should consider input received from civil society, publish its reasoned responses promptly together with an action plan with timelines for implementation.

Assessment criterion 11(a)(c):

There is ample evidence that the government takes into account the input, comments and feedback received from civil society.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The MAPs Assessment team were not able to find ample evidence to satisfy this criterion.

Gap Analysis

Active engagement of civil society by government: There is insufficient evidence to conclude that civil society is actively engaged by government to facilitate the monitoring of public procurement.

This Gap is assigned a Red flag because it significantly impedes the objectives of improving accountability and improving effectiveness and efficiency of the procurement system through meaningful civil society engagement. In order to be fully effective, it requires inter-institutional cooperation and allocation of resources and policy decisions which go beyond the sole remit of the ESPPRA and lies outside the procurement sphere.

Recommendations

See combined recommendations at 11(a)(b).

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Sub-indicator 11(b) Adequate and timely access to information by the public	
Assessment criterion 11(b)(a): Requirements in combination with actual practices ensure that all stakeholders have adequate and timely access to information as a precondition for effective participation.	
Conclusion: Substantive gap	
Red flag: Yes	
Qualitative analysis Laws, regulations and policies are published and easily accessible to the public from the ESPPRA website (see analysis at 1(a)). Appeals decisions are published and available on-line through the ESPPRA website. Analysis at 7(a) concludes, in summary that, information available to stakeholders in relation to specific procurement opportunities, the conduct of procurement processes, contract award and contract delivery, is either unavailable or, when available is piecemeal, inconsistent and not accessible from a single data source. Available information is not all in an open and structured machine-readable format.	
Gap Analysis Access to information for effective participation: The overall picture is one of inadequate disclosure of information to the public in relation to specific procurements across the procurement lifecycle, from planning through to contract delivery. Available information is limited and fragmented, hindering the possibilities for effective public participation to support the integrity of public procurement, including the visibility of flow of public funds. This Gap is assigned a Red flag because lack of provision for access to information on procurement by the public significantly hinders and impedes the objectives of improving transparency, accountability, effectiveness and efficiency of the procurement system. In addition, system-wide changes involving pro-active cross-governmental cooperation between a large number of stakeholder institutions and with far-reaching impact on the current activities of a significant number of stakeholders, will be necessary. This will require coordinated, pro-active measures, not lying solely within the procurement sphere.	
Recommendations Access to information for effective participation: A combination of measures is required to ensure that the procurement system in Eswatini provides adequate disclosure to ensure that stakeholders have meaningful understanding for effective participation in the system to enhance both integrity and competition. Specific recommendations are set out in this assessment but include: ensuring publication of procurement opportunities and contract awards in a single location – this could be remedied in the short term by use of the existing ESPPRA website, pending roll-out of the e-GP system; publication and mandatory use of the same suite of standard tender and contract documents by all procuring entities, and; collection and publication of reliable national data on procurement activities.	
Sub-indicator 11(c) Direct engagement of civil society	
Assessment criterion 11(c)(a): The legal/regulatory and policy framework allows citizens to participate in the following phases of a procurement process, as appropriate: <ul style="list-style-type: none"> • the planning phase (consultation) • bid/proposal opening (observation) • evaluation and contract award (observation), when appropriate, according to local law • contract management and completion (monitoring). 	
Conclusion: Substantive gap	

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Red flag: No
<p>Qualitative analysis</p> <p>The legal and regulatory framework does not specifically provide for citizen participation in planning, evaluation, contract award, contract award or completion thus restricting opportunities for consultation, observation and monitoring. PPR R.58 Tender Opening refers to the opening of tenders in public. When the MAPS Assessment Team asked stakeholders whether the public have a right to attend bid opening a number expressed uncertainty about whether they, as a member of public, would have a right to attend and questioned the value of attending.</p>
<p>Gap analysis</p> <p>Promoting citizen participation: The legal and regulatory framework lacks provisions which positively promote participation of citizens in procurement processes through consultation, observation and monitoring which reduces transparency and accountability, in particular.</p>
<p>Recommendations</p> <p>Combined recommendations for 11(c), (a) & (b)</p> <p>Promoting direct citizen participation: Amend the legal/regulatory and policy framework to include provisions to allow citizens to participate in phases of the procurement process in order to encourage citizen involvement and enhance competition, transparency and accountability, in particular. A variety of additional measures may be considered. In order to ensure that the measures are appropriate, can be implemented in practice and are of true value, citizens/civil society must be fully engaged in meaningful consultation on proposed measures. (See recommendation at 11(b)(a)).</p>
<p>Assessment criterion 11(c)(b):</p> <p>There is ample evidence for direct participation of citizens in procurement processes through consultation, observation and monitoring.</p>
Conclusion: Substantive gap
Red flag: Yes
<p>Qualitative analysis</p> <p>The MAPs Assessment team were not able to find ample evidence to satisfy this criterion.</p>
<p>Gap analysis</p> <p>Evidence of direct citizen participation: There is insufficient evidence to conclude that citizens are actively engaged in procurement processes through consultation, observation or monitoring.</p> <p>This Gap is assigned a Red flag because insufficient active public engagement significantly hinders transparency and impedes the objectives of improving accountability, effectiveness and efficiency of the procurement system. Mitigation measures to facilitate direct citizen participation and create an environment where relevant evidence is available, will require cross governmental, inter-institutional co-operation, to support this type of engagement and start to build improved levels of citizen trust in the procurement system and this lies beyond the procurement sphere.</p>
<p>Recommendations</p> <p>See combined recommendations at 11(c)(a).</p>

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Indicator 12. The country has effective control and audit systems

<p style="text-align: center;">Sub-indicator 12(a) Legal framework, organisation and procedures of the control system The system in the country provides for:</p>
<p>Assessment criterion 12(a)(a): laws and regulations that establish a comprehensive control framework, including internal controls, internal audits, external audits and oversight by legal bodies</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis Laws and regulations provide for the establishment of a comprehensive control framework including internal controls and internal audit function, external audit conducted by the Office of the Auditor General or other external auditors in the case of Category A parastatals and parliamentary oversight by the Parliamentary Public Accounts Committee.</p> <p>Constitution: Section 207 of the Constitution establishes the independent public Office of the Auditor General (OAG), to audit and report on public accounts of Eswatini and all offices, courts and authorities of the Government. Section 209 of the Constitution establishes the Finance Committee and the Parliamentary Public Accounts Committee (PAC). The PAC has a constitutional duty to examine and report to the House on accounts of the Government.</p> <p>The main legislation governing the control and audit framework is the Audit Act 2005, the Public Finance Management Act 2017 (PFMA) and the. The Office of the Auditor General (OAG) and Internal Audit Office (IAO) play a significant role in the control system. PFMA provides for the establishment and operation of the Audit Committee (internal audit), which is an important part of the audit system. The Audit Committee is still in the course of being established. In addition, the ESPPRA conducts specialised procurement audits pursuant to its oversight functions in the Procurement Act s.10. Local government and Category A parastatal procuring entities can appoint their own internal auditors and external auditors and must comply with requirements for publication of annual accounts and external audit reports. The Auditor General entitled to receive all audit reports.</p> <p>Audit Act 2005: The Audit Act 2005 sets out detailed provisions relating to the functions, establishment and operation of the Office of the Auditor General (external audit) as well as reporting requirements. The Auditor General is appointed by the King on the advice of the Minister of Finance, after recommendation by the Civil Service Commission. The Audit Act No.4 of 2005 (Audit Act) contains more detailed provisions on the establishment, functions and activities of the office of the Auditor General. The Auditor General is empowered to conduct the full range of types of audit including financial, compliance and performance audits. The Audit Act s.21 provides that the Auditor General shall not be required to audit the books of a statutory body or Government company for which another auditor is appointed in accordance with the provision of the act that establishes it. Category A parastatals falls within this provision. Where another auditor is appointed, they must provide the Auditor General with a copy of annual financial statements, report on those statements and any other reports as specified in the Audit Act. (See note on Public Enterprises (Control and Monitoring) Act 1989 (PE Act) - Category A parastatals below).</p> <p>Public Finance Management Act (PFMA): The PFMA provides for annual Government level and entity level reporting and audit. It establishes the Internal Audit Office under the Ministry of Finance. It requires the Chief Executive Officer or Board of an entity (including procuring entities for the purposes of the Procurement Act) to put into place measures for the management of public finances.</p> <p>The PFMA S.82 provides for the Establishment of an Audit Committee appointed by the Minister of Finance, to assist Chief Executive Officers in fulfilling oversight responsibilities, to consider Internal Audit Office Reports and make</p>

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recommendations on findings and resolve disagreements between Chief Executive Officers and internal audit which may arise from an internal audit report. The Audit Committee is still in the course of being established.

Public Enterprises (Control and Monitoring) Act 1989 (PE Act) - Category A parastatals: The PE Act requires each public enterprise to prepare an annual report on its operations and submit this report, together with a copy of its annual audited accounts and other auditors reports to the Minister responsible. According to PE Act, Category A parastatals are required to report on financial affairs and budgets to the Public Enterprises Unit, within the Ministry of Finance. Annual accounts of each Category A parastatal must be laid before Parliament, together with a consolidated report on all Category A parastatals.

Procurement Act: ESPPRA compliance and performance audits: The ESPPRA carries out risk-based compliance and performance audits of procurement, pursuant to its oversight functions (Procurement Act s.10(c)). The ESPPRA conducts both routine audits planned on an annual basis and special audits in response to specific requests or instructions. This function extends in theory to all procuring entities but in practice there is no uptake from central government Ministries and so this activity is focused on local government and Category A parastatals.

Gap Analysis

Comprehensive control framework - Internal control/audit mechanisms: There are internal control/audit mechanisms and systems but they do not function in a manner to ensure appropriate oversight of procurement. Procuring entities do not always have standard operating procedures in place and information available when internal audit is conducted is not consistent. The Audit Committee provided for in the PFMA and which should strengthen controls, has not yet been established.

This Gap is assigned a Red flag because poor functioning of internal control/audit and a non-existent Audit Committee significantly hinders appropriate oversight of procurement, increasing the risk that procurements will fail to meet objectives including efficiency and value for money outcomes. In addition, it requires actions to improve internal control/audit mechanisms which may require significant changes in practice by procuring entities and action lying outside the procurement sphere such as establishment of the Audit Committee provided for in PFMA.

Recommendations

Combined Recommendations for 12(a), (a) (b) & (c) and 12(b)(a)

Comprehensive control framework: To improve internal control mechanisms and practices, ensure that all procuring entities have relevant and up to date standard operating procedures and internal control manuals in place. In order to ensure that procuring entities have relevant models available, replace or update instructions, regulations and manuals to be applied by procuring entities to ensure that they are consistent with the current audit and controls framework and provide for appropriate balance between efficiency of decision making and risk mitigation. The Audit Committee should be established and become operational as soon as possible.

Assessment criterion 12(a)(b):

internal control/audit mechanisms and functions that ensure appropriate oversight of procurement, including reporting to management on compliance, effectiveness and efficiency of procurement operations

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The internal control/audit mechanisms and systems do not function in a manner to ensure appropriate oversight of procurement. Procuring entities do not always have standard operating procedures in place and information available when internal audit is conducted is not consistent.

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Internal control mechanisms: PFMA s.11 requires the Chief Executive Officer or Board of an entity (including procuring entities for the purposes of the Procurement Act) to put into place measures for the management of public finances including “effective and efficient internal controls arrangements and systems for the management of assets, liabilities and other risks” and “a procurement system in compliance with the law on procurement and instructions issued under [the PFMA].”

In addition to provisions in the PFMA relating to internal control mechanisms, there are older documents still applying to internal financial management and accounting, including Financial Management and Accounting Regulations 1992, Financial Management and Accounting Procedures Manual 1993. According to the CIFA 2010 Report⁴³ (applying PEFA methodology) most of the procedures provided for in this Manual are outdated. Financial and Accounting Instructions 1970 also continue to remain in force and need to be replaced or updated.⁴⁴ The MAPS Assessment team understand that Parliament has approved new Financial Regulations to support the implementation of the PFMA, but the Regulations have yet to be published.

Internal audit functions: PFMA s.81 Establishment of Internal Audit Office, establishes the Internal Audit Office under the Ministry for Finance to provide internal audit functions to a public entity and any other entity designated by the Principal Secretary of the Ministry of Finance. The Internal Audit Office is centralised, with internal auditors based in the Internal Audit Office not within individual Ministries. The Internal Audit Office has an allocation of 23 staff, with 5 positions vacant.⁴⁵ Category A parastatals and Local government appoint their own internal auditors.

Internal control mechanisms in practice: Internal controls at procuring entity level in relation to procurement expenditure are weak in practice. Procuring entities do not always have standard operating procedures in place and information available when internal audit is conducted is not consistent.⁴⁶ The Auditor General’s Compliance Audit Report for the financial year ended 31 March 2021 noted deficiencies in budget management and expenditure, including non-compliance with applicable rules and regulations and examples of public officers and companies unduly receiving public funds. The Auditor General referred in this report to ongoing concerns about procurement activities “carried out in a system that already contains internal control weaknesses, especially in the area of procurement, as evidenced in our audit reports, over the last number of years.” He noted, in particular, “control weaknesses in the Payroll and Human Resources Systems, as well as the Procurement and Accounting Systems” concluding that “The control weaknesses and non-compliance issues have caused a great loss in the Government’s finances.” This was identified as an area of concern in the CIFA 2010 Report, with an overall low score of D* for effectiveness of internal controls for non-salary expenditure.

Gap analysis

Internal audit and control mechanisms to ensure appropriate oversight: Internal controls at procuring entity level are weak in practice. Some of the instructions, regulations and manuals setting out control mechanisms and measures to be applied by procuring entities are very outdated and need to be replaced or updated.

This Gap is assigned a Red flag because it requires significant levels of inter-institutional cooperation including, procurement, audit and finance, to tackle a systemic issue which significantly impedes overall operation of the procurement system to ensure efficiency, effectiveness and value for money.

Recommendations

See combined recommendations at 12(a)(a).

Assessment criterion 12(a)(c):

internal control mechanisms that ensure a proper balance between timely and efficient decision-making and adequate risk mitigation

⁴³ <https://www.pefa.org/sites/pefa/files/assessments/reports/SW-Sep11-CIFA-Public.pdf>

⁴⁴ Comment from Office of Auditor General in discussion with MAPS Assessment Team, August 2023.

⁴⁵ Information provided by Internal Audit Office to MAPS Assessment Team, August 2023.

⁴⁶ Information provided by Internal Audit Office to MAPS Assessment Team, August 2023.

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Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The internal control/audit mechanisms and systems do not function in a manner to ensure a proper balance between timely and efficient decision making and adequate risk mitigation. Internal controls at procuring entity level in relation to procurement expenditure are weak in practice. Procuring entities do not always have standard operating procedures in place and information available when internal audit is conducted is not consistent. See analysis at 12(a)(b).

Gap analysis

Internal control mechanisms to ensure balance between timely and efficient decision-making and adequate risk mitigation: The internal control/audit mechanisms and systems do not function in a manner to ensure a proper balance between timely and efficient decision making and adequate risk mitigation.

This Gap is assigned a Red flag because it requires significant levels of inter-institutional cooperation including, procurement, audit and finance, to tackle a systemic issue which significantly impedes overall operation of the procurement system to ensure efficiency, effectiveness and value for money.

Recommendations

See combined recommendations at 12(a)(a).

Assessment criterion 12(a)(d):

independent external audits provided by the country's Supreme Audit Institution (SAI) that ensure appropriate oversight of the procurement function based on periodic risk assessments and controls tailored to risk management

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The Office of the Auditor General (OAG) is the supreme audit institution. As well as carrying out and publishing independent external financial audits, the OAG has conducted risk-based compliance audits including assessment of the procurement function within selected procuring entities. In addition, the ESPPRA carries out risk-based compliance and performance audits.

External audit – Auditor General: The Auditor General is empowered to conduct the full range of types of audits including financial, compliance and performance audits. The Auditor General conducts and publishes an annual Financial Audit Report. The most recent annual Financial Audit Report available to download from the website of the Office of the Auditor General is for the financial year ended 31 March 2023.⁴⁷

In 2022, the Auditor General published a Compliance Audit Report for the financial year ended 31 March 2021, conducted in accordance with International Standards of Supreme Audit Institutions, in which significant concerns were raised including in relation to internal controls and procurement related matters.⁴⁸

In 2023, the Office of the Auditor General undertook an audit of procurement systems in the Ministry of Finance, but the results are not yet available publicly.

⁴⁷ <https://www.gov.sz/images/Auditor-General-Report-2023.pdf>

⁴⁸ Compliance Audit Report of the Government of the Kingdom of Eswatini, for the financial year ended 31st March 2021, Office of the Auditor General. <https://www.gov.sz/index.php/document-auditor/audit-report>

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Office of the Auditor General: Whilst the Office of the Auditor General is established as an independent public office, according to the OAG Strategic Plan 2021-2024 “the office is struggling to be independent of the executive who in this case are its audit clients.”⁴⁹ The OAG Strategic Plan refers in this context to failure to achieve financial independence as provided for in Audit Act s.22 and deprivation of functional and organizational independence due to controls exercised by the Ministry of Public Service, Public Policy Coordination Unit, Civil Service Commission, Deputy Prime Minister, Prime Minister and Ministry of Finance, including in the appointment of staff and HR issues. The Open Budget Survey 2021⁵⁰ recommends actions to strengthen independence and audit oversight of the OAG including legislative or judicial approval to appoint and remove the Auditor General and ensuring adequate funding, to be determined by an independent body. The Office of the Auditor General is significantly under-resourced. There are currently 47 auditors, with 30 auditor posts to fill.⁵¹

Gap analysis

External audit by the Office of the Auditor General: The Office of the Auditor General is not sufficiently independent of the executive and is significantly under-resourced. Both of these factors impact on the ability of the Office of the Auditor -General to undertake the full range of audit activities within its mandate, including specialised compliance and performance audits in public procurement.

This Gap is assigned a Red flag because independence of the Office of the Auditor General is a key element of a well-functioning control framework necessary to ensure that procurement objectives are met and, where they are not met, that failures are identified and resolved to improve the system. In addition, it requires action outside the procurement sphere to remedy shortfalls in the audit system.

Recommendations

External audit by the Office of the Auditor General: High level policy and decision making is required to ensure sufficient independence and resourcing of the Office of the Auditor General.

Assessment criterion 12(a)(e):

review of audit reports provided by the SAI and determination of appropriate actions by the legislature (or other body responsible for public finance governance)

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

There is a mechanism for review at Parliamentary level of audit reports provided by the Auditor General and for determination of appropriate actions and implementation. In practice, however, the mechanism is limited in its effectiveness as there is systemic weakness in respect of implementation.

There is a mechanism for review at Parliamentary level of audit reports provided by the Auditor General and for determination of appropriate actions. The Office of the Auditor General makes recommendations in audit reports for implementation by procuring entities. When those recommendations are not implemented or it is argued that they cannot be implemented, the OAG will take those to Parliament, through the Parliamentary Public Accounts Committee (PAC) using a compliance report process.

The PAC holds sessions to discuss the Auditor General’s reports and recommendations and will issue its own recommendations in the light of those discussions. Non-implementation may lead to fines for non-compliance.

⁴⁹ Strategic Plan of the Supreme Audit Institution of Eswatini (Office of the Auditor General) for the Period 1 January 2021 to 31 December 2024.

⁵⁰ Open Budget Survey 2021 Eswatini, International Budget Partnership.

<https://internationalbudget.org/open-budget-survey/country-results/2021/eswatini>

⁵¹ Information provided by Office of Auditor General to MAPS Assessment Team in discussions, October 2023.

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In practice the Auditor General has, in many cases, needed to push the PAC to take action and the Auditor General continues to raise concerns that the Executive does not implement recommendations.⁵²

Parliamentary Public Accounts Committee (PAC): The PAC has a constitutional duty to examine and report to the House on accounts of the Government (Constitution section 207(5)). PFMA s.34 Unauthorised expenditure, provides that statements of excess government expenditure (also referred to as unauthorized expenditure) must be prepared and published and then considered by the PAC which shall submit a report to Parliament with recommendations to address the cause of the unauthorized expenditure and recommend disciplinary action.

Gap analysis

Reports of the Auditor General: The mechanism for review and determination of appropriate actions in response to reports of the Auditor General is limited in its effectiveness as there is systemic weakness in respect of implementation.

This Gap is assigned a Red flag because review and implementation of actions required in response to audit reports is a key element of a well-functioning control framework necessary to ensure that procurement objectives are met and, where they are not met, failures are identified and resolved to improve the system. In addition, it requires action outside the procurement sphere to remedy shortfalls in the audit system.

Combined Recommendations for 12(a)(e), 12(a)(f) & 12(c)(b)

Put into place measures to ensure effectiveness of mechanisms for review and determination of actions in response to reports of the Auditor General and for follow up and implementation of findings of both internal and external audit recommendations.

Assessment criterion 12(a)(f):

clear mechanisms to ensure that there is follow-up on the respective findings.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

There are well delineated mechanisms to follow-up on audit findings but in practice there is a poor level of compliance with implementation of both internal and external audit recommendations.

Internal audit: According to the Internal Audit Office, the internal audit process includes a close out meeting/exit meeting with the management of the procuring entity after completion of the fieldwork to discuss draft findings. The final report will contain findings and areas for improvement leading to agreed management actions. The Internal Audit Office recommends time frames for implementation: immediate, short, medium and long term. The Internal Audit Manual requires monitoring of implementation of agreed improvements. According to the Internal Audit Office the level of compliance with implementation of recommendations has dropped significantly in 2023 - a drop from 52% in 2021/2022 to 30% in 2022/2023.⁵³

External audit: Audit reports (financial and compliance) prepared and published by the Office of the Auditor General include commentary on findings and queries made to procuring entities together with their responses to findings and queries including non-implementation. See analysis at 12(a)(e) on referral to the Parliamentary Public Accounts Committee in the case of non-implementation of recommendations.

Gap analysis

⁵² Information provided by Office of the Auditor General to MAPS Assessment team, October 2023 and to AfDB PFM specialist team in March 2024.

⁵³ Information provided by Office of the Auditor General to MAPS Assessment team, October 2023 and to AfDB PFM specialist team in March 2024.

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Follow-up on internal and external audit findings: The available mechanisms for follow-up on internal and external audit findings are inadequately enforced. There is a poor level of compliance on implementation of both internal and external audit recommendations.

This Gap is assigned a Red flag because lack of effective follow up and enforcement of internal and external audit findings significantly reduces actual and perceived accountability. In addition, it requires action outside the procurement sphere to remedy shortfalls in the audit system.

Recommendations

See combined Recommendations at 12(a)(e)

Sub-indicator 12(b)

Coordination of controls and audits of public procurement

Assessment criterion 12(b)(a):

There are written procedures that state requirements for internal controls, ideally in an internal control manual.

Conclusion: **Substantive gap**

Red flag: Yes

Qualitative analysis

There is a template for standard operating procedures for internal financial controls and a Financial Management and Accounting Procedures Manual but the standard operating procedures are not always in place and the Manual is very out of date.

There is a template for standard operating procedures for internal financial controls which can be adapted by each procuring entity but, according to the Internal Audit Office, not all procuring entities have standard operating procedures in place. Where Internal Auditors find that there are no standard operating procedures in place a standing recommendation is adoption of procedures, which is checked in a follow up audit. Internal auditors also check compliance against requirements of the Procurement Act and PPR. The Financial Management and Accounting Procedures Manual dates from 1993. According to the CIFA 2010 Report⁵⁴ (applying PEFA methodology) most of the procedures provided for in this Manual are outdated. Financial and Accounting Instructions 1970 also continue to remain in force and need to be replaced or updated.⁵⁵

Gap analysis

Written procedures for internal controls: Not all procuring entities have standard operating procedures in place and, as identified in 12(a), some of the instructions, regulations and manuals setting out control mechanisms and measures to be applied by procuring entities are very outdated and need to be replaced or updated.

This Gap is assigned a Red flag because it requires significant levels of inter-institutional cooperation, including by procurement, finance and audit institutions, to tackle a systemic issue which impedes overall operation of the procurement system to ensure efficiency, effectiveness and value for money.

Recommendations

See Combined Recommendations at 12(a)(a)

Assessment criterion 12(b)(b):

There are written standards and procedures (e.g. a manual) for conducting procurement audits (both on compliance and performance) to facilitate co-ordinated and mutually reinforcing auditing.

Conclusion: **Substantive gap**

Red flag: Yes

⁵⁴ <https://www.pefa.org/sites/pefa/files/assessments/reports/SW-Sep11-CIFA-Public.pdf>

⁵⁵ Comment from Office of Auditor General in discussion with MAPS Assessment Team, August 2023.

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Qualitative analysis

There are written standards and procedures for conducting compliance and performance audits by internal and external auditors. These more general standards are applied to conduct of procurement audit. The ESPPRA conducts value for money and compliance audits of procurement by procuring entities, in accordance with written procedures.

The Internal Audit Office conducts internal financial audits according to an annual plan for all portfolio ministries and in accordance with the Government of Eswatini Internal Audit Manual 2019, applying IIA standards.⁵⁶ Audit reports are shared with the Office of the Auditor General.

The Auditor General conducts annual financial audits applying international audit standards.

The ESPPRA conducts value for money and compliance audits of procurement by procuring entities, in accordance with written procedures.

There is the potential for overlap in the activities of the internal/external auditors and the audit function of ESPPRA. In discussions with the MAPS Assessment Team some stakeholders, including procuring entities, flagged concerns about lack of coordination and potential for overlap in the activities of auditors and the procurement audit function of the ESPPRA.

A draft Combined Assurance Framework has recently been re-established, involving the Office of the Auditor General, Internal Audit Office, Accountant General, ESPPRA, ACC and REPS. Aims of this framework include to ensure better co-ordination of activities and to avoid duplication.

Gap analysis

Written standards and procedures for procurement audits: There are no specialised written standard and procedure for conducting compliance and performance procurement audits. There is the potential for overlap in the activities of the internal/external auditors and the audit function of ESPPRA.

This Gap is assigned a Red flag because lack of written standards and procedure for conducting compliance and performance procurement audits significantly hinders the opportunity to identify and remedy failure to comply with procurement requirements and jeopardises delivery of effective outcomes including value for money. In addition, it requires action outside the procurement sphere to remedy shortfalls in the audit system and requires inter-institutional cooperation.

Recommendations

Written standards and procedures for procurement audits: Consider adoption of written standards and procedures specifically focused on the conduct of both compliance and performance procurement audits. Audit authorities and ESPPRA need to jointly consider ways to better co-ordinate their audit activities to avoid overlap. This may be considered as part of implementation of the new Combined Assurance Framework.

Assessment criterion 12(b)(c):

There is evidence that internal or external audits are carried out at least annually and that other established written standards are complied with.*

Conclusion: No gap

Red flag: No

Qualitative analysis

The Auditor General publishes an annual report on external audits carried out which is available to download from the website of the Office of the Auditor General. The Auditor General conducts annual financial audits applying international audit standards.

⁵⁶ International Standards for Professional Internal Auditing published by the Institute of Internal Auditors (IIA).

<https://www.iaa.org.uk/about-us/our-standards-and-ethics/#:~:text=of%20Internal%20Auditing-,The%20International%20Standards%20for%20the%20Professional%20Practice%20of%20Internal%20Auditing,for%20evaluating%20internal%20audit%20performance.>

ethics/#:~:text=of%20Internal%20Auditing-,The%20International%20Standards%20for%20the%20Professional%20Practice%20of%20Internal%20Auditing,for%20evaluating%20internal%20audit%20performance.

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The Internal Audit Office carries out audits in accordance with an annual procurement plan. (See analysis at 12(b)(b) for note on coordination activities)

Quantitative analysis

* Recommended quantitative indicator to substantiate assessment of sub-indicator 12(b) Assessment criterion (c):

- number of specialised procurement audits carried out compared to total number of audits (in %).
- share of procurement performance audits carried out (in % of total number of procurement audits).

Source: Ministry of Finance/Supreme Audit Institution.

Internal Audit Data						
	FY 2018/19	FY 2019/20	FY 2020/21	FY 2021/22	FY 2022/23	FY 2023/24
Number of Audits						
Total number of audits	27	28	28	29	41	25
Specialised procurement audits (including procurement performance audits)						
Number of audits	7	11	4	5	9	3
As % of total number of audits	26%	39%	14%	17%	22%	12%
Procurement performance audits						
Number	3	2	1	1	6	2
As % of total number of audits	11%	7%	4%	3%	15%	8%

Source: Internal Audit Office, Ministry of Finance

Note: No data received from Office of the Auditor General.

Gap analysis

Recommendations

Assessment criterion 12(b)(d):

Clear and reliable reporting lines to relevant oversight bodies exist.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The Auditor General does not have a Memorandum of Understanding with the Anti-Corruption Commission. In practice, the Auditor General refers matters of suspected corruption to the Anti-Corruption Commission. The Auditor General also liaises, where appropriate with the fraud unit of Royal Eswatini Police Service. The Auditor General is in discussion with ESPPRA to conclude and Memorandum of Understanding to enhance cooperation.

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A draft Combined Assurance Framework has recently been re-established but not finalised, involving the Office of the Auditor General, Internal Audit Office, Accountant General, ESPPRA, ACC and REPS. Aims of this framework include coordinated and more focused assurance efforts.

Gap Analysis

Reporting lines to oversight bodies: A reliable and comprehensive network of reporting lines to relevant oversight bodies is not yet formally established and implemented thus reducing the efficacy of the operation of the audit and control system.

This Gap is assigned a Red flag because it requires significant levels of inter-institutional cooperation including by procurement, finance and audit institutions, to tackle a systemic issue which impedes overall operation of the procurement system to ensure efficiency, effectiveness and value for money.

Recommendations

Reporting lines to oversight bodies: Prioritise implementation of the draft Combined Assurance Framework to enhance inter-institutional cooperation and reporting lines.

Sub-indicator 12(c)

Enforcement and follow-up on findings and Recommendations

Assessment criterion 12(c)(a):

Recommendations are responded to and implemented within the time frames established in the law.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Internal Audit Office confirmed that their audit reports include the time frames for implementation of recommendations. Time frames for implementation or recommendations are not statutory and are designated as immediate, short, medium and long term. Implementation of internal audit recommendations is followed up and, according to Internal Audit Office, compliance with their recommendations has been generally good but in the last financial year the level of compliance has dropped significantly.

The Auditor General does not report on implementation of recommendations.

Quantitative analysis

* Recommended quantitative indicator to substantiate assessment of sub-indicator 12(c) Assessment criterion (a):
- Share of internal and external audit Recommendations implemented within the time frames established in the law (in %).

Source: Ministry of Finance/Supreme Audit Institution.

Internal Audit Data						
	FY 2018/19	FY 2019/20	FY 2020/21	FY 2021/22	FY 2022/23	FY 2023/24
Implementation of audit recommendations						
% of audit recommendations implemented within timeframes specified	50.2%	66.3%	60%	57.9%	65.4%	27.4%

Source: Internal Audit Office, Ministry of Finance

Note: No data received from Office of the Auditor General.

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<p>Gap analysis</p> <p>Compliance with audit recommendations: Compliance with the recommendations of the Internal Audit Office has been generally good but in the last financial year the level of compliance has dropped significantly. The Auditor General does not report on implementation of recommendations.</p> <p>This Gap is assigned a Red flag because lack of information on implementation of recommendations significantly hinders transparency and accountability. In addition, it requires action outside the procurement sphere to remedy shortfalls in the audit system.</p>
<p>Recommendations</p> <p>See Combined Recommendations at 12(a)(f).</p>
<p>Assessment criterion 12(c)(b):</p> <p>There are systems in place to follow up on the implementation/enforcement of the audit recommendations</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis</p> <p>Internal audit conducts follow up audits to check on implementation/enforcement of audit recommendations. External auditors also follow up on queries and recommendations and non-compliance may lead to reporting process to the Parliamentary Public Accounts Committee with resulting potential for additional recommendations and fines. In practice, there are systemic problems with ensuring the implementation and enforcement of audit recommendations. (See analysis at 12(a)(e) & (f), 12(c)(a)).</p> <p>A draft Combined Assurance Framework has recently been re-established, involving the Office of the Auditor General, Internal Audit Office, Accountant General, ESPPRA, ACC and REPS. Aims of this framework include improved reporting and a more comprehensive and prioritized tracking of remedial actions.</p>
<p>Gap analysis</p> <p>Systems to follow up on the implementation/enforcement of audit recommendations: The systems in place to follow up on the implementation/enforcement of audit recommendations are ineffective due to systemic problems. This Gap is assigned a Red flag because lack of effective enforcement of audit recommendations significantly reduces actual and perceived accountability. In addition, it requires action outside the procurement sphere to remedy shortfalls in the audit system.</p>
<p>Recommendations</p> <p>See Combined Recommendations at 12(a)(f).</p>
<p>Sub-indicator 12(d)</p> <p>Qualification and training to conduct procurement audits</p>
<p>Assessment criterion 12(d)(a):</p> <p>There is an established programme to train internal and external auditors to ensure that they are qualified to conduct high-quality procurement audits, including performance audits.*</p>
<p>Conclusion: No gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis</p> <p>There is training in place to ensure that auditors working on procurement audits are adequate to the task.</p>

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External audit: External auditors in the Office of the Auditor General are required to have, as a minimum, a degree in accounting and ACCA qualification. They also undertake the AFROSAI (African Organisation of Supreme Audit Institutions) external auditors course, delivered in a hybrid manner. In addition, they receive training on: (1) contract and procurement audit. 17 auditors have received this specialist training (36% of total number of external auditors in the OAG) and (2) procurement fraud audits and procurement investigations. 12 auditors have received this specialist training (26%).

In 2022, AFROSAI-E conducted workshops in Eswatini on compliance audit management and internal Quality Management (internal quality control functions).

Internal audit: Internal auditors in the Internal Audit Office are required to have a first degree and accounting/internal audit qualifications. Internal auditors take the Internal Audit of South Africa course on conducting audit “from cradle to grave”. The Internal Audit Office conducts its own in-house training on public procurement and all auditors have received this training. Currently there are no internal auditors in the Internal Audit Office who are IIA Accredited although training is underway. Approximately 6 of the internal auditors based in the Internal Audit Office have recently received training on governance, IT and compliance audit and pilot audits have been conducted.

Quantitative analysis

* Recommended quantitative indicator to substantiate assessment of sub-indicator 12(d) Assessment criterion (a):

- number of training courses conducted to train internal and external auditors in public procurement audits.

- share of auditors trained in public procurement (as % of total number of auditors).

Share of Auditors trained in public procurement

External Audit (Office of the Auditor General) : 17 auditors have received training on contract and procurement audit (36% of total), 12 auditors have received training on procurement fraud audit and procurement investigation (26% of total)

Internal Audit Data						
	FY 2018/19	FY 2019/20	FY 2020/21	FY 2021/22	FY 2022/23	FY 2023/24
Training of auditors in public procurement audit						
Number of training courses conducted to train internal auditors in public procurement audits <i>*please indicate if training is shared with external auditors</i>	0	0	0	0	0	0
Total number of internal auditors	16	16	21	28	29	29
Number of internal auditors trained in public procurement audit	16	0	0	0	0	0

Source: Internal Audit Office, Ministry of Finance

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Gap analysis
Recommendations
Assessment criterion 12(d)(b): The selection of auditors requires that they have adequate knowledge of the subject as a condition for carrying out procurement audits; if auditors lack procurement knowledge, they are routinely supported by procurement specialists or consultants.
Conclusion: No gap
Red flag: No
Qualitative analysis Auditors are selected according to relevant experience and training of relevance to conduct of procurement audits. Resourcing levels in the Office of the Auditor General may, in practice, limit the number of available staff with relevant expertise when procurement related audit is contemplated (See analysis, gap and recommendations at 12(a)(d)).
Gap analysis
Recommendations
Assessment criterion 12(d)(c): Auditors are selected in a fair and transparent way and are fully independent.
Conclusion: No gap
Red flag: No
Qualitative analysis External audit: External audit positions are advertised in the media and appointment process, including interviews, is conducted [jointly by the Office of the Auditor General and] Civil Service Commission. See analysis, gap and recommendations at 12(a)(d) concerning insufficient independence of the Office of the Auditor General, with particular reference to involvement of executive in appointment of staff and other HR issues). Internal audit: Internal audit positions are advertised in the media and appointment process, including interviews, is conducted jointly by the Internal Audit Office and Civil Service Commission.
Gap analysis
Recommendations

Indicator 13. Procurement appeals mechanisms are effective and efficient

Sub-indicator 13(a) Process for challenges and appeals
Assessment criterion 13(a)(a):

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Decisions are rendered on the basis of available evidence submitted by the parties.
Conclusion: No gap
Red flag: No
Qualitative analysis Decisions on initial application for review by procuring entities and decision on administrative review by the Independent Review Committee (IRC) are rendered on the basis of available evidence submitted by the parties. In the case of administrative review by the IRC, there are detailed provisions in the IRC Rules of Procedure on process and content of written submissions and filing of additional supporting evidence. The initial application for review is submitted to and considered by the controlling officer or Chief Executive Officer of the procuring entity conducting the procurement. The Procurement Act s.47 requires the investigating officer to immediately institute an investigation and issue a written decision which must include reasons for a decision to uphold the application in whole or in part or dismiss the application. IRC Rules of Procedure set out a process and content of submissions to be made by the parties plus provisions permitting filing of supporting papers for consideration by the IRC as well as for oral hearings.
Gap analysis
Recommendations
Assessment criterion 13(a)(b): The first review of the evidence is carried out by the entity specified in the law.
Conclusion: No gap
Red flag: No
Qualitative analysis The initial application for review is submitted to and considered by the controlling officer or Chief Executive Officer of the procuring entity conducting the procurement. The Procurement Act s.47 requires the investigating officer to immediately institute and investigate and issue a written decision which must include reasons for a decision to uphold the application in whole or in part or dismiss the application.
Gap analysis
Recommendations
Assessment criterion 13(a)(c): The body or authority (appeals body) in charge of reviewing decisions of the specified first review body issues final, enforceable decisions. *
Conclusion: No gap
Red flag: No
Qualitative analysis Decisions of the IRC are final, enforceable and subject to a right of appeal to the courts. The ESPPRA has measures available to assist in enforcement. ESPPRA may, upon receipt of an IRC decision, recommend to the competent authority to take disciplinary measures against the concerned person or body implicated in the decision, in accordance with provisions of the Procurement Act. PPR R.29 also brings compliance with IRC decisions within the remit of the ESPPRA's continuous monitoring function.

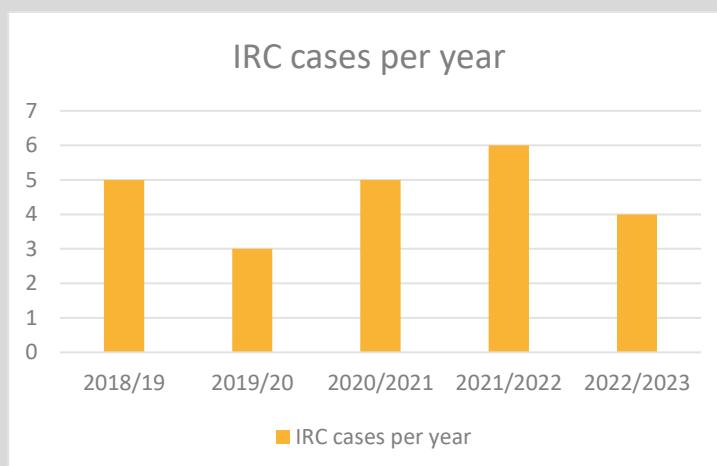
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Quantitative analysis

// Minimum indicator // * Quantitative indicator to substantiate assessment of sub-indicator 13(a) Assessment criterion (c):

- number of appeals.

Source: Appeals body.



* Recommended quantitative indicator to substantiate assessment of sub-indicator 13(a) Assessment criterion (c): number (and percentage) of enforced decisions.

Source: Appeals body.

Gap analysis

Recommendations

Assessment criterion 13(a)(d):

The time frames specified for the submission and review of challenges and for appeals and issuing of decisions do not unduly delay the procurement process or make an appeal unrealistic.

Conclusion: No gap

Red flag: No

Qualitative analysis

The time frames specified for submission of applications for review (challenge) and administrative review (appeal) and for issue of decisions are reasonable and should not unduly delay the procurement process or make an appeal unrealistic.

Time frame for submission of written application for review (challenge) to procuring entity: The Procurement Act s.47(2) requires submission within ten working days of “when the tenderer submitting it became aware of the circumstances giving rise to the application for review or of when the tenderer should have become aware of those circumstances, whichever is the earlier.”

Time frame for issue of decision by procuring entity: The Procurement Act s.47(4) requires a written decision to be issued within ten working days after submission of the application.

Time frame for submission of written application for administrative review (appeal) to IRC: The Procurement Act s.49(1) requires submission of an application for administrative review within ten working days of the date of issue

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of the decision on application for review by the procuring entity or the date by which such a decision should have been issued.

Time frame for issue of decision by IRC: The Procurement Act s.51 (1) requires the IRC to issue a written decision with 15 working days after submission of the application (unless the application is dismissed)

Gap analysis

Recommendations

Sub-indicator 13(b) Independence and capacity of the appeals body The appeals body:

Assessment criterion 13(b)(a):

is not involved in any capacity in procurement transactions or in the process leading to contract award decisions

Conclusion: No gap

Red flag: No

Qualitative analysis

The Procurement Act requires that members of the IRC Standing Review Panel have no direct or indirect personal interest in public procurement functions. Member of the Standing Review Panel who are selected for appointment to an Independent Review Committee are required to formally declare that they have no interest, direct or indirect, in the case subject of the review.

The Procurement Act s.50 requires that an Independent Review Committee of three members is constituted to consider each application for review or appeal against suspension. Rules of Procedure of the IRC (FORM IRC 01) is a written declaration to be made by IRC members, technical specialist or staff declaring that they have no interest, direct or indirect, in the case subject of the review.

Members of an Independent Review Committee are drawn from the standing review panel, currently comprising 12 members. The Procurement Act s.50(2) requires that the standing review panel "shall consist of members of high integrity...with no direct or indirect personal involvement in public procurement functions during the period of service on the standing review panel." The IRC Secretariat asks for confirmation by members proposed for an IRC that no conflict of interest exists.

Rules of Procedure of the IRC (FORM IRC 01) is a written declaration to be made by IRC members, technical specialist or staff declaring that they have no interest, direct or indirect, in the case subject of the review.

Gap analysis

Recommendations

Assessment criterion 13(b)(b):

does not charge fees that inhibit access by concerned parties

Conclusion: No gap

Red flag: No

Qualitative analysis

PPR Second Schedule: Fee for processing application for administrative review is 0.5 percent of the tender value subject to a minimum of Emalangeni 5,000 (approximately USD 270) and of Emalangeni 100,000 (approximately USD 5460) maximum.

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The private sector survey asked the questions “If you have never submitted an application for review of a decision taken by a procuring entity or never submitted an application for administrative review to the IRC please indicate why”. In response to this question, 14% of respondents indicated that this was due to the costs involved (administrative costs and legal fees). When the MAPS Assessment team explored this issue with the private sector, the specific issue of the administrative fee was not raised, but associated legal costs were flagged as an area of concern.

Gap analysis

Recommendations

Assessment criterion 13(b)(c):

follows procedures for submission and resolution of complaints that are clearly defined and publicly available

Conclusion: No gap

Red flag: No

Qualitative analysis

Detailed procedures for submission and conduct of administrative review are clearly set out in the Rules of Procedure for the IRC. The Rules of Procedure for the IRC are available to download from the ESPPRA website, Review and Appeals tab.⁵⁷

Also available from the ESPPRA Review and Appeals tab are: copies of the relevant provisions from the Procurement Act and a power point presentation which outlines the procedures for both submission of an application for review to the procuring entity and the rules and process for administrative review.

Gap analysis

Recommendations

Assessment criterion 13(b)(d):

exercises its legal authority to suspend procurement proceedings and impose remedies

Conclusion: No gap

Red flag: No

Qualitative analysis

According to the Procurement Act, submission of an application for administrative review triggers suspension of award of the contract pending completion of the administrative review process (see analysis at 1(h)(b)). The MAPS Assessment Team reviewed 29 decisions of the IRC, decided between 2015, when the IRC became operational and 2023. The analysis confirms that the IRC exercises its legal authority to impose a range of remedies as designated by the Procurement Act.⁵⁸

Gap analysis

Recommendations

Assessment criterion 13(b)(e):

issues decisions within the time frame specified in the law/regulations*

⁵⁷ https://esppra.co.sz/sppra/review_appeals.php, accessed 14 June 2023.

⁵⁸ In 2018 the High Court ruled that the IRC had acted beyond its powers in, inter alia, the award of a contract to an aggrieved party. The IRC has been cognisant of and compliant with this ruling in its subsequent activities.

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Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

Procurement Act s.49 requires the IRC to issue a written decision within fifteen working days after submission of the application for administrative review. The IRC does not issue decisions within the time frame of 15 working days specified in the Procurement Act.

No cases submitted to the IRC in financial years 2020/2021, 2021/2022 and 2022/2023 were decided within the statutory time frame (calculated from date of submission of application for review to date of written decision, according to data provided by IRC Secretariat).

In discussion with IRC Secretariat and IRC members to explore the reasons for failure to meet the 15 working day deadline, it was clear that in many cases the applications considered by the IRC have become increasingly complex and the process is highly “legal”, with parties represented by lawyers, extensive pleadings and oral hearings in every case. Resulting high levels of paperwork and logistical challenges contribute significantly to delays.

Quantitative analysis

**Quantitative indicator to substantiate assessment of sub-indicator 13(b) assessment criterion (e):*

- *appeals resolved within the time frame specified in the law/exceeding this time frame/unresolved (Total number and in %).*

Source: Appeals body.

See qualitative analysis above

No cases submitted to the IRC in financial years 2020/2021, 2021/2022 and 2022/2023 were decided within the statutory time frame.

Gap analysis

Time frame for decision making: Decisions are rarely made within the time frame specified in the law. Delays in decision making reduce the efficacy of the system of appeals and may be a disincentive for suppliers considering submitting an appeal.

Recommendations

Time frame for decision making: Consider ways to streamline the appeals process, for example, by allowing for decisions on the basis of written submissions alone (if permitted under national law) to speed up both the process and also, potentially, reduce Parties’ legal costs in oral hearings.

Assessment criterion 13(b)(f):

issues decisions that are binding on all parties

Conclusion: **No gap**

Red flag: No

Qualitative analysis

Decisions of the IRC are final and binding. ESPRA can exercise measures to enforce IRC decisions (see analysis at 13(a)(c). Parties may also seek the assistance of the courts in enforcement.

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Gap analysis
Recommendations
Assessment criterion 13(b)(g): is adequately resourced and staffed to fulfil its functions.
Conclusion: Substantive gap
Red flag: Yes
<p>Qualitative analysis</p> <p>IRC Secretariat services are provided by the Audit and Compliance department of the ESPPRA, in particular by the acting manager of that department and a compliance assistant with input as necessary from the CEO ESPPRA and finance department. ESPPRA is significantly under-resourced (see analysis at 5(c)).</p> <p>The combined role of the Audit and Compliance department of the ESPPRA in undertaking audit, compliance and providing IRC Secretariat services raises concerns of potential conflicts of interest as matters considered by the IRC may have been the subject of audit and compliance by the Audit and Compliance department. The potential for conflict of interest also arises in the context of other activities of the ESPPRA including pre-tender quality assurance and advisory functions which may have involved consideration of matters which are subsequently considered by the IRC. This issue has been identified as a Gap at 5(c).</p>
<p>Gap Analysis</p> <p>Resources and staffing of the IRC: The IRC is not adequately staffed as it relies on ESPPRA for its secretariat functions and the ESPPRA is significantly under-resourced.</p> <p>This Gap is assigned a Red flag because insufficient capacity of the IRC has a negative impact on the compliance environment and impedes the overall effectiveness of the procurement system. In addition, issues of resources and funding do not lie solely within the procurement sphere.</p>
<p>Recommendations</p> <p>Resources and staffing of the IRC: Allocate sufficient resources and funding to ensure that the functions and activities of the IRC are appropriately supported.</p>
<p style="text-align: center;">Sub-indicator 13(c) Decisions of the appeals body</p> <p style="text-align: center;">Procedures governing the decision making process of the appeals body provide that decisions are:</p>
Assessment criterion 13(c)(a): based on information relevant to the case.
Conclusion: No gap
Red flag: No
<p>Qualitative analysis</p> <p>Rules of Procedure for the IRC contained detailed provisions on the information and documentary evidence to be submitted by parties, hearings and oral evidence ensuring that IRC decisions are based on information relevant to the case.</p> <p>Analysis of published IRC cases demonstrates that cases are decided on information relevant to the case.</p>
Gap analysis
Recommendations

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Assessment criterion 13(c)(b):

balanced and unbiased in consideration of the relevant information.*

Conclusion: No gap

Red flag: No

Qualitative analysis

Rules of Procedure for the IRC contained detailed provisions on the information and documentary evidence to be submitted by parties, hearings and oral evidence ensuring that IRC decisions are balance and unbiased in consideration of the relevant information.

Analysis of samples of recent IRC cases by the MAPS Assessment team demonstrates that IRC members are highly aware of the need for balance and lack of bias and decisions in cases and reasons given for decisions. In a recent decision concerning an application for recusal due to alleged bias there is a clear record of how IRC considered these issues in detail before rejecting the application.

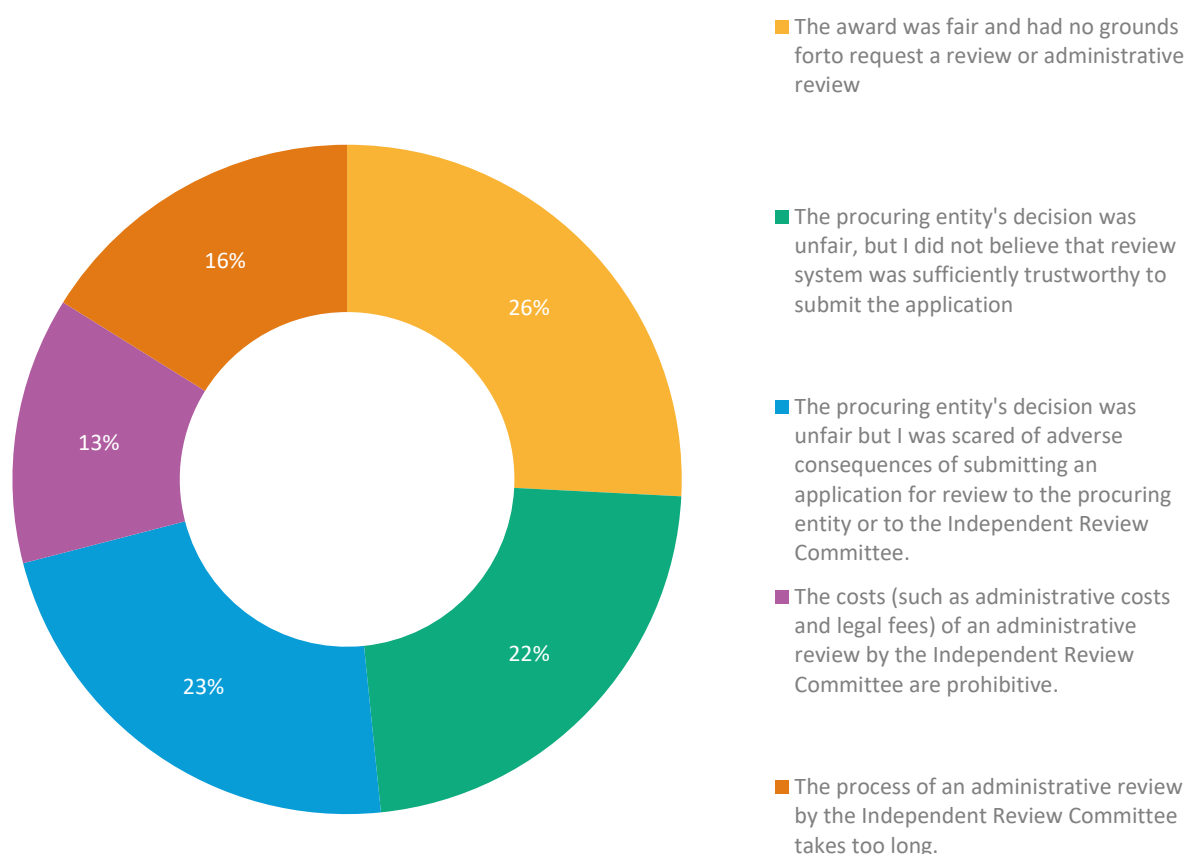
The quantitative analysis of the private sector survey results (based on a small sample) indicates a general lack of trust in the challenge and appeals system by a significant minority of respondents. The data does not, however, provide sufficient evidence to lead the MAPS Assessment Team to conclude that decisions of the IRC are unbalanced or biased, for the purposes of assessment of this criterion.

Quantitative analysis

Recommended quantitative indicator to substantiate assessment of sub-indicator 13(c) Assessment criterion (b): - share of suppliers that perceive the challenge and appeals system as trustworthy (in % of responses). Source: Survey.

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If you have never submitted an application for review of a decision taken by a procuring entity or never submitted an application for administrative review to the IRC please indicate why:



Source: Survey.

Comment on data collected: In this small sample, 48% of the respondents gave the primary reason for not submitting an application for review or administrative as lack of trust in the system or fear of the consequences of doing so. In response to the survey question on whether respondents felt that the process of submitting an application for review to the procuring entity (not the IRC process) was trustworthy and fair, 4 out of 7 of the respondents (again a very small sample) replied in the negative.

Only one of the respondents to the private sector survey confirmed that it had submitted an application for review to the IRC and responded, in the negative, to the question as to whether the IRC process was trustworthy and fair. This sample of one is insufficient to draw a reliable conclusion in respect of the IRC process and decisions.

- share of suppliers that perceive appeals decisions as consistent (in % of responses).

Sample response too small to draw reliable conclusions.

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Gap analysis																		
Recommendations																		
Assessment criterion 13(c)(c): result in remedies, if required, that are necessary to correcting the implementation of the process or procedures.*																		
Conclusion: No gap																		
Red flag: No																		
Qualitative analysis The IRC has power to grant a range of remedies listed in the Procurement Act s.52 (see analysis at 1(h)(b)). The MAPS Assessment Team reviewed 29 decisions of the IRC, decided between IRC coming into operation in 2015 and 2023. The analysis confirms that the IRC exercises it legal authority to impose a range of remedies as designated by the Procurement Act. ⁵⁹ The remedies ordered include: directions to re-evaluate financial proposals, apply evaluation criteria in the manner set out in the tender documents and set aside of decisions to award and orders to start afresh.																		
Quantitative analysis * Recommended quantitative indicator to substantiate assessment of sub-indicator 13(c) Assessment criterion (c): - outcome of appeals (dismissed; decision in favour of procuring entity; decision in favour of applicant) (in %). Source: Appeals body. Note: as there are only a few cases and so the MAPS Assessment team is presenting data by reference to number of cases rather than %.																		
<div><p>Outcomes of applications to IRC for Administrative Review</p><p>Number of cases</p><table><tr><th>Period</th><th>In favour of PE</th><th>In favour of applicant</th></tr><tr><td>2018/2019</td><td>1</td><td>4</td></tr><tr><td>2019/2020</td><td>1</td><td>2</td></tr><tr><td>2020/2021</td><td>4</td><td>1</td></tr><tr><td>2021/2022</td><td>2</td><td>4</td></tr><tr><td>2022/2023</td><td>1</td><td>3</td></tr></table></div>	Period	In favour of PE	In favour of applicant	2018/2019	1	4	2019/2020	1	2	2020/2021	4	1	2021/2022	2	4	2022/2023	1	3
Period	In favour of PE	In favour of applicant																
2018/2019	1	4																
2019/2020	1	2																
2020/2021	4	1																
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Gap analysis																		
Recommendations																		

⁵⁹ In 2018 the High Court ruled that the IRC had acted beyond its powers in, inter alia, the award of a contract to an aggrieved party. The IRC has been cognisant of and compliant with this ruling in its subsequent activities.

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Assessment criterion 13(c)(d): decisions are published on the centralised government online portal within specified timelines and as stipulated in the law.*
Conclusion: Minor gap
Red flag: No
Qualitative analysis IRC decisions are published online on the ESPPRA website, Review and Appeals tab, under the heading “Decisions”. There is no statutory timescale specified for publication of cases. The MAPS Assessment team checked the date of the decision against date of publication on the ESPPRA website for the decisions made in 2022 and 2023. All cases were published promptly on the ESPPRA website, generally within 48 hours of the decision being promulgated.
Quantitative analysis <i>// Minimum indicator // *Quantitative indicator to substantiate assessment of sub-indicator 13(c) Assessment criterion (d):</i> <i>- share of appeals decisions posted on a central online platform within timelines specified in the law (in %).</i> <i>Source: Centralised online portal.*</i> See qualitative analysis above.
Gap analysis Publication of IRC decisions: There is no timescale specified in the Procurement Act or PPR for publication of decisions. A statutory requirement assists to provide additional reassurance of transparency in decision making.
Recommendation Publication of IRC decisions: Include clear provisions in the legal/regulatory framework clearly setting out the designated location of publication of IRC decisions and specifying timelines for publication.

Indicator 14. The country has ethics and anticorruption measures in place

Sub-indicator 14(a) Legal definition of prohibited practices, conflict of interest, and associated responsibilities, accountabilities, and penalties The legal/regulatory framework provides for the following:
Assessment criterion 14(a)(a): definitions of fraud, corruption and other prohibited practices in procurement, consistent with obligations deriving from legally binding international anti-corruption agreements.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis

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The public procurement legal framework does not include comprehensive definitions of fraud, corruption and other prohibited practices in procurement. Some definitions of prohibited practices are not consistent with obligations derived from the United Nations Convention against Corruption (UNCAC).

The Prevention of Corruption Act No.3 of 2006 (POCA), sets out in detail offences with regard to: contracts and tenders (inducement) (POCA s.2); corrupt transactions by or with public or private bodies (POCA s.23); cheating the public revenue (POCA s.24); conflicts of interest (POCA s.27).

The UNODC undertook two rounds of review on implementation of UNCAC, with reports published in 2016 and 2020. UNODC Country Report 2016 on Implementation of Articles 15-42 of Chapter III UNCAC⁶⁰ ⁶¹analyses relevant provisions defining fraud, corruption and other prohibited practices. That report found that whilst the offence of corruption was criminalized under the POCA, POCA “does not define the offence of corruption but rather criminalizes and punishes corrupt practices” with the criminalized acts being bribery, money laundering, conflict of interest and cheating of the public revenue.⁶² The UNODC Country Report 2016 identified internal discrepancies as to how bribery offences are covered in POCA and it recommended harmonization in the legislation. It made further recommendations to ensure alignment of national legislation with UNCAC. According to the Anti-Corruption Commission, no implementing technical committee has been established to address these discrepancies. A draft Bill was prepared some years ago to address issues raised in this UNODC report, but it has not been passed into law and the issues identified remain unresolved.

Gap analysis

Legal definitions of prohibited practices: Legal definitions of prohibited practices are not fully aligned with obligations derived from UNCAC. The draft Bill prepared to address issues raised in UNODC report has not been passed into law and identified issues, including those related to definitions, remain unresolved.

This Gap is assigned a Red flag because failure to align with international obligations jeopardises the overall effectiveness of the anti-corruption framework including its application to public procurement. In addition, required changes to anti-corruption legislation do not lie solely within the procurement sphere.

Recommendations

Combined Recommendations

The Government of Eswatini to coordinate review and implementation of revised or new anti-corruption legislation to align with obligations deriving from UNCAC and other relevant legally binding international anti-corruption agreements. As part of this process there must be co-operation between all relevant institutions, including the anti-corruption authorities, ESPRA and Ministry of Finance, to ensure alignment between revised or new anti-corruption legislation and the public procurement legal and regulatory framework.

The government-led review and implementation of revised or new anti-corruption legislation should include consideration and introduction of a system for collection and publication of comprehensive evidence of the application of effective sanctions, enforcement and penalties applied in each case. This should include information specifically relating to public procurement related cases and, in that context, should draw together different sources including, but not limited to, information relating to debarment currently published by ESPRA and Register of Tender Defaulters, when operational.

Assessment criterion 14(a)(b):

definitions of the individual responsibilities, accountability and penalties for government employees and private firms or individuals found guilty of fraud, corruption or other prohibited practices in procurement, without prejudice of other provisions in the criminal law.

⁶⁰ Executive summary: UNODC Country Review Report of the Kingdom of Swaziland, 2016, CAC/COSP/IRG/I/4/1/Add.38

⁶¹ Full report:

https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2016_04_12_Swaziland_Final_Country_Report.pdf

⁶² UNODC Country Review Report of the Kingdom of Swaziland, 2016, para.15.

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Conclusion: No gap
Red flag: No
<p>Qualitative analysis</p> <p>The legal framework includes provisions in POCA, PFMA and the Procurement Act, covering individual responsibilities, accountability and penalties for fraud, corruption and other prohibited practices in procurement.</p> <p>In addition to the general offence of bribery, POCA defines in detail a number of offences of direct relevance to public procurement and accountability for those offences, in particular to; contracts and tenders (inducement) (POCA s.22); corrupt transactions by of with public or private bodies (POCA s.23); cheating the public revenue (POCA s.24), POCA also defines the penalties for both government employees, private firms (liability of legal persons is also recognized in the Eswatini legal system) and individuals found guilty.</p> <p>PFMA s.108 provides that a public office holder, public office or other persons with responsibility for Government resources commits a criminal offence if they engage in an activity stipulated under the PFMA which include corrupt acts and financial misconduct.</p> <p>The Procurement Act s.62 provides that a person commits an offence where the person “connives or colludes to commit a corrupt, fraudulent, collusive or coercive practice.” As well as using their position dishonestly, or recklessly, to directly or indirectly to gain advantage.</p>
Gap analysis
Recommendations
<p>Assessment criterion 14(a)(c):</p> <p>definitions and provisions concerning conflict of interest, including a cooling-off period for former public officials.</p>
Conclusion: Substantive gap
Red flag: Yes
<p>Qualitative analysis</p> <p>The legal framework contains definitions and provisions concerning conflicts of interest including requirements for disclosure of interests by public officers, members of a Tender board and evaluation committees as well as politicians who have responsibility for procurement. However, the framework is fragmented and there is a lack of comprehensive regulatory framework covering declaration and management conflicts of interest. The detailed provisions on the Leadership Code of Conduct mandated by the Constitution are still not in place.</p> <p>There are no specific provisions covering requirements for a cooling-off period for former public officials.</p> <p>POCA includes definitions of and provisions concerning conflicts interest, both direct and indirect (POCA s.27).</p> <p>The Procurement Act defines “conflict of interest” as “circumstances in which the personal interest of an officer, or of a close relative or close associate of an officer, might benefit, directly or indirectly, from their official actions”. “close relative” is also a defined term. The Procurement Act s.30 Disclosure of Interest, requires members of a Tender Board to disclose personal interests (direct and indirect) and not be present at or participate in deliberations or decision making in relation to the agenda items to which the interest relates. There is also a requirement on all public officers and politicians who have responsibility for procurement to at all times avoid actual and apparent conflicts of interest (Procurement Act s.60). It also provides that public officers and politicians shall not participate as tenderers in public procurement.</p> <p>PPR R.59 provides that disclosure of interest is also applicable to members of the Evaluation Committee. The Procurement Act s.59 provides that the ESPPRA may promulgate codes of conduct to guide behaviour of public officers, politicians, tenderers and suppliers involved in public procurement.</p>

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Public Service Act 2018 (PSA) s.15 introduced an obligation for public officials to declare conflicts of interest, although this term is not defined in that Act. PSA also contains a “Public Officer’s Code of Conduct” and Public Service Charter. The Public Service Charter contains a definition of “corruption” and includes provisions on conflict of interest situations and acceptance of gifts, favours, honours etc.

Leadership Code of Conduct: Chapter XVI of the Constitution establishes the Leadership Code of Conduct (s.239) with provisions on avoidance of conflict of interest at s.240 and declaration of assets and liabilities, by reference to holders of offices (high ranking officials) defined in s.241(2). According to the Constitution, failure to comply with the Leadership Code of Conduct may lead to dismissal, removal and disqualification from holding any public office either generally or for a specified period in addition to other penalties as may be prescribed. In practice, however, the Leadership Code of Conduct Bill, implementing detailed provisions, has not been passed into law.

The UNODC Country Review Report 2020⁶³ noted in its observations on provisions in the PSA and the failure to implement the Leadership Code of Conduct that “the lack of a comprehensive regulatory framework to declare and manage conflicts of interest hinders Eswatini’s ability to effectively implement interest disclosure requirements”.

Gap analysis

Conflicts of interest and cooling off-period: The framework is fragmented and there is a lack of comprehensive regulatory framework covering declaration and management conflicts of interest. The detailed provisions on the Leadership Code of Conduct mandated by the Constitution are still not in place. There are no specific provisions covering requirements for a cooling-off period for former public officials.

This Gap is assigned a Red flag because a fragmented and incomplete framework addressing conflicts of interest undermines the principle of transparency. In addition, required changes to anti-corruption legislation and implementation of the Leadership Code of Conduct require actions outside the procurement sphere.

Recommendations

Conflicts of interest and cooling off-period: Implement recommendations of UNODC and ensure alignment between revised provisions in POCA/anti-corruption framework and the procurement legal/regulatory framework. Include specific provisions covering appropriate requirements for a reasonable cooling off period for former public officials.

Sub-indicator 14(b)

Provisions on prohibited practices in procurement documents

Assessment criterion 14(b)(a):

The legal/regulatory framework specifies this mandatory requirement and gives precise instructions on how to incorporate the matter in procurement and contract documents.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

The Procurement Act and PPR do not specifically mandate inclusion of provisions on prohibited practices in procurement and contract documents. The legal/regulatory framework does not compel procuring entities to include references on all of the following in procurement and contract documents: fraud, corruption and other prohibited practices, conflict of interest and unethical behaviour.

There is no single set of procurement documents mandated for use by all procuring entities (ministries, local government and Category A parastatals) and no comprehensive manual for procurement, where explanations and precise instructions could be included to guide procuring entities (See full analysis and recommendation on model procurement documents at 2(b)).

⁶³ Full country report:

https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_02_19_Eswatini_Final_Country_Report.pdf

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Gap analysis

Mandated use of specified provisions: The legal/regulatory framework does not mandate use of specified provisions on prohibited practices in procurement documents and there is no standard set of provisions or instructions on use, applicable to all procuring entities. This potentially reduces the perceived importance of inclusion of these provisions and means that practices are likely to be inconsistent.

Recommendations

Combined recommendations for 14(b)(a) and 14(b)(b)

Mandated use of specified provisions and incorporation in procurement documents: Implement recommendations of UNODC and ensure alignment between revised provisions in POCA/anti-corruption framework and the procurement legal/regulatory framework. Include specific provisions covering appropriate requirements for a reasonable cooling off period for former public officials. To stress the importance of addressing the issue of prohibited practices in procurement documents, include provisions in the legal/regulatory framework requiring incorporation of specified definitions and provisions on prohibited practices in procurement and contract documents. In order to ensure consistency, mandate use of the same set of standard documents by all procuring entities (ministries, local government and Category A parastatals) which include relevant standard provisions on procurement prohibited practices, together with clear instructions and guidance.

Assessment criterion 14(b)(b):

Procurement and contract documents include provisions on fraud, corruption and other prohibited practices, as specified in the legal/regulatory framework.

Conclusion: **Substantive gap**

Red flag: No

Qualitative analysis

Procuring entities use a range of different procurement and contract documents and there is a lack of consistency in provisions on fraud, corruption and other prohibited practices.

The MoF standard ITT for open and limited bidding, issued by the Ministry of Finance and used by Ministries, includes provisions on fraud, corruption and other prohibited practices in Instructions to Tenderers and a Declaration of Eligibility. Sampled documents issued by Category A parastatals and downloaded from ESPRA website include declarations of eligibility but do not always include relevant provisions in Instructions to Tenderers. Definitions of prohibited practices, where used, are not consistent.

It is important to ensure consistency of approach to facilitate a coherent understanding and application of the legal and regulatory framework for all users. This includes the use of model bidding/contract documents and standard provisions covering fraud, corruption and other prohibited practices. with clear instructions and guidance on their use.

Gap analysis

Prohibited practices in procurement documents: Procurement and contract documents do not always include provisions on fraud, corruption and other prohibited practices and relevant provisions, when used, are not consistent.

Recommendations

See combined recommendations at 14(b)(a).

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Sub-indicator 14(c) Effective sanctions and enforcement systems
Assessment criterion 14(c)(a): Procuring entities are required to report allegations of fraud, corruption and other prohibited practices to law enforcement authorities, and there is a clear procedure in place for doing this.
Conclusion: No gap
Red flag: No
Qualitative analysis Procuring entities are required to report allegations, to the Anti-Corruption Commission (ACC) or the Royal Eswatini Police Service (REPS) and there are clear reporting routes available. POCA does not specify a duty to report but this requirement is implied by reference to the offence of failure to report under the heading “Duty to report corrupt instructions”. In theory, other institutional stakeholders may also refer reports flagging concerns about alleged corruption direct to ACC. In practice, however, this reporting route is rarely used. ⁶⁴ POCA s.49 Duty to report corrupt transactions, does not specify an active duty to report but instead defines the offence of failure to report corrupt transactions or suspicion of such transactions. POCA s.49 provides, in summary, that a person who holds a position of authority (which is defined and includes principal secretary of Government Ministry, head of department or equivalent officer, chief executive officer/town clerk of a municipality or head or chief executive of any agency) and who fails to report to the relevant authorities knowledge or suspicion of an offence under Part III (including bribery, corruption, cheating of public revenue and money laundering offences) will, on conviction, be liable to a fine or imprisonment. The relevant authorities to whom a report must be made are the Anti-Corruption Commission (ACC) or the Royal Eswatini Police Service (REPS). ⁶⁵ This drafting could be improved to introduce an active duty to report. Both the ACC and REPS provide means for the public (which may include staff of procuring entities) to report allegations, including anonymously. See analysis at 14(f).
Gap analysis
Recommendations
Assessment criterion 14(c)(b): There is evidence that this system is systematically applied and reports are consistently followed up by law enforcement authorities.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis The data available is insufficient to provide evidence of systematic application of an effective sanctions and enforcement system relating specifically to public procurement.

⁶⁴ Information provided to MAPS Assessment Team in discussion with ACC, August 2023.

⁶⁵ Eswatini Revenue Authority also offers reporting methods by email, telephone and in person.

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The Royal Eswatini Police Service regularly refers alleged fraud & corruption offences to the Director of Public Prosecutions (DPP) and all cases heard by the courts resulted in convictions.⁶⁶ The Anti-Corruption Commission has a large number of cases brought forward and limited capacity to investigate. In the last financial year, no fraud & corruption cases referred by the ACC were finalized in court.⁶⁷ The MAPS Assessment Team understands from general discussions with a number of stakeholders that some courts cases can take years to conclude.

The Anti-Corruption Commission receives complaints on a wide range of issues including cheating public revenue, bribery, conflict of interest, general offence of corruption, corrupt activities relating to politicians and money laundering. Breakdown of data investigations and prosecutions specifically related to public procurement is not available.

The last Annual Report published by the Anti-Corruption Commission and available from its website dates from 2016/2017. The Anti-Corruption Commission confirmed in discussions with the MAPS Assessment team that their systems cannot capture data at the level of detail requested by the MAPS Assessment Team.

Summary data is shown below for the most recent full financial year:

Anti-Corruption Commission Financial year 2022-2023	
Enquiry File Dockets Brought forward cases	251
Criminal Dockets pending Investigation	11
Number of Dockets pending in Courts	34
Number of Criminal Dockets awaiting issuance of warrants	5
Number of Criminal Dockets waiting DPP directives	5
Number of Criminal Dockets finalised in Court	0

Data source: Anti-Corruption Commission, November 2023⁶⁸

The Royal Eswatini Police Service investigates allegations of fraud and corruption. Breakdown of data investigations and prosecutions specifically related to public procurement is not available.

Data on reports, complaints, prosecutions and convictions for fraud and corruption related offences are set out below.

Royal Eswatini Police Services Number of fraud & corruption reports/complaints, investigation and outcomes					
	FY 2018/19	FY 2019/20	FY 2020/21	FY 2021/22	FY 2022/23
Number of reports/complaints received	98	95	101	91	82
Number of reports/complaints investigated	98	95	101	91	82
Number of complaints referred to other agencies	Nil	Nil	Nil	Nil	Nil
Number of reports/complaints referred to Director of Public Prosecutions	53	61	42	45	39
Number of cases pending in the court system	23	36	22	28	25
Cases completed in the court	30	25	20	17	14
• Number of acquittals					
• Number of convictions	30	25	20	17	14

Data source: Royal Eswatini Police Service, November 2023.

⁶⁶ Information provided to MAPS Assessment Team in discussion with REPS, August 2023.

⁶⁷ Information provided to MAPS Assessment Team in discussion with ACC, August 2023.

⁶⁸ Data requested for last 5 full financial years. Data received relates to 2022-2023 only.

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Gap analysis

Evidence of systematic application of an effective sanctions and enforcement system: There is no comprehensive source of evidence of systematic application of an effective sanctions and enforcement system relating to public procurement.

This Gap is assigned a Red flag because lack of evidence of systematic application of effective sanctions and enforcement of anti-corruption measures substantially undermines public confidence in the procurement system as a whole and limits opportunities to use data to identify areas for improvement to increase effectiveness of procurement outcomes. In addition, responsibility for putting in place a system for gathering relevant evidence and collection, analysis and publication of that information requires broad inter-institutional cooperation and should be part of the wider anti-corruption framework review and implementation activities.

Recommendations

Evidence of systematic application of an effective sanctions and enforcement system: The government-led review and implementation of revised or new anti-corruption legislation (see 14(a)(a)) should include consideration and introduction of a system for collection and publication of comprehensive evidence of the application of effective sanctions, enforcement and penalties applied in each case. This should include information specifically relating to public procurement related cases and, in that context, should draw together different sources including, but not limited to, information relating to debarment currently published by ESPPRA and Register of Tender Defaulters, when operational.

Assessment criterion 14(c)(c):

There is a system for suspension/debarment that ensures due process and is consistently applied.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The Procurement Act provides for a process of administrative debarment, including on grounds of corrupt or fraudulent practices. Debarred tenderers are listed on the Register of suspended tenderers maintained by ESPPRA. There is one supplier listed on that Register. POCA provides for the establishment and operation of a Register for Tender Defaulters, with listed defaulters automatically suspended from participation. The Register for Tender Defaulters is not in operation.

Administrative debarment (suspension by the ESPPRA)

The Procurement Act s11 Powers of the Agency, give authority to the ESPPRA to suspend bidders and suppliers from participation, in accordance with the Procurement Act s.55. The Procurement Act ss.55 and 56 set out the process and grounds for suspension. The grounds for suspension include corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of underpricing of tenders and breach of confidentiality; conviction of a criminal offence relating to obtaining or attempting to obtain a contract or subcontract, and; conviction of a crime related to business or professional activities. There is a register of suspended tenderers (suppliers) maintained by ESPPRA and published on the ESPPRA website. There is only one supplier listed on the Register published on the ESPPRA website.⁶⁹ (See full analysis at 1(d)(c))

Register for Tender Defaulters (POCA Part IV): In theory, suspension from participation in procurement is automatic where the tenderer, supplier or person is listed on the Register for Tender Defaulters, maintained by the Accountant-General, following a court conviction for an offence under POCA s.22 Offences with regard to contracts and tenders. The Register for Tender Defaulters is not, however, in operation.

⁶⁹ ESPPRA website, Register of Suspended Suppliers, accessed 02 November 2023.

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Gap analysis

Administrative debarment & Register for Tender Defaulters: There is a system for administrative debarment with due process, but it is not possible to assess the consistency of application, with only one supplier currently listed and very few cases. The Register for Tender Defaulters, which is the responsibility of the Accountant General, is not operational, thus hindering the operation of a more robust system for suspension/debarment in the public procurement context.

This Gap is assigned a Red flag because lack of the Register of Tender Defaulters reduces transparency and accountability. In addition, responsibility for establishment and operation of the Register of Defaulters does not fall within the functions of the ESPPRA and requires wider inter-institutional cooperation.

Recommendations

Administrative debarment & Register for Tender Defaulters: The Register of Tender Defaulters should be established and operated in accordance with statutory requirements. The Register of Tender defaulters should be made publicly available on-line and be linked to/accessible from ESPPRA and MoF tender pages, and e-GP when established.

Assessment criterion 14(c)(d):

There is evidence that the laws on fraud, corruption and other prohibited practices are being enforced in the country by application of stated penalties.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The evidence that laws on fraud, corruption and other prohibited practices are being enforced is poor and it is not possible to conclude that there is effective enforcement.

See qualitative analysis and data at 14(c)(b).

Data on convictions for public procurement related offences is not available from the Anti-Corruption Commission. The Register of Tender Defaulters, which should list suppliers suspended from participation in public procurement following conviction, is not operational.

There is a strong perception that some kind of gift is necessary to secure a public sector contract.

There is one supplier on ESPPRA's list of debarred suppliers.

Data on convictions for public procurement related offences is not available from the Anti-Corruption Commission.

Quantitative analysis

* Recommended quantitative indicator to substantiate assessment of sub-indicator 14(c) Assessment criterion (d):

- Firms/individuals found guilty of fraud and corruption in procurement: number of firms/individuals prosecuted/convicted; prohibited from participation in future procurements (suspended/debarred).

Source: Normative/regulatory function/anti-corruption body.

There is no data available on number of firms/individuals found guilty of fraud and corruption in procurement.

- Government officials found guilty of fraud and corruption in public procurement: number of officials prosecuted/convicted.

Source: Normative/regulatory function/anti-corruption body.

There is no data available.

- Gifts to secure public contracts: number of firms admitting to unethical practices, including making gifts in (in %).

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Source: Survey.

Note: 50% of the survey respondents were of the opinion that some kind of gift is necessary to secure a public sector contract. According to the World Bank Eswatini Systematic Country Diagnostic (2020),⁷⁰ “a significant proportion of private firms expect to give a bribe to secure a government contract”.

Gap Analysis

Evidence of enforcement: There is evidence of prosecution of fraud and corruption cases, but no public procurement specific data is available to provide a detailed quantitative analysis. The number of debarments by ESPPRA is limited and the Register of Tender Defaulters provided for in POCA is not operational (see 14(c)(c)).

This Gap is assigned a Red flag because lack of evidence of enforcement and application of penalties undermines public confidence in the procurement system as a whole and limits opportunities to use data to identify areas for improvement to increase effectiveness of procurement outcomes. In addition, responsibility for collection and publication of data providing evidence of enforcement and application of stated penalties for contravention of laws on fraud, corruption and other prohibited practices requires broad inter-institutional cooperation. This lies beyond solely the procurement sphere, being part of the wider government-led anti-corruption framework review and implementation activities. (See 14(a)(a)).

Recommendations

See combined recommendations for 14(c), (b) & (c).

Sub-indicator 14(d) Anti-corruption framework and integrity training

Assessment criterion 14(d)(a):

The country has in place a comprehensive anti-corruption framework to prevent, detect and penalise corruption in government that involves the appropriate agencies of government with a level of responsibility and capacity to enable its responsibilities to be carried out.*

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The anti-corruption framework is not comprehensive, there is no national oversight board to oversee implementation of strategies or plans and the National Anti-Corruption Strategy is only partially implemented. There is no monitoring or evaluation capacity in place to enforce the existing framework and effective inter-institutional cooperation is lacking. In practice, the Anti-Corruption Commission is not fully independent of government and is inadequately staffed to fulfil its mandates.

UNODC Report 2020 observes, in summary, as follows: Eswatini adopted a National Anti-Corruption Strategy (NACS) in 2007, developed a National Anti-Corruption Action Plan (NAP) for implementation of NACS and prepared a *draft* National Anti-Corruption Policy.⁷¹ A National Anti-Corruption Forum was constituted in 2007 to facilitate implementation of NACS and NAP, with members drawn from public and private sectors, civil society and the media. The NACS has been implemented only in part and National Anti-Corruption Forum has been inactive for several years. Reasons for partial implementation are identified as “lack of enabling policy, an effective oversight, coordination, monitoring and evaluation mechanism and dedicated resources...” UNODC also notes “Although Eswatini has a Law Reform Commission under the AGO, it does not have sufficient measures in place to systematically evaluate the adequacy of legal instruments and administrative measures in preventing and fighting

⁷⁰<https://openknowledge.worldbank.org/server/api/core/bitstreams/1836ef1a-154f-5593-b339-b54194126062/content>

⁷¹ National Anti-Corruption Policy, Kingdom of Swaziland, August 2012. Copy provided to MAPS Assessment Team by Anti-Corruption Commission, October 2023.

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corruption.” On 12 February 2024, the Prime Minister launched an Anti-Corruption Task Team, reporting to the Prime Minister and comprising the Director of Public Prosecutions, National Commissioner of Police and the Commissioner of the Anti-Corruption Commission.

According to the World Bank Eswatini Systemic Country Diagnostic (2020),⁷² cited in Eswatini’s current National Development Plan 2023/24-2027/2028 (NDP), “corruption has worsened in the past decade and is the single biggest challenge in doing business in Eswatini as a number of managers cited it as a frequent occurrence in their route operations”. The NDP goes on to observe (p.45): “The root of corruption in the country emanates from three facets mainly conflicting legal frameworks, weak institutional framework as well as a departure from the social construct as a majority people have normalised corruption and have high tolerance for it... Corruption on the procurement of goods and services is observed through the use of the same suppliers, inflated prices and sub-standard products... Corruption on public investment programme perspective, is observed through political interference in selecting capital projects without any feasibility studies and cost benefit analysis for funding. Progresses further into implementation where most of the public project bids are won by a single entity, projects scope of works are changed and costs escalations are experienced.”

The Anti-Corruption Commission is established pursuant to POCA, with the Commissioner and Deputy Commissioners appointed by the King on the advice of the Judicial Service Commission. A member of the Anti-Corruption Commission may be removed by the King on the grounds of inability to perform the functions of the office. The Anti-Corruption Commission receives funding from the Government, with an average annual budget over the last few years of Emalangeni 27 million. The Anti-Corruption Commission has two departments: Operations Department, which deals with Investigation, Prevention and Education; Administration Department. The Anti-Corruption Commission relies on the Minister of Public Services for staff appointments and has been affected by the government-wide freeze on recruitment announced in 2018 (Circular No.3 of 2018). In November 2023, there are 26 vacancies out of a total allocated staff complement of 41, with, for example, six vacancies for Senior Anti-Corruption Officers. The Anti-Corruption Commission is inadequately staffed to fulfil its mandates of Investigation, Prevention and Education. Freedom House reports⁷³ that the Anti-Corruption Commission is perceived to be ineffective, and this observation was also made to the MAPS Assessment team in direct discussions with a number of stakeholders.

There are examples of active cooperation between institutional stakeholders, such as referrals by REPS to the Auditor General, and a Memorandum of Understanding between ACC and REPS. There is no Memorandum of Understanding between the ACC and ESPPRA. Work is currently underway to develop and implement a Combined Assurance Framework, “effectively coordinating management, internal and external assurance providers, increasing collaboration and developing a more holistic view of government’s risks.”⁷⁴

On 12 February 2024, the Prime Minister launched an Anti-Corruption Task Team, reporting to the Prime Minister and comprising the Director of Public Prosecutions, National Commissioner of Police and the Commissioner of the Anti-Corruption Commission. According to the Prime Minister’s statement, “the task team will be responsible for investigating corruption allegations, prosecuting cases, implementing preventive measures, and strengthening legal frameworks to address corruption effectively. The team will immediately deal with corruption cases that have been reported and ensure that the offenders brought to book with immediate effect... Cases must be dealt with to finality and not be dropped mid process. The DPP is expected to prioritise corruption cases henceforth.”⁷⁵

⁷²World Bank Eswatini Systemic Country Diagnostic (2020).

<https://openknowledge.worldbank.org/server/api/core/bitstreams/1836ef1a-154f-5593-b339-b54194126062/content>

⁷³ <https://freedomhouse.org/country/eswatini/freedom-world/2023>

⁷⁴Definition of Combined Assurance in Combined Assurance Framework (Draft), Internal Audit Office, 2023.

⁷⁵ MAPS Assessment Team also noted reference to an Inter-Agency Task Force Against Corruption being re-established in 2019. <https://www.gov.sz/index.php/latest-news/204-latest-news/2364-editors-forum>

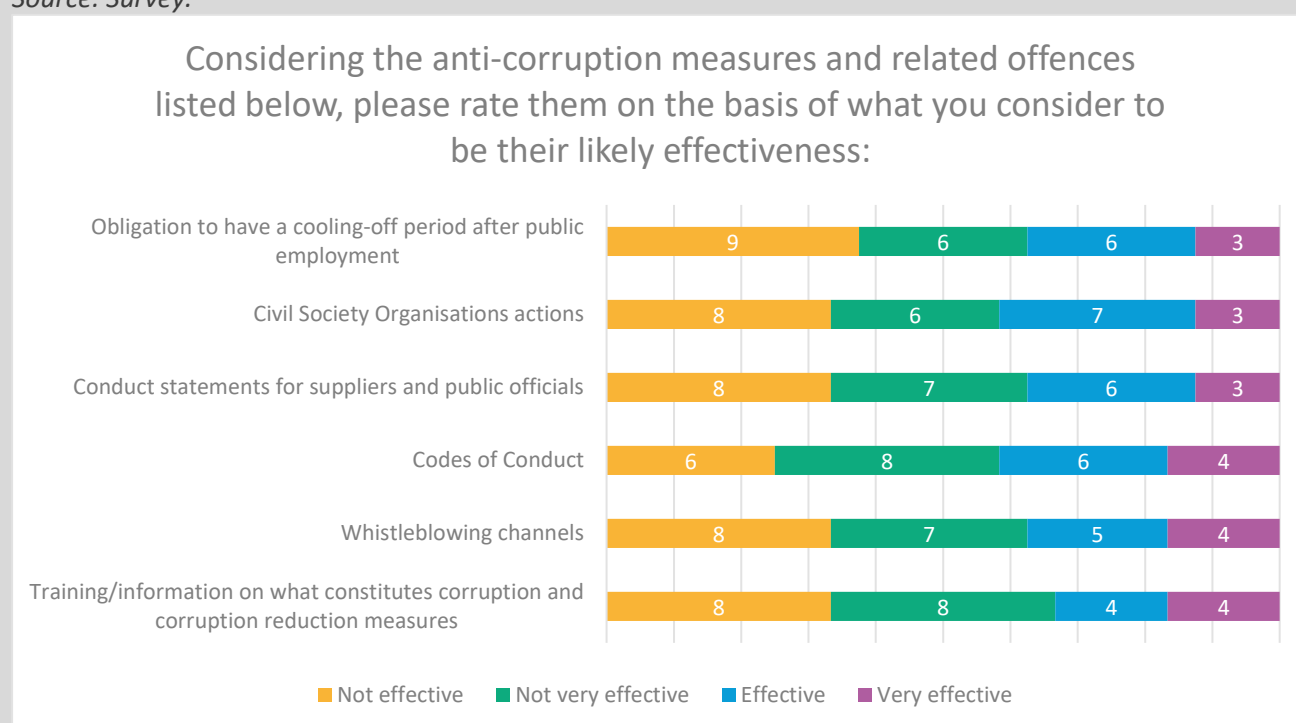
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In the 2023 Transparency International Corruption Perceptions Index, Eswatini has a CPI Score of 30/100 (the same as in 2022) and Ranks 130/180. There has been a continued decline in the CPI score since 2017 when it stood at 39. There is no Transparency International National Chapter in Eswatini. Eswatini scored 0/4 in the Freedom House index “Freedom in the World 2023” in response to the question “Are safeguards against official corruption strong and effective?”, noting that “Corruption is a major problem, and implicated officials generally enjoy impunity. Freedom House reports that Anti-Corruption Commission is perceived to be ineffective, and this observation was also made to the MAPS Assessment team in direct discussions with a number of stakeholders.”⁷⁶

Quantitative analysis

**Recommended quantitative indicator to substantiate assessment of sub-indicator 14(d) Assessment criterion (a): - percentage of favourable opinions by the public on the effectiveness of anti-corruption measures (in % of responses).*

Source: Survey.



Gap analysis

Anti-corruption framework: The anti-corruption framework is disjointed and incomplete, thus significantly reducing the likelihood of prevention and/or detection of fraud and corruption specifically associated with public procurement.

This Gap is assigned a Red flag because a poorly functioning anti-corruption framework undermines public confidence in the procurement system as a whole. Creation of a well-functioning, joined up and comprehensive anti-corruption framework is a whole system issue. It requires a combination of legislative action and institutional review with full governmental support, and cooperation between a number of ministries and institutions.

Recommendations

Combined recommendation for sub-indicator 14(d), (a) (b) (c) & (d)

Anti-corruption framework, mechanisms for identifying, preventing & mitigating corruption in procurement and statistics: The anti-corruption framework requires thorough review and updating at legislative, regulatory,

⁷⁶ <https://freedomhouse.org/country/eswatini/freedom-world/2023>

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institutional and implementation level to create a coherent and effective framework. Provisions and measures specific to public procurement should be considered and implemented as part of this process including a reliable and fully resourced mechanism for identification and mitigation of public procurement related corruption risks by procuring entities and stakeholder institutions. Review and updating the anti-corruption framework, with particular reference to public procurement, requires an holistic approach and so should also involve measures to: raise public awareness of procurement related risks; improve reporting lines to include on-line reporting; protection of whistleblowers; regular annual publication of corruption related statistics and procurement statistics; enhanced engagement of civil society, and; use of modern technology such as a comprehensive end-to-end e-GP system.

Assessment criterion 14(d)(b):

As part of the anti-corruption framework, a mechanism is in place and is used for systematically identifying corruption risks and for mitigating these risks in the public procurement cycle.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

There is currently no mechanism in place for systematically identifying and mitigating corruption risks in the public procurement cycle.

The MAPS Assessment team obtained confirmation in direct discussions with relevant stakeholders that no such mechanism is in place.

According to the UNODC Country Review Report 2020 "Several institutions, including ACC, publish statistics and annual activity reports; however, none of those reports covers corruption risks. ACC has begun conducting corruption risk assessments of private and public entities, none of which have been finalized."

Work is currently (2023) underway to develop and implement a Combined Assurance Framework and part of that framework is aimed at developing a comprehensive tool for corruption risk assessments. (See analysis at 14(d)(a).

Gap analysis

Mechanism for systematically identifying and mitigating corruption risks in public procurement: There is no mechanism in place for systematically identifying and mitigating corruption risks in the public procurement cycle. This Gap is assigned a Red flag because it significantly impedes achieving the objectives sought by public procurement, including transparency and accountability. In addition, the creation of a mechanism for the systematic identification and mitigation of corruption risks requires cooperation between a number of ministries and institutions.

Recommendations

See combined recommendations at 14(d)(a).

Assessment criterion 14(d)(c):

As part of the anti-corruption framework, statistics on corruption-related legal proceedings and convictions are compiled and reports are published annually.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

Comprehensive statistics on corruption-related legal proceedings and convictions are not compiled and published annually.

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ACC has not published annual reports on its website since 2016/2017. The last Annual Report published by ACC and available publicly dates from 2016/17. The 2017/2018 Report is listed on the ACC website Annual Report Page but cannot be accessed using the link provided.⁷⁷ The MAPS Assessment Team understands that there can be several years delay in corruption cases being heard and decided by the courts.⁷⁸ Confidence of the general public in the rule of law is low.⁷⁹

Gap analysis

Statistics on corruption-related legal proceedings and convictions: Comprehensive statistics on corruption-related legal proceedings and convictions are not compiled and published annually.

This Gap is assigned a Red flag because it significantly impedes achieving the objectives sought by public procurement, including transparency and accountability. Lack of publicly available statistics on corruption-related legal proceedings and convictions also undermines public confidence in the procurement system as a whole. In addition, responsibility for collection and dissemination of data relating to corruption does not lie with ESPRA and cannot be immediately mitigated through actions in the procurement sphere.

Recommendations

See combined recommendations at 14(d)(a).

Assessment criterion 14(d)(d):

Special measures are in place for the detection and prevention of corruption associated with procurement.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis.

The office of the Auditor General undertakes both performance and compliance audit reports and has flagged control weaknesses and non-compliance issues associated with public procurement (see analysis at indicator 12(a)). The Parliamentary Public Accounts Committee (PAC), has duties relating to consideration, examination or reporting on government accounts and matters relating to public finance. Royal Eswatini Police Service may investigate corruption related allegations raised by the PAC, working directly with the Attorney General and may also refer matters to the Auditor General for investigation. REPS and the Anti-Corruption Commission both seek to raise general public awareness through various media but there is no comprehensive, multi-disciplinary approach to raising public awareness and education on detection and prevention of corruption specifically related to procurement. There are no civil society organisations dedicated to monitoring of public procurement to protect the public interest. There is currently no end-to-end e-GP system in place which could play a part in a comprehensive anti-corruption strategy and there is no consolidated annual reporting of public procurement activities by all procuring entities.

Gap analysis

Measures are in place for the detection and prevention of corruption associated with procurement: There are limited and disjointed measures in place for detection and prevention of corruption associated with procurement. This Gap is assigned a Red flag because it significantly impedes achieving the objectives sought by public procurement, in particular ensuring effective conduct of procurement processes, with value for money outcomes. In addition, putting into place comprehensive measures for detection and corruption associated with procurement

⁷⁷ ACC website, accessed 20 June 2023

<http://acc.gov.sz/resources/reports.html#>

⁷⁸ Information from discussions between MAPS Assessment team, ACC and REPS, August 2023.

⁷⁹ Afrobarometer Round 9 Summary survey results for Eswatini, 2023 Q.28-Q33G.

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requires cooperation between a number of ministries and institutions, as well as involvement of control organisations, legal oversight bodies and civil society.

Recommendations

See combined recommendations at 14(d)(a).

Assessment criterion 14(d)(e):

Special integrity training programmes are offered and the procurement workforce regularly participates in this training.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Ethics and anti-corruption issues are included in general training for civil servants and procuring entities but there are no special integrity training programmes for the procurement workforce.

The Anti-Corruption Commission (ACC) has limited resources to fulfil its prevention and education mandate, with vacancies in the Prevention and Education Department. It does, however, deliver a 2 hour session on procurement issues as part of the standard training programme for all civil servants which incorporates information on PFMA, the Procurement Act, Public Service Act 2018 and Code of Conduct for Public Officials.⁸⁰ The ESPPRA delivers training to procuring entities which covers ethical practices in public procurement and the ESPPRA has, in the past, participated in training delivered by the Anti-Corruption Commission. There is no formal Memorandum of Understanding between ACC and ESPPRA.

Gap analysis

Integrity training for the procurement workforce: Ethics and integrity training is included as part of more general training for officials but there are no special procurement focused integrity training programmes offered.

This Gap is assigned a Red flag because lack of focused ethics and integrity training hinders reduction of non-ethical behaviours in procurement with consequent negative impact on public trust in the overall system, including poor public participation, resulting in poor procurement outcomes. In addition, putting in place special procurement focused integrity training programmes and ensuring regular participation by the procurement workforce requires cooperation and, potentially sharing of resources, between a number of ministries and institutions as well as procuring entities.

Recommendations

Combined Recommendations for 14(d)(e) and 14(g)(d)

Integrity training for the procurement workforce: Special ethics and integrity training programmes or dedicated slots in regular training programmes for staff involved in procurement, should be prepared and delivered. In order to ensure consistency at national level, this should be designed for and attended by all officials involved in procurement in central government, local government and Category A parastatals. This needs to be a coordinated effort involving procuring entities, ESPPRA, Anti-Corruption Agency and other relevant institutions engaged in implementing the anti-corruption framework. This training should be mandatory and be delivered on a regular basis to procurement officials and staff of procuring entities whose work includes public procurement, in order to strengthen awareness and clarify responsibilities and reporting channels.

Ideally the programme should be developed and delivered by a multi-disciplinary team drawing on expertise from all relevant institutional stakeholders and also involving the wider stakeholder community including CSOs and the business sector to lend their perspectives.

⁸⁰ Information provided to MAPS Assessment Team in discussion with ACC, August 2023.

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Sub-indicator 14(e) Stakeholder support to strengthen integrity in procurement
Assessment criterion 14(e)(a): There are strong and credible civil society organisations that exercise social audit and control.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis <p>There is no civil society organisation which the MAPS Assessment Team could identify with a procurement focus within their agenda which is currently in a position to actively provide oversight and social control in public procurement. The national NGO representative organisation has interest in procurement related matters but lacks capacity and relevant knowledge to exercise social audit and control. Press freedom is limited.</p> <p>CANGO is the Co-ordinating Assembly of Non-Governmental Organisations (CANGO) which has over 70 member organisations. Its mission is to coordinate, advocate, strengthen capacity and empower NGOs to effectively deliver on their mandates. CANGO is an active CSO focusing on advocacy and it has a number of externally funded projects which link into public procurement issues, including: the Open Society Initiative for Southern Africa,⁸¹ which seeks to enhance and sustain active citizenship to processes of governance; implementation of the EU funded “Civil Society Platform for Inclusiveness,”⁸² and; conduct of the International Budget Partnership Open Budget Survey(OBS).⁸³</p> <p>There is no local office of Transparency International in Eswatini. The Reporters Without Borders (RSF) world press freedom index 2023 ranks Eswatini 111 out of 180 countries and notes that broadcast media are entirely controlled by government with the level of interference in news content being high and journalists facing risks to their safety.⁸⁴</p> <p>Afrobarometer Round 9 Summary survey results for Eswatini, 2023 (Afrobarometer Survey 2023):⁸⁵ The same survey asked participants the question “In this country, how free are you to say what you think?” 73.9% of the participants responded by saying that they were not at all free or not very free.</p> <p>The State of Press Freedom in Southern Africa 2022⁸⁶ report noted, in the Eswatini country report, that “citizens and journalists find it difficult to assert their rights to freedom of expression and this fear is largely driven by the constrictive legislative framework that governs the country.”</p> <p>The Afrobarometer Survey 2023 also asked participants for their views on the likelihood of getting information from government or other public institutions on three issues of particular relevance for public procurement. The percentage of participants who were of the view that they were not at all likely/not very likely to get the information was: 67.2% local school budget and how the funds have been used; 79.3% local government development plan and budget, and; 78.4% requesting to see a contract for a government-funded project or purchase.</p>
Gap analysis

⁸¹ <https://osisa.org/>

⁸² <https://cango.org.sz/civil-society-platform-for-inclusiveness/>

⁸³ <https://internationalbudget.org/open-budget-survey>

⁸⁴ <https://rsf.org/en/country/eswatini>

⁸⁵ <https://www.afrobarometer.org/wp-content/uploads/2023/11/Summary-of-results-Eswatini-R9-Afrobarometer-24nov23.pdf>

⁸⁶ Media Institute of Southern Africa <https://misa.org/blog/category/access-to-information/>

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Civil society organisations: There is no civil society organisation identified by the MAPS Assessment Team with a specific procurement focus within their agenda and which is currently in a position to actively provide comprehensive oversight and social control in public procurement.

This Gap is assigned a Red flag because the absence of active oversight and social control can significantly impede the creation and maintenance of a sound procurement environment. In addition, in order to mitigate this Gap, procurement focused civil society organisations may need to be created, or current activities of relevant CSOs enhanced, with relevant support provided. These measures lie beyond the public procurement sphere.

Recommendation

Combined recommendations for 14(e) (a), (b) & (c)

Civil society: Government should actively encourage and support strong and credible civil society organisations to exercise meaningful social audit and control in public procurement as an important element in creating and maintaining a sound environment. The introduction of e-GP, with the attendant increase in publicly available data provides a focused opportunity to develop and implement relevant measures, which can start before roll out of e-GP and continue as it is introduced and operated. Civil society should be engaged in discussions on the development and roll-out of e-GP as well as being involved in relevant training and other capacity building to enable them to monitor public procurement. Formal channels for ongoing regular engagement and feedback on public procurement by civil society should be promoted and actively supported by government and enhance quality of debate and assist in improving integrity in public procurement.

Assessment criterion 14(e)(b):

There is an enabling environment for civil society organisations to have a meaningful role as third-party monitors, including clear channels for engagement and feedback that are promoted by the government.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

The environment in Eswatini cannot be regarded as one which actively enables civil society organisations to have a meaningful role as third party monitors of public procurement. (See analysis at 14(e)(b).

CSOs are not involved in meaningful monitoring of public procurement activities either at local or national level. They lack relevant expertise and knowledge and, as highlighted in the analysis of 7(b) & 7(c) reliable consolidated data on procurement activities which would facilitate monitoring, is not available.

Eswatini scored 0/4 in the Freedom House index “Freedom in the World 2023”⁸⁷ in response to the question “Does the government operate with openness and transparency?” noting that “Eswatini lacks access-to-information laws, and there is no culture of proactive disclosure of government information. Public requests for information are largely ignored in practice, and the budgeting process lacks transparency.”

Gap analysis

Enabling environment for civil society: Eswatini does not have an environment that enable civil society organisations to have a meaningful role as third-party monitors.

This Gap is assigned a Red flag because the absence of active oversight and social control can significantly impede the creation and maintenance of a sound procurement environment.

Recommendation

See combined recommendations at 14(e)(a).

⁸⁷ <https://freedomhouse.org/country/eswatini/freedom-world/2023>

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Assessment criterion 14(e)(c): There is evidence that civil society contributes to shape and improve integrity of public procurement.*
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis The MAPS Assessment Team was unable to find evidence that civil society is currently in a position to shape and improve integrity in public procurement (see analysis at 14(e)(a)).
Quantitative analysis <i>* Recommended quantitative indicator to substantiate assessment of sub-indicator 14(e) Assessment criterion (c): - number of domestic civil society organisations (CSOs), including national offices of international CSOs) actively providing oversight and social control in public procurement. Source: Survey/interviews.</i> Data not available
Gap analysis Evidence is not available to conclude that civil society is currently in a position to shape and improve integrity in public procurement in a consistent or meaningful manner. This Gap is assigned a Red flag because the absence of active oversight and social control can significantly impede the creation and maintenance of a sound procurement environment.
Recommendation See combined recommendations at 14(e)(a).
Assessment criterion 14(e)(d): Suppliers and business associations actively support integrity and ethical behaviour in public procurement, e.g. through internal compliance measures.*
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis Business association has a general set of values to which their members subscribe supporting integrity and ethical behaviour, including accountability. The focus of activities is on advocacy and with limited resources there is no specific programme supporting, for example, introduction of internal compliance measures.
Quantitative analysis <i>* Recommended quantitative indicator to substantiate assessment of sub-indicator 14(e) Assessment criterion (d): - number of suppliers that have internal compliance measures in place (in %). Source: Supplier database.</i> There is no central supplier database and thus no available national level data to establish the number of suppliers who have internal compliance measures.

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Gap analysis

Business organisations: Business organisations do not have specific programmes to support increased integrity through, for example, development of internal compliance measures.

This Gap is assigned a Red flag because lack of measures to support increased integrity impedes overall transparency and confidence in the procurement system and it requires action outside the procurement sphere with inter-institutional cooperation between, as a minimum, ESPPRA, anti-corruption institutions and business representative organisations.

Recommendation

Business organisations: Encourage and support supply side measures to increase focus on integrity in public procurement for example by regular and active participation in business led education and training events in a joined-up manner, involving both procurement and anti-corruption focused stakeholder institutions.

Sub-indicator 14(f)

Secure mechanism for reporting prohibited practices or unethical behaviour

Assessment criterion 14(f)(a):

There are secure, accessible and confidential channels for reporting cases of fraud, corruption or other prohibited practices or unethical behaviour.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

There are channels for reporting cases of fraud, corruption or other prohibited practices but public confidence in the efficacy of these channels is low.

Both the ACC and REPS provide means to report allegations, including anonymously.

Anti-Corruption Commission: The website of the ACC has a "Report Complaint" function and information on the Report Centre Office page⁸⁸ lists other means of reporting complaints by personal call, telephone, letter, telex, fax or e-mail, with a note in each case saying the complainant might or might not wish to identify himself/herself. A complainant may also use the Commission's hotline and the number is listed on the Report Centre Office Page. The Report Centre Office page includes a few lines noting that the summary of the complaint should be factual and concise but with sufficient detail to enable the Complaints Review Committee to make a rational recommendation to the Commissioner and the process for scrutiny and acceptance of the complaint. There is no simple step-by-step guide for complainants on the requirements for and process of reporting and conduct of investigations.

The Royal Eswatini Police Service: have a toll-free line for reporting offences including corruption offences and can receive of alleged corruption through other means such as via service centres and various media platforms. It may also investigate allegations raised by the Public Accounts Committee, working directly with the Attorney General and with Banks. REPS has a Financial and Economic Crimes Unit which investigates criminal allegations, including those relating to public procurement, in accordance with standard investigative procedures. REPS may refer matters to the Auditor General for investigation.

Afrobarometer Round 9 Summary survey results for Eswatini, 2023 (Afrobarometer Survey 2023:⁸⁹ The same survey asked participants for their views on the likelihood of getting someone to take action if they went to a local

⁸⁸ ACC Report Centre page, accessed 20 June 2023

<http://acc.gov.sz/investigation/report-centre.html>

⁸⁹<https://www.afrobarometer.org/wp-content/uploads/2023/11/Summary-of-results-Eswatini-R9-Afrobarometer-24nov23.pdf>

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government office of anti-corruption office to report corrupt behaviour like misuse of funds or requests for bribes. 74/6% of participants said that getting someone to take action was not at all likely or not very likely. Views expressed by a number of stakeholders in direct discussions with the MAPS Assessment team support this finding of low levels of confidence.

See also analysis at 14(f)(b) on confidentiality and whistle-blower protection.

Gap analysis

Secure channels for reporting: Public confidence in the efficacy of available channels for reporting cases of fraud, corruption or other prohibited practices is low.

This Gap is assigned a Red flag because it significantly impedes the objective of ensuring operation of secure mechanisms for reporting prohibited practices and because it requires inter-institutional cooperation and action outside the procurement sphere, including by anti-corruption institutions and the police as well as possible non-procurement related legislative changes.

Recommendation

Secure channels for reporting, whistle blower protection and disclosures: Undertake a critical review of current mechanisms for reporting cases of fraud, corruption or other prohibited practices or unethical behaviour in the context of public procurement to identify potential changes and measures for improvement. One step in enhancing general public confidence will be to implement UNCAC recommendation to adopt “measures to provide effective protection against unjustified treatment for reporting persons”. Another measure is publication of reliable consolidated data on investigations and actions taken. (See recommendations at 14(c)).

Assessment criterion 14(f)(b):

There are legal provisions to protect whistle-blowers, and these are considered effective.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

Eswatini does not have dedicated whistleblower legislation and limited protection is provided by POCA s.56. Public confidence in the effectiveness of whistle blower protection is low.

UNODC Country Report 2016 on Implementation of Articles 15-42 of Chapter III UNCAC⁹⁰ found that UNCAC provisions on protection of reporting persons was partially implemented in POCA s.56 as follows: “POCA provides for the protection of informers in terms of not disclosing their identity. The law does not go all the way to give protection against unjustified treatment to reporting persons. The protection goes only so far as to prohibit their disclosure.” The following recommendation was made: “It is recommended that Swaziland consider adopting measures to provide effective protection against unjustified treatment for reporting persons, in accordance with the article under review.”

Afrobarometer Round 9 Summary survey results for Eswatini, 2023 (Afrobarometer Survey 2023: ⁹¹ the Afrobarometer Survey 2023 whether ordinary people can “report incidents of corruption without fear, or do they risk retaliation or other negative consequences if they speak out?”, 85.1% of participants said that they risked retaliation or other negative consequences. Views expressed by a number of stakeholders in direct discussions with the MAPS Assessment team support this finding of low levels of confidence.

⁹⁰ UNODC Country Review Report of the Kingdom of Swaziland, 2016, CAC/COSP/IRG/I/4/1/Add.38.

⁹¹<https://www.afrobarometer.org/wp-content/uploads/2023/11/Summary-of-results-Eswatini-R9-Afrobarometer-24nov23.pdf>

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<p>Gap analysis</p> <p>Legal provisions to protect whistle-blowers: There is no specialised legislation to protect whistle-blowers. Public confidence in the protection of whistle-blowers in practice under existing legislation is low.</p> <p>This Gap is assigned a Red flag because it significantly impedes the objective of ensuring operation of secure mechanisms for reporting prohibited practices and because it requires inter-institutional cooperation and action outside the procurement sphere.</p>
<p>Recommendations</p> <p>See combined Recommendations at 14(f)(a).</p>
<p>Assessment criterion 14(f)(c):</p> <p>There is a functioning system that serves to follow up on disclosures.</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis</p> <p>System to follow up on disclosures: There is no reliable trusted and consolidated reporting intake system which is established and functioning.</p> <p>See analysis at 14(c) and 14(f)(a) & (b).</p>
<p>Gap analysis</p> <p>System to follow up on disclosures: There is no well-functioning system to follow up on disclosure.</p> <p>This Gap is assigned a Red flag because it significantly impedes the objective of ensuring operation of secure mechanisms for reporting prohibited practices and because it requires inter-institutional cooperation and action outside the procurement sphere.</p>
<p>Recommendations</p> <p>See combined Recommendations at 14(f)(a).</p>
<p>Sub-indicator 14(g)</p> <p>Codes of conduct/codes of ethics and financial disclosure rules</p>
<p>Assessment criterion 14(g)(a):</p> <p>There is a code of conduct or ethics for government officials, with particular provisions for those involved in public financial management, including procurement.*</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis</p> <p>There is a Code of Conduct and Public Service Charter are of general application to all public officers in central government, but it is not specifically tailored to public finance management, including procurement.</p> <p>Code of Conduct and Public Service Charter: Public Service Act 2018 s.5 Code of Conduct and Public Service Charter, requires a public officer to comply with the Code of Conduct and sign the Public Service Charter, both of which are contained in Schedules to the Public Service Act. Public officer is defined by reference to s.261 of the Constitution.</p> <p>The Code of Conduct is a short, high level, Code of Conduct for public officers. The Public Service Charter is a more detailed document intended “to codify the norms and standards of acceptable behaviour in Government” and constitute the “principal behavioural code for the public service. The Code of Conduct and Public Service Charter are of general application to all public officers and are not specifically tailored to public finance management, including procurement. The Code of Conduct and Public Service Charter do not apply to officials in Category A parastatals or Local Government.</p>

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Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 14(g) Assessment criterion (a): - share of procurement entities that have a mandatory code of conduct or ethics, with particular provisions for those involved in public financial management, including procurement (in % of total number of procuring entities).*

Source: Normative/regulatory function.

Data not available

Gap analysis

Codes of conduct/codes of ethics and financial disclosure rules: The Code of Conduct and Public Service Charter are of general application and do not have provisions specifically tailored to those involved in public financial management, including procurement. The Code of Conduct does not apply to officials in Category A parastatals or Local Government.

This Gap is assigned a Red flag because it significantly impedes the objective of preventing unethical or corrupt practices and because it requires inter institutional cooperation and action outside the procurement sphere, as it concerns Charter and codes issued pursuant to the Public Service Act and of wider application than just procurement.

Recommendations

Combined Recommendations for 14(g)(a), (b) & (c)

Codes of conduct/codes of ethics and financial disclosure rules: Prepare a code of conduct/ethics, which should be complementary to the existing Code of Conduct and Public Service Charter, setting out special provisions applying to those involved in public procurement. This code of conduct/ethics should specifically address conflicts of interest and financial disclosure requirements. It should be drafted in such a manner so as to be relevant to officials in all types of procuring entities and be mandatory in nature with consequences of failure to comply clearly described.

Assessment criterion 14(g)(b):

The code defines accountability for decision making, and subjects decision makers to specific financial disclosure requirements.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The Public Service Charter A.15 requires an officer to declare a conflicts of interest situation, POCA criminalises unexplained wealth by public officer. According to the International Monetary Fund Country Report 2023 asset declaration requirements are minimally observed. The MAPS Assessment Team were made aware, from several different sources, of concerns over perceived conflicts of interest in the activities of the Government Tender Board.

Constitution A.240 Conflict of interest, sets out basic principles relating to actual or likely conflicts of interest by office holders. The Public Service Charter includes detailed provisions on conflicts of interest.

The Constitution at A.241 establishes a declaration of assets and liabilities regime applying to any person holding a defined office, including persons being "in the public service and any other public institution". According to

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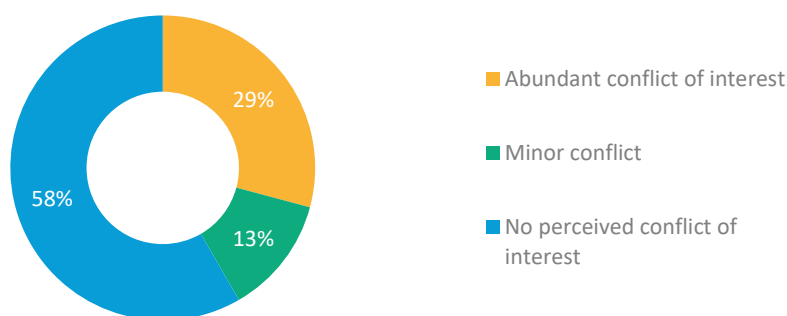
Constitution A.231, non-compliance with requirements to declare assets shall be the matter of investigation by the Integrity Commission or Judicial Service Committee.

The Public Service Act contains provisions concerning responsibility and accountability of Ministers, Principal Secretaries and on assignment of functions. The Code of Conduct and Public Service Charter include provisions concerning responsibilities, duties and ethics applying government officials. Public Service Charter A.15 requires an officer to declare a conflicts of interest situation or ask for authorization to abstain at critical decision-making stages. POCA s.34 Possession of property without reasonable explanation, criminalises the possession of unexplained wealth by public officers. All government officials are required to declare and Oath of Office and Service pledge.

The International Monetary Fund Country Report 2023,⁹² in considering asset declaration observes that “the requirement for public officials to declare assets upon taking and leaving office has been minimally observed in the absence of a penalty for noncompliance.” This report advises that strengthening asset declaration should remain a priority.

Government Tender Board: The MAPS Assessment Team were made aware, from several different sources, of concerns over perceived conflicts of interest in the activities of the Government Tender Board. This is underpinned by the findings of the private sector survey where 42% of respondents were of the view that there are abundant or minor conflicts of interest existing within the Government Tender Board.

Are there conflicts of interest in the procurement operations promoted by the Procuring Entities or the Government Tender Board?



Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 14(g) Assessment criterion (b): - officials involved in public procurement that have filed financial disclosure forms (in % of total required by law).*

Source: Normative/regulatory function.

Data not available

Gap analysis

Provisions in the Public Service Act, Code of Conduct and Public Service Charter on financial disclosure are minimally observed.

⁹² <https://www.imf.org/en/Publications/CR/Issues/2023/05/05/Kingdom-of-Eswatini-2023-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-533091>

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This Gap is assigned a Red flag because it significantly impedes the objective preventing unethical or corrupt practices and because it requires inter institutional cooperation and action outside the procurement sphere.
Recommendations See combined recommendation at 14(g)(a).
Assessment criterion 14(g)(c): The code is of mandatory, and the consequences of any failure to comply are administrative or criminal.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis Public Service Act 2018 s.5 Code of Conduct and Public Service Charter, requires a public officer to comply with the Code of Conduct and sign the Public Service Charter, both of which are contained in Schedules to the Public Service Act. All government officials are also required to declare an Oath of Office and Service pledge, renewable five yearly or on appointment to new office. Consequences of non-compliance are administrative.
Gap analysis The Code of Conduct, Oath of Office and Service pledge is mandatory but it is not procurement specific and not of universal application. This Gap is assigned a Red flag because it significantly impedes the objective preventing unethical or corrupt practices and because it requires inter-institutional cooperation and action outside the procurement sphere.
Recommendations See combined recommendation at 14(g)(a).
Assessment criterion 14(g)(d): Regular training programmes are offered to ensure sustained awareness and implementation of measures.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis Training on ethical issues is part of the standard induction for public officials and included as an integral part of more general training on procurement delivered by ESPPRA. See also, analysis at 14(d)(e).
Gap analysis Training on ethics and integrity in public procurement: The MAPS Assessment team did not find evidence of a schedule of regular and repeated training programmes on ethics and integrity tailored to public procurement delivered to all officials involved in procurement in all types of procuring entities. This Gap is assigned a Red flag because it significantly impedes the objective of preventing unethical or corrupt practices and because it requires inter-institutional cooperation and actions beyond the procurement sphere, including involvement of CSOs and the business sector whose needs and opinions should be understood by procurement officials.
Recommendations Training on ethics and integrity in public procurement: Develop and deliver a regularly scheduled training programme specifically focused on ethics and integrity in procurement. In order to ensure consistency at national level, this should be designed for and attended by all officials involved in procurement in central government, local

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government and Category A parastatals. Ideally the programme should be developed and delivered by a multi-disciplinary team drawing on expertise from all relevant institutional stakeholders and also involving the wider stakeholder community including CSOs and the business sector to lend their perspectives.

Assessment criterion 14(g)(e):

Conflict of interest statements, financial disclosure forms and information on beneficial ownership are systematically filed, accessible and utilised by decision makers to prevent corruption risks throughout the public procurement cycle.

Conclusion: **Substantive gap**

Red flag: **Yes**

Qualitative analysis

Record keeping is generally poor (see analysis at 1(k)), conflicts of interest must be declared but asset declaration requirements do not apply across the board and there are no effective arrangements for obtaining and retaining beneficial ownership information.

Procurement Act s.30 Disclosure of interest requires members of a Tender Board to disclose interests and not be present at or participate in the deliberations or decision-making process. Disclosure of interest under s.30 must be recorded in the minutes of the meeting.

According to the “Anti-money laundering and counter-terrorist financing measures, Eswatini” Mutual Evaluation Report, Eastern and Southern Africa Anti-Money Laundering Group, June 2022. “Eswatini does not have effective arrangements in place for obtaining and retaining beneficial ownership (BO) information.” The UNODC Report 2020 recommended that Eswatini take measures to require beneficial ownership identification of companies and legal entities.

According to The UNODC Country Review Report 2020 (p.105), apart from Public Leaders, there are no present plans to extend asset declaration requirements to other public officials. At present, public officials are subject to a requirement to disclose conflicts of interest, under section 15 of the Public Service Act, 2018. UNODC recommended that “Eswatini reconsider the requirements under this provision and re-examine the proposed framework for asset declarations under the 2011 Leadership Bill in line with international best practices to ensure, in particular, the comprehensive scope and effectiveness of the reporting and verification mechanism.”

Gap analysis

Records of conflicts of interest, financial disclosure and beneficial ownership: There are no effective arrangements for obtaining and retaining beneficial ownership information. Record keeping is generally poor.

It is highly unlikely that information currently available to decision makers, even if collected in a systematic manner, is sufficiently comprehensive or accessible to be effectively utilized to prevent corruption risks throughout the public procurement cycle.

This Gap is assigned a Red flag because it significantly impedes the objective preventing unethical or corrupt practices and because it requires inter-institutional cooperation and actions beyond the procurement sphere including collection of, and access to, company related information.

Recommendations

Records of conflicts of interest, financial disclosure and beneficial ownership: Introduce a system of universal application to ensure consistent provision and filing of conflict of interest statements, financial disclosure forms and also information on beneficial ownership. Implement UNCAC recommendations in particular in relation to asset declaration and beneficial ownership.