

# របាយការណ៍វិភាគ

សេចក្តីព្រាងច្បាប់លទ្ធកម្មសាធារណៈ (២០២២)  
និងលិខិតបទដ្ឋានពាក់ព័ន្ធកម្ពុជា



## LEGAL ANALYSIS REPORT

THE DRAFT LAW ON PUBLIC  
PROCUREMENT (VERSION 2022) AND  
RELATED REGULATIONS



ស៊ុយអែត  
Sverige



គម្ពុជា  
TRANSPARENCY  
INTERNATIONAL  
Cambodia

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## List of Abbreviation

<b>Abbreviated Term</b>	<b>Full Term</b>
<b>Draft PPL or DRAFT PPL</b>	Draft version 1 of Law on Public Procurement dated 18 July 2022
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>MEF</b>	Ministry of Economy and Finance
<b>PFM</b>	Public Financial Management
<b>PPL</b>	Law on Public Procurement was promulgated by Royal Kram No. NS/RKM/0112/004 issued on 14 January 2012
<b>RGC</b>	Royal Government of Cambodia
<b>SMEs</b>	Small and Medium Enterprises
<b>UNCITRAL</b>	United Nations Commissions for International Trade Law
<b>UNCITRAL Model Law</b>	United Nations, UNCITRAL Model Law on Public Procurement, June 2014
<b>UNDOC</b>	United Nations Office for on Drugs and Crimes



# Review of the Legal Framework for Public Procurement Transparency and its Enforcement in the Kingdom of Cambodia

## Executive Summary

This Report has been commissioned by Advocacy and Policy Institute (API) and Transparency International Cambodia (TIC) to conduct a *Review of Legal Framework for Public Procurement Transparency and Its Enforcement in Cambodia*. Having been chosen upon a competitive bidding process, Sethalay Law Office has conducted a thorough desk review of the Cambodian legal framework for Public Procurement. As the Ministry of Economy and Finance (“MEF”) has been preparing a new draft law on public procurement (“**Draft PPL**”), which is at the stage of public consultation, this Report also looks into the Draft PPL as a main part of its assessment. To conduct this review, a comparative analysis has been conducted between the current Public Procurement Law and the first draft law on public procurement as provided by API, between the current Cambodian legal framework and international standards, using the UNCITRAL Model Law on Public Procurement as a reference, as well as other legislation governing public procurement in other foreign jurisdictions.

The Report focuses on seven main technical areas, namely transparency, good management, accountability and integrity, control and monitoring, right to redress, public participation, openness and inclusiveness. The Report formulates several recommendations based on the findings as the following:

- i. **On transparency**, in order to palliate to the silence of the legislation regarding the publicity of the negotiated procedure and the single-source procurement, the Report recommends specifying in the Draft PPL the needs and the requirements for publicizing these procedures. Furthermore, it is of consensus that the use of technology can enhance the transparency of the procurement procedure. For that, this Report recommends to establish an online portal for the disclosure of all non-confidential information in relation to the entire public procurement process, including but not limited to, the invitation for bids, the identity of the bidders, the successful bidder and the details of the contract awarded.
- ii. **On good management**, the Report recommends that the legislations governing public financial management, particularly in relation to public procurement projects, needs to address the preparation of budget for on-going procurement projects that require medium term expenditure. Therefore, the public financial management laws and regulations may consider 1) enhancing medium term expenditure framework for public procurement projects; 2) requiring brief of expenditure plan for public procurement

projects to be attached with the annual budget documents for parliament to review and publication; and 3) having the brief execution report of public procurement project be attached with the annual budget execution report for the parliament to review and publication. Moreover, the Report recommends the RGC to consider adopting provisions imposing a mechanism to provide legal protection to the procurement committee and whistle blower.

- iii. **On accountability and integrity**, the Report recommends to make the public competitive bidding the default method, rather than the preferred method provided that other methods shall be considered for exceptional cases only. Accountability and integrity principles are supposed to have a clear chain of command. The Report recommends the Draft PPL to provide the obligation to record decision for the purpose of tracking the decision-making process, whether at the procuring entity level or at the regulator level (*i.e.* MEF). The current legal framework needs to address the possibility of cancellation of the procurement process; thus, it is recommended to insert provisions to regulate the possibility of cancellation of procurement, including the obligation to record the reasons for such cancellation. As well, the Report addresses the possibility to consider delegating power to a separate entity (rather than the MEF) to regulate and monitor public procurement for check and balance and avoiding conflict of interest. The Draft PPL also should determine that all agreement, which is made in non-compliance to the legal requirements of public procurement, shall be considered as void in order to avoid any collusion between the private bidders and the public officers responsible for procurement.
- iv. **On control and monitoring**, the Report recommends issuing required implementing regulations, such as the Prakas on the procedure for delivery and acceptance (of goods and works). Any public procurement project, which has been completed, shall be properly verified and acknowledged of receipt by the competent authority under the applicable laws, regulations and procurement contracts. Onward, the result of those completed projects shall be considered as state asset to be properly listed in the state balance sheet and managed by the competent authority for managing state's assets. In order to be proactive in risk management, the Report recommends the Draft PPL to adopt an approach for procurement management institutions and procuring entity to map out risks of irregularities and potential corruption acts in public procurement on a regular basis. Monitoring of the accountability and integrity of the procurement process may also need to provide a dedicated legal protection for whistle blowers. Therefore, the Report recommends including in the Draft PPL a mechanism for relevant stakeholders to report any irregularities in relation to the procurement project, and to provide a protective system in such event.

- v. **On right to redress**, a general principle of law is the separation of the functions to decide and to adjudicate on a specific matter. Linking with the recommendation made to establish an independent body in charge of public procurement, the Report recommends delegating the competence to adjudicate and administrative review to an authority, which is an independent body from the MEF or has no conflict of interest. In order to deal with complaint against irregularities during the procurement procedure, the Report recommends developing a mechanism to address the lack of administrative and/or legal remedies for third-party having legal interest in the matter to challenge, such as the choice of the bidding method. For reason of legal certainty, the Report also recommends clarifying the time limits for handling complaints to be brought by bidders to the administration and before the courts, including challenges made during the standstill period. Moreover, the Draft PPL should also consider arbitration as a viable option for resolving disputes in procurement.
- vi. **On public participation**, the Report recommends establishing a system which allows the citizens and relevant stakeholders to make comments on the draft budget law, which includes public procurement projects. For effective participation from the public, the information about the public procured project including but not limited to the cost, quality and execution report shall be published for public information in a succinct way. Moreover, the public may be represented by the parliament and local council to review and approve the spending of public money including the expenditure on public procurement projects. Therefore, the funds spent for public procurement projects as well as the projects shall be briefed to the parliament via budget documents for being reviewed and approved by the parliament and local council. At the end of each financial year, the brief execution reports of public procurement projects shall be submitted to the parliament and local council for review and question, if there is any. The public participation in public procurement may be enhanced via the mechanisms such as social accountability at the local authority.
- vii. **On openness and inclusiveness**, the Report recommends the legislation addressing three main items, which are 1) to remove the administrative barrier related to registration with the MEF for tendering; 2) to consider introducing provisions in favor of participation of SMEs; and 3) to standardize procedures aligned with national socio-economic policies for an effective use of 'contracting with communities' procurement method as provided by the PPL/Draft PPL. As well, the DRAFT PPL should also consider about decentralization of public procurement save for any procurement that require large bargaining power for efficient and effective purchase. Therefore, the social accountability at local administration can be adopted for enhancing public participation in procurement.



## Introduction

Public procurement plays an important role in two phases of the Public Financial Management (“**PFM**”) in the budget cycle, namely during the processes of budget preparation and budget execution. The first Cambodian Law on Public Procurement was promulgated by Royal Kram No. NS/RKM/0112/004 on 14 January 2012 (the “**PPL**”)<sup>1</sup>. This PPL was adopted to ensure that the public procurement process is carried out with openness, accountability, fairness, effectiveness, quality, equality/equity, economic efficiency, and timeliness as well as to ensure that the public procurement system is coherence throughout the Kingdom of Cambodia. However, the current issues of the PPL are 1) unclear division between Public Procurement Regulator and Procuring Entity and 2) lack to include the principle of public financial reform and public procurement. The PPL aims at establishing the guidelines, practices, and organizational framework for organizing and carrying out all public procurement activities in the Kingdom of Cambodia. In addition to the PPL, there are other legislations such as Sub-Decrees adopted by the Royal Government of Cambodia (“**RGC**”), as well as regulations (Prakas), and circulars adopted by the Ministry of Economy and Finance (“**MEF**”) that govern public procurement in Cambodia.

As the political direction and reform, the reform of public procurement is considered as a part of the public financial management reform program. Initially, public procurement reform was integrated as a part of the national budget reform program from 2018 to 2025. Based on necessity of the public procurement reform in the stage of budget preparation and implementation, the RGC has adopted the reform strategy for public procurement from 2019 to 2025. Under such adopted reform strategy, the RGC aims at 1) decentralizing the procurement process and procedures except for certain type of procurement that requires centralization for cost efficiency; 2) enhancing efficient and effective procurement procedure via using technology and guidelines; and 3) harmonizing procurement procedures with PFM cycle.

In line with the reform, the MEF has been preparing a new draft law on public procurement. As of now, the Draft PPL has been circulated for comments. Based on the current version of the provided draft law, the draft law consists of some provisions from the current PPL with some revisions. As well, the new draft law also introduces new legal provisions for 1) decentralization of public procurement; 2) qualification of winning bidder; 3) linking

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<sup>1</sup> It is to be noted that Public Procurement was previously governed by regulatory instruments. See: Sub-Decree No. 105 ANKr.BK dated 18 October 2006 on Public Procurement.

procurement with the sustainability of economy, society and environment; 4) dispute settlement in line with the agreement; and 5) procurement post review.

Taking the opportunity that the draft public procurement law (“**Draft PPL**”) is under review, it is necessary to conduct a legal framework analysis on public procurement in Cambodia in order to identify the legal challenges in order to provide constructive comments on the new draft law.

Before moving into the assessment of public procurement legal framework in Cambodia in the next part, this part will first provide a brief background information on the general principles of public procurement in subsection (a) and a general overview of public procurement in Cambodia in subsection (b).

#### **a. Background about the General Principles of Public Procurement**

In general, Public Procurement is known as a procedure of purchasing goods and/or services from private companies/contractors by a public procuring entity. It can also be defined as referring “*to a process of identifying what is needed; determining who the best person or organization is to supply this need; and ensuring what is needed is delivered to the right place, at the right time, for the best price and that all this is done in a fair and open manner*”.<sup>2</sup> Public procurement principles are principles that serve as the foundation for the conduct of public procurement. In term of best practices, the United Nations Commissions for International Trade Law (“**UNCITRAL**”) has adopted a model public procurement law for states to use as a good model to adopt their own domestic procurement law.<sup>3</sup> Additionally, the Organization for Economic Co-operation and Development (“**OECD**”) has adopted the ‘OECD Recommendation of the Council for Public Procurement’ which provides twelve (12) guiding principles recommended for countries to adopt in order to “promote the strategic and holistic use of public procurement”.<sup>4</sup>

The common key principles to public procurement include: Transparency, Integrity, Economy, Value for Money, Openness, Fairness, Competition, and Accountability. Each of these principles will be further described below.

- i) Transparency:** Transparency is one of the key principles in public procurement. Ideally, the entire procurement cycle should be transparent. Transparency

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<sup>2</sup> OECD, Recommendation of the Council on Public Procurement, 18 February 2015, available online at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0411#dates>

<sup>3</sup> United Nations, UNCITRAL Model Law on Public Procurement, June 2014, available online at: <https://www.un-ilibrary.org/content/books/9789210541947#:~:text=The%20Model%20Law%20is%20a,and%20equitable%20treatment%20and%20transparency>.

<sup>4</sup> Organization for Economic Co-operation and Development (“**OECD**”), *OECD Recommendation of the Council for Public Procurement*, 2015, available online at: <https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf>

generally involves: “(a) *publicity of procurement opportunities and the disclosure of the rules to be followed; (b) undertaking procurement processes publicly and visibly, according to prescribed rules and procedures that limit the discretion of officials; and (c) the provision of a system for monitoring and enforcing applicable rules*”.<sup>5</sup>

- ii) **Integrity:** Public procurement integrity includes integrity of the public procurement process and integrity of the practitioners. Integrity of the public procurement process requires that all information disseminated during the conduct of procurement has to be reliable and trustworthy. Integrity of the practitioners refers to the professional integrity that all entities involved in the procurement process should adhere to. As an additional information on this principle, the OECD has adopted the ‘OECD Principles for Integrity in Public Procurement’ with the aim to recommend the principles that are believed to enhance good governance in public procurement as well as to help the government “prevent waste, fraud and corruption” in the procurement cycle.<sup>6</sup>
- iii) **Economy, Efficiency and Value for Money:** These principles require that public funds should be managed with care and diligence with less non-essential administration in order to ensure that the amount spent on the goods and/services procured is effective and not wasted.
- iv) **Openness:** Invitation for tender should be open to all bidders, whether local or international, without any restriction.
- v) **Fairness:** The public procurement procedure needs to be fair. This includes the fact that the decision making is made without any bias or favorable treatment but objective criteria; and there is a mechanism for challenging the decision making. The government can ensure this principle by providing all tenderers with fair opportunity to compete.
- vi) **Accountability:** All persons involved in the procurement project take responsibilities for their actions and/or decision. For that, establishing a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, is generally seen as important. The monitoring mechanism can be considered as the other side of the coin, by providing a

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<sup>5</sup> United Nations Office on Drugs and Crimes (“UNODC”), *Guidebook on anti-corruption in public procurement and the management of public finances: good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, 2013, available online at:

[https://www.unodc.org/documents/corruption/Publications/2013/Guidebook\\_on\\_anti-corruption\\_in\\_public\\_procurement\\_and\\_the\\_management\\_of\\_public\\_finances.pdf](https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf)

<sup>6</sup> Organization for Economic Co-operation and Development (“OECD”), *OECD Principles for Integrity in Public Procurement*, 2009, available online at: <https://www.oecd.org/gov/ethics/48994520.pdf>

framework for assessing whether the action is taken in accordance with the procurement procedures.<sup>7</sup>

#### **b. General Overview of Public Procurement in Cambodia**

Under the current PPL, there are four types of public procurement in Cambodia, which are procurement on goods, procurement on construction, procurement on service, and procurement for consultation services. The two public competitive bidding methods provided under the current PPL and the Draft PPL are international procurement and domestic procurement.<sup>8</sup> Other bidding methods include: 1) restricted competitive bidding; 2) competitive shopping; and 3) canvassing.<sup>9</sup> There is also non-competitive bidding method provided under the current PPL and Draft PPL, which is permitted only upon obtaining the permission from the MEF.

In terms of players, the main institutions that are involved in public procurement are: 1) procuring entity; 2) procurement management institution; 3) institution providing financial support; and 4) procurement usage institution. The procuring entity also establishes procurement committee and procurement unit, which are directly responsible for the entire procurement cycle, especially the implementation of the procurement contract.

There are three stages in a public procurement cycle, which are: pre-tender stage, tender stage, and post-tender stage. As a general overview of this public procurement cycle, the procedure starts from the preparation of procurement plans by each budgetary institution. Upon the adoption of the procurement plan, the budgetary institution will implement those plans. During the implementation, the procuring entity will first list down the pre-conditions for selecting the bidders, and then will prepare the bidding announcement to invite bidders to submit their bidding documents. Upon the receipt of the bidding documents from bidders, the procurement committee will evaluate the bidding documents and make decision on the bidder to be selected. Afterwards, there will be an announcement of the winning bidder. In the event that there is no complaint from other bidders against the bidding decision, the procurement implementing entity will sign an agreement with the winning bidder.

The next phase is the management of the contract implementation. For whatever type of procurement that is, the procurement contract implementation will be assessed in order to confirm the conformity with the agreement as well as to ensure quality. Finally, there will be payment to the winning bidder.

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<sup>7</sup> Organization for Economic Co-operation and Development (“OECD”), *OECD Principles for Integrity in Public Procurement*, 2009, available online at: <https://www.oecd.org/gov/ethics/48994520.pdf>

<sup>8</sup> PPL, Art. 11; Draft PPL, Art. 11.

<sup>9</sup> PPL, Art. 12; Draft PPL, Art. 12.

Whereas the above public procurement procedure in Cambodia may seem simple, there are issues to watch over in order to ensure that the good principles are enshrined in the public procurement law as well as to ensure that both the law and the principles are being followed.

Below, this study will assess the current legal framework of public procurement and the Draft PPL in order to identify any loopholes that may cause issues. The study will provide a recommendation based on the issues identified.

## **Assessment and Findings**

The assessment of the legal framework of public procurement in Cambodia, this research will assess based on the following 07 points: a) Transparency; b) Good Management; c) Accountability and Integrity; d) Control and Monitoring; e) Right to Redress; f) Public Participation; and g) Inclusiveness and Openness.

### **a. Transparency**

As a best practice, transparency is the key to promote integrity and reduce the risk of corruption. As the digital technology is widely used, many countries have adopted standards to implement the transparency principle via 1) publication of information via website in addition to the news channel; 2) the establishment of online portal for publishing all information in relations to procurement matters from the bidding process until the execution process; and 3) the process of debriefing to bidders on contract award decisions and explaining how they were reached.<sup>10</sup>

#### **i Publication of Information**

In relation to the procurement cycle, at pre-tender stage, after the pre-conditions for the selection of bidders has been determined, Article 40 of the Public Procurement Law requires that such pre-conditions have to be announced publicly.

At tender stage, both the PPL and the Draft PPL require that the notification of bidding documents and any amendments thereof have to be made publicly,<sup>11</sup> implying that the bidding opportunities have to be publicized with the opening of the tender documents. However, the laws are silent in relation to the publicity of the negotiated procedure and the single-source procurement.

With regards to the publication method of the bidding announcement, the bidding announcement may be made via the website of the MEF, the website and bulletin board of the procuring entity and the newspaper.<sup>12</sup> The bidding announcement shall

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<sup>10</sup> OECD, *Compendium of Good Practices for Integrity in Public Procurement*, 2014, pp. 4-7.

<sup>11</sup> PPL, Art. 40; Draft PPL, Art. 42.

<sup>12</sup> PPL, Art. 40; Draft PPL, Art. 42.

consist of the following key information: 1) the description and scope of goods, works or services; 2) name, address, email, phone contact of procurement unit of the procuring entity; 3) methods of procurement to be used; 4) bidder qualification requirements; 5) date and time of selling bidding documents, deadline for submission and opening of bids; and 6) requirements for bid and performance security.<sup>13</sup> The information required for publication is mostly qualitative information, which may be uncertain or not clear. Therefore, Article 42 of the PPL and Article 44 of the Draft PPL provide that the procuring entity shall respond to any request for written clarification about the bidding documents or shall hold a meeting prior to the deadline of bid submission in order to provide clarification. However, neither the PPL nor the Draft PPL provide the principle of sufficient time for: 1) publication of bidding notice; and 2) providing responses or holding clarification meeting. Also, the Draft PPL does not set any possibility for granting an extension of the deadline for the bidders to submit the tender proposal to allow such bidders to have sufficient time to take such clarification into account in their submissions.<sup>14</sup>

Evidently, Cambodian law always stipulated or regulates the principle of practice, the procedure of which are always prescribed in the provisions to maintain high flexibility as actual requirement and circumstance. In practice, those regulations are implemented by the competent authority while the violations are subject to administrative sanctions. Therefore, failure to set forth the minimum requirement under the law may restrict the possibility for the bidder to file a complaint to the court for compensation.

## **ii Online Portal for Public Procurement**

A new approach to the publication of procurement information is through an online portal. To illustrate, the government of Australia has established one website, which provides centralized information concerning Australian government's business opportunities, annual procurement plan, and all contracts that were awarded.<sup>15</sup> As stated above, the PPL and Draft PPL requires only publication of bid announcement and any amendments thereof on the website. However, other important procurement information, such as contracts awards, are not required to be published.

The transparency of procurement should not be required only for the bidding notification; however, such disclosure should be required during the whole process

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<sup>13</sup> PPL, Art. 38.

<sup>14</sup> United Nations, UNCITRAL Model Law on Public Procurement, 2011, Art. 14.

<sup>15</sup> See, <https://www.tenders.gov.au/>

of procurement from pre-procurement to conclusion of the procurement project. The transparency requirement for the whole public procurement process needs to also be balanced with the requirement for confidentiality and red taps as complication to the implementation of the project itself.

As of now, both the PPL and the Draft PPL are silent about the disclosure requirement for the implementation of the project under public procurement. Moreover, the PPL and the Draft PPL provide for the establishment of the organization but not for the establishment of the online portal dedicated to the gathering and the publication of all information related to public procurement.

Whereas transparency is one of the key principles for good public procurement, there could be information that are deemed as confidential information, which could not be disclosed to the public. This said, the Draft PPL should provide for a provision that regulates the confidentiality obligation of relevant persons and a definition of information that are deemed as confidential information, which cannot be disclosed to the public. In relation to the definition of ‘confidential information’, the Draft PPL could provide an open list of what are considered as confidential information.

To illustration about a provision on confidentiality obligation, the UNCITRAL Model Law distinguishes two items: “classified information” and “confidential information”. Article 24 of the UNCITRAL Model Law states the following:

**Article 24 – Confidentiality**

1. In its communications with suppliers or contractors or with any person, the procuring entity shall not disclose any information if non-disclosure of such information is necessary for the protection of essential security interests of the State or if disclosure of such information would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition, unless disclosure of that information is ordered by the [*name of the court or courts*] or the [*name of the relevant organ designated by the enacting State*] and, in such case, subject to the conditions of such an order.
2. Other than when providing or publishing information pursuant to paragraphs 2 and 10 of article 22 and to articles 23, 25 and 42 of this Law, the procuring entity shall treat applications to pre-qualify or for pre-selection and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.
3. Any discussions, communications, negotiations or dialogue between the procuring entity and a supplier or contractor pursuant to paragraph 3 of article 48 and to



articles 49 to 52 of this Law shall be confidential. Unless required by law or ordered by the [name of the court or courts] or the [name of the relevant organ designated by the enacting State], no party to any such discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party.

4. Subject to the requirements in paragraph 1 of this article, in procurement involving classified information, the procuring entity may:
  - a. Impose on suppliers or contractors requirements aimed at protecting classified information; and
  - b. Demand that suppliers or contractors ensure that their subcontractors comply with requirements aimed at protecting classified information.

The UNCITRAL Model Law approaches the confidentiality requirements under different angles:

- Communication from the procuring entity, where the confidentiality is the burden of the procuring entity, which shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned<sup>16</sup>.
- It recognizes that different aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright<sup>17</sup>.
- Confidentiality during the procurement process, where the procuring entity is prohibited from disclosing to suppliers or contractors and to any other person information provided during the process, including information whose disclosure would “*prejudice the legitimate commercial interests of the suppliers or contractors*”, or information whose disclosure may “*impede fair competition*”, reserved for disclosure ordered by order of the court or any relevant organ designated by the enacting States<sup>18</sup>. The DRAFT PPL does not contain any confidentiality requirements regarding the Communication from the procuring entity. It might be interpreted as providing the possibility for the procuring entity to communication on any information related to the procurement process, except those falling under the category of classified information or those falling under the scope of the DRAFT PPL Art. 47, A

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<sup>16</sup> UNCITRAL Model Law, Art. 7.

<sup>17</sup> Guide to Enactment, Comments Art. 7.

<sup>18</sup> UNCITRAL Model Law on Public Procurement, Art. 24.



*contrario*, it might be also interpreted as not giving any margin for the procuring entity to disclose any information.

### **iii Debrief on the Award Decisions**

As the general best practice, the decision to accept a successful tender has to be informed to other bidders as well as to publish publicly once a procurement contract is signed.<sup>19</sup> For instance, Article 23(1) of the UNCITRAL Model Law states that “Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the supplier (or suppliers) or contractor (or contractors) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price.”

Article 47 of the PPL and Article 50 of the Draft PPL require the procuring entity to issue the notification on the decision to award the contract to the successful bidder by copying such decision to all the failed bidders after finalizing an evaluation to select appropriate bidders. Such legal requirement is in line with international best practices. However, the PPL and the Draft PPL did not mention anything about the requirement to publish a notice on the entry into force of a procurement contract. As well, there is no provision requiring the procuring entity to provide a specific reason to the failed bidders. As per the confirmation from the competent officers, the requirement to explain on the bidding result and the notice to the losing bidder would be included in the Draft PPL.

### **b. Good Management**

One of the aspects for good public procurement management concerns the ‘value for money’ principle. According to the MEF, this principle refers to “effective, efficient, and economic use of resources, which requires an evaluation of relevant costs and benefits and may include life-cycle costs and non-price attributes like environmental and social considerations”.<sup>20</sup> However, the PPL has yet specifically mentioned about the mechanism for the requirement of environmental, social and governance for the bidders to comply or strictly comply and justify based on the characteristic of some projects. Article 54 of the Draft PPL mentioned about ‘Sustainable Procurement’ at the implementation stage; the competent officers confirm that the definition of ‘Sustainable

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<sup>19</sup> See, UNCITRAL Model Law on Public Procurement, Arts. 22(2) and 23.

<sup>20</sup> Standard Operation Procedure on Procurement for All Externally Financed Projects/Programs in Cambodia, Volume I, p. 7.

Procurement' will be determined in the law and all details proceedings and implementation will be further specified in the provision of law.

The PPL states that the planning of a procurement project shall be in compliance with the approved budget.<sup>21</sup> Under Cambodian public finance management, for the purpose of drafting the annual budget law, each budget entity is responsible for planning their budget, which includes the budget for public procurement project. In relations to project planning, there are rather limited regulatory guideline for including an on-going procurement project into a new budget plan. As a result, there could be an issue with the management of public funds in relation to on-going procurement projects. This issue may be improved after the full adoption of 1) the medium-term budgetary framework; 2) the harmonization of capital budget with current budget; and 3) the harmonization of public procurement with budget preparation, budget execution and asset management. Therefore, the public financial management laws and regulations may consider 1) enhancing medium term expenditure framework for public procurement projects; 2) requiring brief of expenditure plan for public procurement projects to be attached with the annual budget documents for parliament to review and publication; and 3) having the brief execution report of public procurement project be attached with the annual budget execution report for the parliament to review and publication.

Additionally, as the best practice, the procurement committee shall not be bias toward any tenderer and shall not be influenced by any external factor in its decision making. In term of protection from undue influence, the Code of Ethics for Procurement requires that the procurement committee shall not be bias in their decision makings.<sup>22</sup> However, this study has not been able to identify any additional institutional or procedural framework to help protecting officials in public procurement against undue influence from politicians or higher-level officials. Without such regulation, there could be a risk of undue influence imposed on the procurement committee.

To raise an example regarding this matter, in addition to being asked to make a written declaration to refrain from acting in any way that could result in giving any advantage or better treatment to a bidder, the Austrian Federal Procurement Agency are prohibited from accepting any gifts in any form, including during special events such as Christmas, from the bidders.<sup>23</sup>

Whereas corruption could be considered as a major cause for biased decision making, the UN Convention against Corruption requires that States promote training programs to

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<sup>21</sup> PPL, Art. 31; Draft PPL, Art. 32.

<sup>22</sup> Prakas No. 987 SHV.BrK dated 31 August 2016 on Code of Ethics for Procurement, Art. 5.

<sup>23</sup> OECD, Compendium for Good Practices, p. 20.

public officials as a mean to raise awareness of the risk of corruption in performing their roles.<sup>24</sup> In relations to this rule, Germany has provided mandatory workshops and trainings on corruption prevention to its officers.<sup>25</sup> The workshops and trainings provide the officers with the knowledge about the risk of being involved in bribery, what to do when the situation occurs, and whom the officers may contact to report the situation. In relations to whistle blower matter, an article from the United Nations Office for on Drugs and Crimes (“**UNDOC**”) states that one of the roles of civil society in relation to public procurement is with regards to the matter of external reporting, namely by accepting whistle blower reports.<sup>26</sup> Additionally, in France, the Central Service for Corruption Prevention developed training materials with case studies as an example to illustrate the situations that poses questions on irregularities in the procurement process and how to handle such a situation.<sup>27</sup>

### c. **Accountability and Integrity**

The PPL/DRAFT PPL set the accountability principle as one of the guiding principles to apply during the public procurement process.<sup>28</sup> Several items need to be considered in order to ensure the accountability of those involved with the procurement process, particularly the procuring entity and the procurement officials:

- to ensure that the chains of responsibility are clear; and
- to adopt measures to regulate matters regarding personnel responsible for procurement.

#### **With regards to the clear chains of responsibility:**

- **Public competitive tendering:** the DRAFT PPL sets the public competitive bidding as the “*preferred method*” to be carried out in public procurement” (Art. 11). The UNCITRAL Model Law sets the open tendering as the default procurement method. As a default method, there are no conditions for its use; it is always available; therefore, the use of any other procurement method requires justification.<sup>29</sup>

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<sup>24</sup> UN Convention against Corruption, Art. 7(1)(d), available online at:

[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)

<sup>25</sup> OECD, Compendium for Good Practices, p. 23.

<sup>26</sup> United Nations Office for on Drugs and Crimes (“**UNDOC**”), *Civil society efforts contribute to strengthening public procurement and whistle-blower protection systems in Southern Africa*, available online at:

<https://www.unodc.org/unodc/en/ngos/civil-society-efforts-contribute-to-strengthening-public-procurement-and-whistle-blower-protection-systems-in-southern-africa.html>

<sup>27</sup> OECD, Compendium for Good Practices, p. 24.

<sup>28</sup> PPL/DRAFT PPL, Art. 1.

<sup>29</sup> United Nations, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012, Comments on Article 28.

- **Centralized purchasing:** while the PPL/DRAFT PPL provides that the procuring entities, when developing the procurement plan, shall group into same procurement package of all procurement targets within the same type, feature, or of similar characteristic, the PPL/DRAFT PPL does not address the possibility where a procuring entity would act as a centralized purchasing entity to conduct the procurement on behalf of other procuring entities agency<sup>30</sup>.
- **Cancellation of the procurement:** the PPL/Draft PPL does not provide for any procedure to cancel the procurement. While, the UNCITRAL Model Law acknowledges the unconditional right of the procuring entity to do so prior to the acceptance of the successful submission.<sup>31</sup> It is also recommended that the procuring entity must provide a short statement of the reasons for that decision, in a manner that must be sufficient to enable a meaningful review of the decision.
- **Public notice of the award:** while the DRAFT PPL provides for the notice of the bid to be made public through various platforms, there is no obligation under the DRAFT PPL to publicize the notice of award of the procurement contract, outside the successful bidder(s) and the unsuccessful bidder(s).<sup>32</sup> Except for a threshold as determined by the national legislation, the UNCITRAL Model Law provides the obligation for the procuring entity to promptly publish notice of the award of the procurement contract and the detailed information.<sup>33</sup>
- **Documentary record of procurement proceedings:** the UNCITRAL Model Law provides an expensive enumeration of the information that shall be recorded by the procuring entity. The essential part is the requirement for stating “*reasons and circumstances relied upon by the procuring entity*” for any major decision made by such entity.<sup>34</sup> The DRAFT PPL provides few requirements regarding the standard for record keeping for the purpose of tracking the decision-making process made by the procuring entity.<sup>35</sup>

The UNCITRAL Model Law provides accountability requirements as regards the decision to use restricted tendering by the procuring entity, particularly by setting requirement for an advance notice of the procurement in such case<sup>36</sup>. The grounds for such requirement are that “*the information to be published in the advance notice of procurement is the*

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<sup>30</sup> PPL, Art. 32; Draft PPL, Art. 33.

<sup>31</sup> United Nations, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012, Comments on Article 19.

<sup>32</sup> DRAFT PPL, Art. 42 and 50.

<sup>33</sup> UNCITRAL Model Law, Art. 23.

<sup>34</sup> UNCITRAL Model Law, Art. 25.

<sup>35</sup> See DRAFT PPL, Art. 46.

<sup>36</sup> UNCITRAL Model Law, Art. 34, 35.

*minimum needed to ensure effective public oversight and possible challenge by aggrieved suppliers or contractors*". The DRAFT PPL retains the obligation for the procuring entity to publish a notification of bidding documents. Such obligation provided in the DRAFT PPL (Chapter 8) on the procurement implementation procedure may be interpreted as a general requirement applicable to all procurement method.

While reaffirming the primary role of the MEF as the governing institution for public procurement, the DRAFT PPL underscores that the MEF is empowered with the competence to assume a centralized procurement function, to oversee public procurement contracts and to evaluate the implementation of the legal framework of procurement.<sup>37</sup> The UNCITRAL Model Law does not provide for an external prior-approval mechanism for certain important actions and decisions of procuring entities.<sup>38</sup> In the opposite, the DRAFT PPL retains procedures based on a centralized procurement function by vesting the MEF with the competence to provide a prior-approval for certain decisions to be made by the procuring entities. For instance, the choice of Non-Public Competitive Bidding Methods, pre-qualification of bidders, for approving the bidding documents or prior to issue the notification on awarding the contracts for *"large-scale procurement projects with a strategic nature and specific technical aspects for management and procurement with high sensitivity"*, etc. While It is generally considered that the use of a prior-approval mechanism may have advantages, such as fostering the detection of errors and problems before certain actions and final decisions are taken, providing an added measure of uniformity in a national procurement system and operate as capacity-building through the justification and consideration of the actions or decisions concerned; it may also display some disadvantages, such as, preventing the longer-term acquisition of decision-making capacity, and taking the risk of diluting accountability.<sup>39</sup>

Another principle set forth in Article 1 of the DRAFT PPL is the integrity principle. According to the Standard Operating Procedure for Implementing All Externally Financed Projects/Programs<sup>40</sup>, *"Integrity' requires the proper use of funds, resources and authority for the intended purposes in a well-informed manner in alignment with the public interest and broader principles of good governance. It requires the Government and project staff, Bidders, Contractors, Consultants, Suppliers etc. involved in the procurement process to*

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<sup>37</sup> PPL, Art. 5; Draft PPL, Art. 4.

<sup>38</sup> United Nations, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012, Part I, General Remarks, par. 72.

<sup>39</sup> United Nations, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012, Part I, General Remarks, par. 72.

<sup>40</sup> Standard Operating Procedure for Implementing All Externally Financed Projects/Programs, Vol I, p8.

*observe the highest standards of ethics and honesty. They must fully refrain from fraud and corruption”.*

In line with the UNCITRAL Model Law,<sup>41</sup> the MEF has adopted a regulation, which aims to enhance the fairness, transparency and accountability in the implementation of the public procurement project, which is the Prakas No. 987 SHV.BrK dated 31 August 2016 on the Code of Ethics for Procurement (“**Prakas No. 987**”). The Code of Ethics for Procurement specifically addresses the conduct of the procurement personnel; however, its scope is even broader to govern all persons related to the procurement project. In particular, any member of the procurement committee, procurement team, any procurement officers, and any bidders involved in a public procurement procedure shall comply with the Code of Ethics for Procurement.<sup>42</sup> The Code of Ethics for Procurement<sup>43</sup> sets a series of principles aiming at preventing any situations, which may affect or influence the neutrality of an officer in the performance of its duties, such as conflict of interest or acts of corruption.

The UNCITRAL Model Law provides that such code shall be made accessible to the public and systematically maintained.<sup>44</sup> In principle, regulations shall be made public via the Royal Gazette. The Code of Ethics for Procurement is available online on the website of the MEF in Khmer version. However, the Code of Ethics for Procurement under the Standard Operating Procedure for Implementing All Externally Financed Projects/Programs is not located at any publicly available official translation in English.

The objective of such code is to set a specific regime for the procurement process alongside the general regime governing the activities of the public servants in a given state. Cambodia has accessed to the UN Convention against Corruption in 2007. Such Convention distinguishes two regimes governed by a code of conduct, which are 1) the general regime for public servants; and 2) a specific regime for public procurement and management of public finances. While the general regime governing the conduct of public servants is governed in Cambodia by the Law on the Common Statute of the Public Servants and the Law on Anti-Corruption, the PPL and the Code of Ethics for Procurement set the specific regime. In order to assess if such specific regime is in line

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<sup>41</sup> UNCITRAL Model Law, Art. 26 (Code of Conduct).

<sup>42</sup> PPL, Art. 64; Draft PPL, Art. 70.

<sup>43</sup> See PPL/DRAFT PPL, Definitions: “*a code whereby those who are involved in public procurement shall comprehend and implement with honesty the effective legal regulations and appropriately implement their roles and functions*”.

<sup>44</sup> UNCITRAL Model Law, Art. 26.

with the standards set by the UNCITRAL Model Law<sup>45</sup>, we can further assess the following matters:

- the prevention of conflicts of interest in procurement; and
- the measures to regulate the matters regarding personnel responsible for procurement such as declarations of interest in particular procurements, screening procedures, and training requirements.

In that regard, the PPL and the Draft PPL require that all members of the procurement committee, who are responsible for reviewing and making a decision on the bid submission, shall sign the Statement on the Code of Professional Ethics.<sup>46</sup>

It is generally recommended that the specific regime may also be articulated with the general regime to ensure the integrity of the procurement process<sup>47</sup>. Therefore, the PPL provides that the corruption offence falls also under the competence of the Anti-Corruption Unit (“**ACU**”).<sup>48</sup> The DRAFT PPL adds that the only competent entity to investigate the case is the ACU, which shall investigate and compile documents to submit to the court for adjudication.<sup>49</sup> The Law on Anti-corruption defines several offenses, such as “corruption offenses”, “conflict of interest”, and the qualification of a “benefit” or “gift”. The DRAFT PPL provides for a short definition of “corrupt offense”, while the Law on Anti-corruption covers a wide specter of offenses<sup>50</sup> including offenses defined by the Criminal Code.

#### **d. Control and Monitoring**

One of mechanisms in the PPL is to monitor the procurement project for ensuring the quality of the project so that the transfer-acceptance of the project has to be made in accordance with the size, quantity, quality, and technicality as stated in the procurement contract. Articles 62 of the PPL further provides for the establishment of a *Committee for Delivery and Acceptance*. Whereas the procedure for the establishment of this committee for the delivery and acceptance of goods and works are to be stipulated in a Prakas of the MEF,<sup>51</sup> which is not found. Any public procurement project, which has been completed, shall be properly verified and acknowledged of receipt by the competent authority under the applicable laws, regulations and procurement contracts. Onward, the

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<sup>45</sup> United Nations, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012, Comments on Article 26.

<sup>46</sup> PPL, Art. 46; Draft PPL, Art. 49.

<sup>47</sup> United Nations, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012, Comments on Preamble.

<sup>48</sup> Draft PPL, Art. 73.

<sup>49</sup> Draft PPL, Art. 79.

<sup>50</sup> See Anti-corruption Law, Chapter 6.

<sup>51</sup> PPL, Art. 59; Draft PPL, Art. 62.



result of those completed projects shall be considered as state asset to be properly listed in the state balance sheet and managed by the competent authority for managing state's assets. Obviously, the competent officers confirm that there are regulations to determine the control and accept the result on the execution of the procurement contract and the record to state assets has been implemented, which requires the consolidation of information between the procurement information system, the state assets management information system and the public financial management information system.

In addition to the above, the MEF also adopted a Prakas on the Management of the Implementation of a Procurement Contract ("**Prakas No. 1613**").<sup>52</sup> This Prakas states the roles and responsibilities of the persons relevant to the procurement project, such as the implementing entity, the budgetary entity, the MEF, the suppliers, the winning tenderer and engineer. Under this Prakas, the procuring entity and procuring unit are directly responsible for the implementation of the procurement contract. The General Department of Public Procurement ("**GDPP**") of the MEF is responsible for governing the procurement projects. Among others duties, the GDPP is tasked with the duties to conduct on-site visit, to verify the implementation of the procurement contract, to advise and to promote the effective implementation of the project in accordance with quality requirements, and to raise any challenges faced during the implementation of the project in order to seek for a solution. As per the confirmation from the competent officers, the Draft PPL will include the implementation or the management of procurement through the information technology system, in coordination with the PFM system for the budget preparation and implementation, and the state assets management system.

In order to ensure good control of public procurement, some countries such as Brazil, France and Korea have adopted an approach, which requires regular risk assessment during the procurement cycle by mapping out risk factors and any vulnerabilities towards procurement integrity.<sup>53</sup> The PPL and Draft PPL are silent on this approach. Whereas the MEF has adopted a Prakas on the Management of the Implementation of a Procurement Contract,<sup>54</sup> which does not mention about such risk assessment to be implemented by either the procurement management entity or procuring entity itself.

In relations to the Right to Redress, which will be further discussed below, one of the mechanisms to monitor the decision made by the decision-making committee is to

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<sup>52</sup> Prakas No. 1613 SHV.BrK issued on 24 December 2018 on the Management of the Implementation of a Procurement Contract.

<sup>53</sup> OECD, *Compendium of Good Practices for Integrity in Public Procurement*, 2014, p. 26.

<sup>54</sup> Prakas No. 1613 SHV.BrK issued on 24 December 2018 on the Management of the Implementation of a Procurement Contract.



establish an appeal mechanism.<sup>55</sup> Such appeal mechanism is provided in the PPL and Draft PPL. In addition, to ensure that there are no irregularities in the decision made by the committee on the bidders, it is necessary that the decision made is announced to all bidders and also announced to the public. This way, any bidder, who suspects any irregularities in the procurement procedure, could have an opportunity to file a complaint or challenge against such decision prior to the signing of the contract for procurement on the project.

The Draft PPL provides for a new mechanism to empower the MEF to conduct a *Post Procurement Review*.<sup>56</sup> Despite such provision, the Draft PPL does not state any condition or requirement in relation to such review. The law leaves the authority to the MEF to determine the procedure for conducting such post-review through the adoption of a *Prakas*. In addition, at the level of legislation, the Draft PPL provides that the MEF has the right to review the procurement under process in case of any irregularity at any stage of procurement.<sup>57</sup> The Draft PPL does not provide for a specific link with the complaint and dispute resolution mechanism (see below).

#### e. Right to Redress

The UNCITRAL Model Law provides for a two-tier system of challenge proceedings for “a supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity”<sup>58</sup>. First, the basic right to challenge by way of “an application for reconsideration to the procuring entity”, and/or “an application for review to the [independent body]” specified by the national legislation, then, for a judicial review or the right of appeal by way of “an application or appeal to the [court or courts]”.

The DRAFT PPL distinguishes between (1) complaints originating from any bidder at any stage of the procurement cycle, including complaints originating during the standstill period; and (2) disputes arising between the parties during the execution of the procurement contract. The procedure in relation to the filing and settlement of the complaint is provided under Sub-Decree No. 21 ANKr.BK issued on 21 February 2018.

The UNCITRAL’s instruments consider *application for reconsideration to the procuring entity* as an optional mechanism. In the opposite, the DRAFT PPL suggests that this is

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<sup>55</sup> United Nations Office on Drugs and Crime, *Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention Against Corruption*, 2013, p. 11, available online at:

[https://www.unodc.org/documents/corruption/Publications/2013/Guidebook\\_on\\_anti-corruption\\_in\\_public\\_procurement\\_and\\_the\\_management\\_of\\_public\\_finances.pdf](https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf)

<sup>56</sup> Draft PPL, Art. 68.

<sup>57</sup> Draft PPL, Art. 69.

<sup>58</sup> UNCITRAL Model Law, Art. 65.

the very first procedural step to resolve a procurement complaint. As to the *application for review to an independent body*, the DRAFT PPL does not provide for another body than the MEF. The UNCITRAL Model Law and its procurement related instruments suggest that the nature of the independent body is a matter of the national procurement regulations, emphasizing though that the challenge mechanism shall be effective. However, the UNCITRAL provides guidance on the notion of “*independence*” in the context of the UNCITRAL Model Law (Chapter VIII), which means:

*“Independence from the procuring entity rather than independence from the Government as a whole and protection from political pressure. For the same reasons as apply to hierarchical administrative review, **an administrative body that under the Model Law as enacted in the State has the competence to approve certain actions or decisions of, or procedures followed by, the procuring entity, or to advise the procuring entity on procedures, will not fulfil the requirement for independence** [underscored by the author of this report]. States will wish therefore to consider in particular whether the independent body should include or be composed of outside experts, independent from the Government. Independence is also important as a practical matter: if decision-taking in review proceedings lacks independence, a further challenge to the court may result, causing lengthy disruption to the procurement process”.*

Therefore, the RGC may consider the possibility of having an independent body, within the meaning of the aforementioned, as the competent body to apply for administrative review or to requalify the nature of the mechanism on the complaint brought to the procuring entity or the MEF (as a consultation or mediation mechanism).

The DRAFT PPL also provides for a judicial review proceeding, where the review of the MEF can be judicially challenged by the courts of Cambodia.<sup>59</sup>

As for the scope of the complaint, the DRAFT PPL is not explicit. As mentioned earlier, the UNCITRAL Model Law provides the scope of the claims that the supplier or contractor may bring for resolution, which are “*claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity*”. The DRAFT PPL just provides vague wording related to suspected irregularities in the procurement procedure.

About the person having interest to be a party of the challenge proceedings, the UNCITRAL Model Law recommends that such right be given to suppliers or contractors and also potential suppliers or contractors, but not to the general public. The DRAFT PPL limit such right to the tenderers. the potential tenderers, who may have an interest

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<sup>59</sup> PPL, Art. 62; Draft PPL, Art. 65.

in the procurement procedure, are then excluded from the right to challenge.<sup>60</sup> Furthermore, the Draft PPL does not specify the effects of a challenge. As a result, the effect of the challenge proceedings on the procurement process may be uncertain.

The DRAFT PPL provides that a complaint may be brought “*at any stage of the procurement process*”, a provision that may be subject to interpretation. This is due to the fact that the DRAFT PPL does not restrict the time limits for complaints to be brought, namely the statute of limitation, and does not circumscribe the right to file a complaint to an appropriate stage of the procurement process. In the same manner, the DRAFT PPL does not provide for a time limit for handling the resolution of a complaint under the administrative challenge process.<sup>61</sup> While potentially constituting an advantage by providing some sort of flexibility to handle a matter based on the project characteristics, the procurement process may suffer undue delays and be subject to discretion in cases where complaints being brought by the bidders are not addressed and resolved by the authorities in a timely manner.

The UNCITRAL Model Law addresses the question of time limit for a challenge to be brought by the competent person or the time limit for the relevant body to issue its decision on the merit. While the UNCITRAL Model Law does not provide for a specific number for the latter, it provides guidance on the principle to consider, which is “*as short as their systems will permit, so as to avoid excessive disruption to the procurement process*”<sup>62</sup>. As to the challenge related to the decision of the procurement committee to award the procurement contract, Article 51 of the DRAFT PPL amends Article 48 of the PPL. Under the draft provision, a complaint against the decision of the procurement committee shall be made within 10 days from the issuance of the notification of the committee’s decision. Upon the receipt of the complaint, the committee is required to take immediate action to resolve the issue; failing of which, the committee shall refer the matter to the MEF.<sup>63</sup> In this latter case, an interpretation may be made *a contrario* in relation to the signing and execution of the procurement contract. In particular, when a

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<sup>60</sup> See for example, the Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, par. 13-14, where “(...) a *contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body*”; “*Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete (...)*”, available online at: <http://data.europa.eu/eli/dir/2007/66/oj>

<sup>61</sup> See for example, *Asia Development Bank, ADB Procurement Policy: Goods, Works, and Non-consulting and Consulting Services*, 2017, para. XI, available online at: <https://www.adb.org/sites/default/files/adb-procurement-policy.pdf>

<sup>62</sup> United Nations, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, 2012, Comments on Article 65.

<sup>63</sup> Draft PPL, Art. 51.

complaint is filed within the ten-days standstill period, the relevant authority must not proceed with the execution of the procurement contract. However, while such interpretation may be implied, the wording of the Draft PPL is not explicit; thus, letting aside the question of the judicial recourse against the decision of the MEF, the time limit to process the complaint, as well as the execution of the contract in urgent circumstances.<sup>64</sup> The UNCITRAL Model Law provides a more straightforward wording, by providing that *“the procuring entity shall not take any step that would bring into force a procurement contract (...) in the procurement proceedings [...]”*<sup>65</sup>.

As for the dispute resolution mechanism between the parties during the implementation of the contract, the DRAFT PPL stipulates a new provision that *“any or all disputes arising during the execution of the procurement contract shall be resolved by both parties to the contract in accordance with the provisions and mechanisms as specified in the contract”*.<sup>66</sup> The DRAFT PPL does not explicitly prohibit any form of dispute resolution, nor explicitly provide for the possibility for the parties to choose for an alternative dispute resolution mechanism, such as arbitration. The DRAFT PPL provides that the MEF shall issue a regulation with the procurement contract template.<sup>67</sup> At the moment, this research has not been able to locate any Prakas from the MEF which provides such sample procurement contract. There is a template for contract on consulting services in the Standard Operating Procedures on Financial Management for all Externally Financed Projects/Programs in Cambodia Volume II<sup>68</sup> and III<sup>69</sup>. Among the templates provided, the template for Contract for Individual Consulting Services provided a vague dispute resolution clause, permitting the parties to choose either arbitration or adjudication as a means for dispute resolution.<sup>70</sup> On the other hand, the template contract provided in in the Standard Operating Procedures on Financial Management for all Externally Financed Projects/Programs in Cambodia Volume II does not provide any dispute resolution clause.<sup>71</sup>

Regardless of the above, given that the scope of party autonomy is a crucial element in relations to the decision to enter into a contract, such matter should be defined at the

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<sup>64</sup> See for comparison, United Nations, UNCITRAL Model Law on Public Procurement, June 2014, Art. 65.

<sup>65</sup> UNCITRAL Model Law, art. 65.

<sup>66</sup> Draft PPL, Art. 66. Art. 67

<sup>67</sup> PPL, Art. 53; Draft PPL, Art. 56.

<sup>68</sup> MEF, *Standard Operating Procedures on Financial Management for all Externally Financed Projects/Programs in Cambodia Volume II*, pp. 73-75, available online at: <https://gdicdm.mef.gov.kh/en/2020/10/05/10176.html>

<sup>69</sup> MEF, *Standard Operating Procedures on Financial Management for all Externally Financed Projects/Programs in Cambodia Volume III*, pp. 462-471, available online at: <https://gdicdm.mef.gov.kh/en/2020/10/05/10179.html>

<sup>70</sup> MEF, *Standard Operating Procedures on Financial Management for all Externally Financed Projects/Programs in Cambodia Volume III*, p. 471 (Clause 15).

<sup>71</sup> MEF, *Standard Operating Procedures on Financial Management for all Externally Financed Projects/Programs in Cambodia Volume II*, pp. 74-75.

level of a legislation.<sup>72</sup> For instance, Article 45 of the Law on Public Private Partnerships provides that the Public Private Partnerships Contract may include an arbitration agreement to settle any dispute between the implementing agency and the private partner.<sup>73</sup> Therefore, the Draft PPL would provide a reasonable degree of certainty if it defines the scope of the party autonomy under the procurement contract. The UNCITRAL Model Law does not deal with the possibility of arbitration as well, as it is considered as “*infrequent*” in public procurement.<sup>74</sup>

#### **f. Public Participation**

For the purpose of improving a public procurement system, one of the recommendations provided by the OECD is that the government should “foster transparent and effective stakeholder participation”.<sup>75</sup> The participation of the stakeholders, particularly the private stakeholders and civil societies, should take place when there is any modification in the public procurement system.<sup>76</sup> The purpose of such participation is to invite the stakeholders to make comments on the draft amendment as well as to inform the relevant stakeholders of such changes. At the moment, the research has learnt that the RGC has invited relevant stakeholders to make comments on the Draft PPL law of Cambodia.

During the Pre-Tender stage, particularly the planning of the procurement project, the PPL does not mention any opportunity for the public to be involved in the planning of public procurement. Nor does the PPL and Draft PPL mention any opportunity of creating a dialogue among relevant stakeholders to keep updated of the market and to keep the stakeholders, who may be potential tenderers, informed of the objectives of the procurement projects.<sup>77</sup>

In relations to budget preparation, which is one of the cycles of PFM, after the draft Budget Law has been drafted, the citizens are generally not invited to comment on the draft law. In this sense, the RGC should try to 1) submit the brief of procurement projects

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<sup>72</sup> See, United Nations, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, 2012, Comments on Chapter VII (Challenging Proceedings), pp.299-300, para. 17: “Chapter VIII does not deal with the possibility of dispute resolution through arbitration or alternative forums, since the use of arbitration in the context of procurement proceedings is relatively infrequent, and given the nature of challenge proceedings, which generally involves the characterization of acts or decisions of the procuring entity as compliant or not compliant with the requirements of the Model Law. Nevertheless, the Model Law does not intend to suggest that the procuring entity and the supplier or contractor are precluded from submitting a dispute relating to the procedures in the Model.”; See also, the *Indonesia Presidential Regulation on Government Procurement (2018)*, Art. 85, which allow arbitration proceedings to resolve dispute between the procuring entity and the contractor.

<sup>73</sup> Law on Public Private Partnership, NS/RKM/1121/18 dated 18 November 2021, available online at: [https://ppp.mef.gov.kh/fileadmin/user\\_upload/Law\\_of\\_PPP\\_EN.pdf](https://ppp.mef.gov.kh/fileadmin/user_upload/Law_of_PPP_EN.pdf)

<sup>74</sup> United Nations, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, 2012, Comments on Chapter VIII, par. 17.

<sup>75</sup> OECD, *OECD Recommendation of the Council on Public Procurement*, 2015, p. 9, part VI, available online at: <https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf>

<sup>76</sup> OECD, *OECD Recommendation of the Council on Public Procurement*, 2015, p. 9, part VI.

<sup>77</sup> OECD, *OECD Recommendation of the Council on Public Procurement*, 2015, p. 9, part VI(ii).

with the annual budget documents to the parliament for review; 2) publish the brief execution and planning reports of procurement projects as well as potential procurement projects; and 3) involve the citizens more in the procurement process as well as the budgeting process for public procurement expenditure.

**g. Openness and Inclusiveness**

**i Choice of procedure:**

The DRAFT PPL does not alter the varieties of procedures available for public procurement. The “preferred method” for selecting suppliers, contractors or service providers is the *Public Competitive Bidding*, which is described as constituting a “highly transparent” method. The *Public Competitive Bidding* is open to all domestic and international bidders under the forms of either *Domestic* or *International Competitive Biddings*. The Draft PPL does not provide that legal person shall be incorporated under the law of Cambodia to be eligible to bid in an *International Competitive Bidding*. On the contrary, the *Domestic Competitive Bidding* may be understood as providing privileges to domestic contractors and domestic produced goods/services, as legal entity conducting business in Cambodia must comply with the legal framework, including the requirements on domestic registration.

Other procedures are provided with different degrees of openness, from limited competitive methods, such as *Restricted Competitive Bidding* or *Competitive Shopping*, to non-competitive bidding methods, where bidders are selected without any bidding. For the good practice, the non-competitive bidding methods shall be used for special and exceptional cases only under high scrutiny subject to certain disclosure. The DRAFT PPL provides for the reasons for the non-competitive bidding to be used; however, it does not require for such bidding process to be disclosed.

Moreover, the DRAFT PPL should provide a legal provision to void any executed agreement or contract for public procurement projects that have not gone through a proper public procurement process under the applicable laws and regulations. This provision would help prevent private bidders and contractors to collude with public officers for getting the contract signed without proper bidding process.

**ii Qualifications of bidders:**

Article 27 of the PPL which becomes Article 28 of the Draft Law provides that the tenderer has to be registered with the MEF to be eligible to participate in any public procurement project. Upon such registration, the MEF is empowered to classify the types and levels of bidders in accordance with their capacities to undertake the implementation of contracts. However, the *Guideline of the MEF on the Procedure*



for the *Determination of Pre-Qualifications for Tenderers* states that only enterprises registered in Cambodia can propose pre-conditions for the implementing institution to consider for the determination of pre-conditions for tenderers.<sup>78</sup> Therefore, a company may be qualified to submit a bidding document to the procurement company only if that company is registered in Cambodia. However, the DRAFT PPL does not include any discriminatory criteria based on nationality of shareholders.

### iii Rules regarding the language:

In consideration of the participation of foreign tenderers, the Decision of the MEF No. 002 dated 06 November 2015 on the *Methodology and Procedure for Procurement by City, District and Khan Administration* states that the announcement for the international competitive bidding shall be made in both Khmer language and foreign languages.<sup>79</sup> Nevertheless, there are limited mechanisms to facilitate participation from foreign companies or foreign investors/entrepreneurs based in Cambodia. In addition to the above registration requirement, the tender documents are also required to be translated to Khmer language if it was prepared in a foreign language.<sup>80</sup>

The Draft PPL does not modify the provision requiring that the procurement contract shall be written in Khmer, and that the Khmer version of the contract shall prevail.<sup>81</sup> This reflects the alternative provided by the *UNCITRAL Model Law on Public Procurement*, which provide that the primary language shall be the official language(s) of that State, but at the same time let the possibility to choose a “*language customarily used in international trade*”.<sup>82</sup> The PPL and Draft PPL does not limit the language of the secondary language, leaving the freedom to the tenderers to choose the secondary foreign language.

### iv Choice of Currency for Payment:

By default, all payments under the procurement contract shall be paid in Khmer currency except for the contracts awarded through the *International Competitive Bidding* in which cases the payment shall be made in the foreign currencies stipulated in the bidding documents. Subject to further specification in the contract, the currency exchange rate shall be denominated based on the exchange rate as

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<sup>78</sup> Guideline No. 014 SHV on the Procedure for the Determination of Pre-Conditions for Tenderers dated 31 May 2019, p. 3, part 2.2.1, available online at:

<http://gdpp.gov.kh/storage/law/file/8eGabZQYawWrfOkfO8WhqTLFPBGUWlehifXsblvc.pdf>

<sup>79</sup> Decision No. 002 SHV.ALSa dated 06 November 2015 on the Methodology and Procedure for Procurement by City, District and Khan Administration, p. 10, part. 4.2.1.

<sup>80</sup> PPL, Art. 54; Draft PPL, Art. 57.

<sup>81</sup> PPL, Art. 54; Draft PPL, Art. 57.

<sup>82</sup> United Nations, UNCITRAL Model Law on Public Procurement, 2011, Art.13

set by the central bank of Cambodia namely the National Bank of Cambodia in order to avoid any loss or exchange rate risks.

**v Minimum Number of Bids:**

Regarding the mechanism to ensure that there are submissions from various bidders, the PPL states the limited minimum number of tenderers to be at least three (3). In the event that there are less than 3 proposals submitted, the tender documents shall not be opened and the tendering procedure needs to restart again.

**vi SME:**

Neither the PPL nor the Draft PPL provide for a specific scheme facilitating the participation of the SME. According to the OECD, the small and medium enterprises (“SMEs”) are considered the key to the growth and development of a country’s economy.<sup>83</sup> However, the SMEs tend to resort to making illegal payments when faced with burdensome administrative requirements.<sup>84</sup> Hence, the European Commission as well as countries such as China and Spain have adopted various measures to foster the active participation of SMEs in public procurement.<sup>85</sup>

**vii Local Communities:**

Both PPL and Draft PPL provide for a specific procedure called *Contracting with Communities*, which is a *Non-Public Competitive Bidding Method*, as an inclusive mechanism which can be adopted with the approval from the MEF.<sup>86</sup> As defined by the law, the *Contracting with Communities* is a procurement method that is used to engage local communities and use local labor force, knowledge and materials to contribute to community development.<sup>87</sup> The *UNCITRAL Model Law on Public Procurement* contains some provisions targeting specific groups with consideration to avoid undue discrimination as procurement can be a tool to implement the socio-economic policies of a given State.<sup>88</sup>

**viii Sustainable Procurement**

A link may be made between the interconnection between the socio-economic policies, public procurement and the rising concept of “*Sustainable Procurement*”, which has been introduced in the provisions of the Draft PPL.

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<sup>83</sup> OECD, *Compendium of Good Practices for Integrity in Public Procurement*, p. 12.

<sup>84</sup> OECD, *Compendium of Good Practices for Integrity in Public Procurement*, p. 12.

<sup>85</sup> OECD, *Compendium of Good Practices for Integrity in Public Procurement*, pp. 12-14.

<sup>86</sup> PPL, Art. 13; Draft PPL, Art. 13(d).

<sup>87</sup> PPL, Art. 13; Draft PPL, Art. 13(d).

<sup>88</sup> United Nations, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, 2012, pp. 52-54, available online at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf>



In accordance with the Lexicon attached to the Law on Public Procurement, Sustainable Procurement means “*the process of procurement which considering the maximum reduction of the potential impact on the environment, ecological system and continuity of community development*”.

In accordance with the Draft PPL (Article 54 New), the implementation of public procurement shall comply with the context of sustainable procurement to contribute to the sustainability of economic, society and environmental development. The timeline, rules, and methodology for the implementation of Sustainable Procurement shall be determined by a Prakas from the Minister of the MEF.

The UNCITRAL Model Law on Public Procurement does not use the term “sustainable” or “sustainable procurement”. However, the UNCITRAL has noted that, even though there is no agreed definition of “sustainable procurement”, it is generally considered to include a long-term approach to procurement policy, reflected in the consideration of the full impact of procurement on society and the environment, for example through the promotion of life-cycle costing, disposal costs and environmental impact<sup>89</sup>. The comments on the UNCITRAL Model Law points out that the UNCITRAL Model Law allows sustainability to be promoted through procurement via qualification criteria (under article 9, which expressly allows the procuring entity to impose environmental qualifications, and ethical and other standards that could include fair trade requirements). The term sustainable procurement can also be used as an umbrella term for pursuit of social, economic and environmental policies through procurement such as:

- “social” factors: employment conditions, social inclusion, antidiscrimination;
- “ethical” factors: human rights, child labour, exploitation of labour; and
- environmental/green procurement<sup>90</sup>.

## **Recommendation**

This part will provide recommendations based on the issues identified above in the same order as provided in the above section.

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<sup>89</sup> United Nations, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012, pp.4-5.

<sup>90</sup> See also UNCITRAL Model Law, article 2 (o):

(o) “Socio-economic policies” means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State to be taken into account by the procuring entity in the procurement proceedings. [The enacting State may expand this subparagraph by providing an illustrative list of such policies.];

## **a. Transparency**

- i) Public Information:
  - 1) Silence of the legislation regarding the publicity of the negotiated procedure and the single-source procurement: The Draft PPL needs to specify the publicity of these procedures.
  - 2) Lack of legal provision on the principle of sufficient time: The RGC should adopt legislation to provide specific timeframe for: 1) publication of bidding notice; and 2) the provision of responses or holding clarification meeting.
- ii) Online Portal for Public Procurement: For transparency purpose as well as for the purpose of providing access to information in relation to public procurement to the citizens and relevant stakeholders, the RGC should establish an online portal for the disclosure of all non-confidential information in relations to the entire public procurement process. Examples of the information that could be disclosed include the tender announcements and any amendments in relation to the announcements, RGC's annual procurement plan, past and current contracts awarded and identity of the winning bidder. The DRAFT PPL may also include such confidentiality requirement for information submitted by suppliers or contractors, as per the Art. 24 (2) of the UNCITRAL Model Law, under which "*the procuring entity shall treat applications to pre-qualify or for pre-selection and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information*", reserved to some exceptions, such as the public notice for the award of the contract, opening of tenders, information necessary to be disclosed in documentary records.
- iii) Debrief on the Award Decisions: As stated above, with an exception to confidential information, the entire procurement process needs to be transparent. This includes also the contracts signed between the procuring entity and the awarded tenderer.

## **b. Good Management**

- i) Issue with the management of public funds in relation to on-going procurement projects: The legislations governing public finance management, particularly in relation to procurement projects, should address the preparation of budget for on-going procurement projects. In particular, as stated above, this issue may be improved after the full adoption of 1) the medium-term budgetary framework;

- 2) the harmonization of capital budget with current budget; and 3) the harmonization of public procurement with budget preparation, budget execution and asset management.
- ii) The public financial management laws and regulations may consider 1) enhancing medium term expenditure framework for public procurement projects; 2) requiring brief of expenditure plan for public procurement projects to be attached with the annual budget documents for parliament to review and publication; and 3) having the brief execution report of public procurement project be attached with the annual budget execution report for the parliament to review and publication.
  - iii) Risk of undue influence imposed on the procurement committee due to lack of protective mechanism: The RGC should consider adopting a legislation and imposing a certain mechanism to provide protection on the procurement committee and whistle blower. For instance, as a part of its public procurement reform in 2002 and for the purpose of protecting procurement authority, the Turkish Public Procurement Law stipulated that the procurement authority shall be financially autonomous and independent in the fulfillment of its duties.<sup>91</sup>

### **c. Accountability and Integrity**

- i) Set the public competitive tendering as the default method of procurement.
- ii) Insert the possibility for a procuring entity to act as a centralized purchasing entity and set a clear chain of command for that.
- iii) The DRAFT PPL may include the obligation for procuring entity to provide a short statement of the reasons in the event of cancellation of the procurement, in a manner that must be sufficient to enable a meaningful review of the decision.
- iv) Provides the obligation for the procuring entity to promptly publish notice of the award of the procurement contract and the detailed information along the procurement process.
- v) The DRAFT PPL may include the standard for record keeping for the purpose of tracking the decision-making process made by the procuring entity.

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<sup>91</sup> Public Procurement Law of Turkey, Article 53, available online at: [http://www2.ihale.gov.tr/english/4734\\_English.pdf](http://www2.ihale.gov.tr/english/4734_English.pdf)

- vi) Lack of independent agency specifically in charge of public procurement: To delegate the task to a separate entity to implement public procurement.<sup>92</sup> In the event that this recommendation is considered, it will be necessary to amend the Law on the Establishment of the Ministry of Economy and Finance (Royal Kram No. NS/RKM/0196/18),<sup>93</sup> dated 24 January 1996, and the Sub-Decree No. 75/ANK/BK, dated 25 May 2017, on Amendment of Sub-Decree No. 488, dated 16 October 2013, on Organization and Functioning of the Ministry of Economy and Finance. As the key role of the MEF is clearly provided by those instruments, particularly “*to manage and control public procurement transaction of the ministries/institutions, provinces/municipalities and state managed or publicly owned autonomous institutions*”.
- vii) The RGC may consider the wording used in the Article 34(5) and 35(4) of the UNCITRAL Model Law to clarify whether a notification shall be published where a non-competitive bidding method is chosen.
- viii) Include in the Draft PPL that any decision by the procuring entity or prior approval decision by the MEF should be justified and included in the record of the procurement proceedings concerned.
- ix) Consolidate and/or rationalize the legal regime to prevent corruption by vesting a dedicated institution, such as ACU, to scrutinize the procedure and to investigate any irregularities during the public procurement cycle.<sup>94</sup> A reference in the DRAFT PPL to the definitions provided in the Law on Anti-corruption may be considered.
- x) The Draft PPL also should determine that all agreement, which is made in non-compliance to the legal requirements of public procurement, shall be considered as void in order to avoid any collusion between the private bidders and the public officers responsible for procurement.

#### **d. Control and Monitoring**

- i) Lack of Prakas on the procedure for delivery and acceptance (*of goods and works*): The MEF needs to adopt this Prakas.

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<sup>92</sup> See for example, the 2002 public procurement reform in Turkey, establishing a Public Procurement Authority (PPA), in *G20 Anti-Corruption Working Group (ACWG); OECD, Compendium of Good Practices for Integrity in Public Procurement, 2014*, pp. 17-18.

<sup>93</sup> Law on the Establishment of the Ministry of Economy and Finance (Royal Kram No. NS/RKM/0196/18 dated 20 January 2020, accessible online at: <https://gdia.mef.gov.kh/wp-content/uploads/2012/04/anukret04.pdf>

<sup>94</sup> See for example, the role of the Anti-Corruption Office in public procurement in Argentina, in *G20 Anti-Corruption Working Group (ACWG); OECD, Compendium of Good Practices for Integrity in Public Procurement, 2014*, pp. 28-29; See also, the Thailand Public Procurement and Supplies Act (2017), Part IV on the Anti-Corruption Co-operation Committee.

- ii) The Draft PPL shall specifically mention about the mechanism for the requirement of environmental, social and governance for the bidders to comply or strictly comply and justify based on the characteristic of some projects.
- iii) Lack of Prakas on procedure for the establishment of *Committee for Delivery and Acceptance (of goods and works)*: The MEF needs to adopt this Prakas. Any public procurement project, which has been completed, shall be properly verified and acknowledged of receipt by the competent authority under the applicable laws, regulations and procurement contracts. Onward, the result of those completed projects shall be considered as state asset to be properly listed in the state balance sheet and managed by the competent authority for managing state's assets.
- iv) Lack of regular risk assessment: The RGC needs to adopt an approach to require procurement management institution and procuring entity to map out risks of irregularities potential corruptions in public procurement on a regular basis.
- v) Legal protection for whistle blower:
  - Report mechanism needs to be established for relevant officers to report any irregularities in relation to the procurement project;
  - Protective system needs to be adopted to provide protection to the officers; and
  - Officers needs to be provided with trainings on integrity and be encouraged to report any irregularities in the procurement process.<sup>95</sup>

#### **e. Right to Redress**

- i) The Draft PPL may include provision for establishing an independent body, particularly to handle administrative challenge proceeding.
- ii) Lack of mechanism for interested third-party to file challenge against any irregularity in the procurement procedure: The RGC may consider developing a mechanism to address the lack of administrative and/or legal remedies for third party having a legal interest in the matter to challenge the choice of the bidding procedure.
- iii) Lack of a time limit for complaint handling: For reason of legal certainty, clarify the time limits for handling "complaints" brought by bidders to the administration

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<sup>95</sup> See for example, the integrity training in Germany in OECD, *Compendium of Good Practices for Integrity in Public Procurement, 2014*, p. 23.

and before the courts and the effects of such challenge may be enumerated.<sup>96</sup> When receiving a challenge, the procuring entity may publicize such challenge via a public notification.

- iv) The RGC may consider establishing a court or a tribunal dedicated to handle any or part of public procurement challenges.<sup>97</sup>
- v) Non-Explicit Wording of Article 51 of the Draft PPL in relation to the challenge against the decision of procurement committee on the awarded contract: The RGC may provide a comprehensive regime on the effects of such challenge made during the standstill period.
- vi) Scope of party autonomy in relation to the choice of dispute resolution mechanism: The DRAFT PPL needs to determine the scope of the autonomy of the parties to the procurement contract with regards to the possibility to choose arbitration or any other means for dispute settlement as a means to resolve dispute.

#### **f. Public Participation**

- i) Involvement of the public during the amendment of public procurement system: The RGC should continue inviting relevant stakeholders to make comments on the draft laws and regulations relating to public procurement while ensuring that the comments provided are taken into consideration and amendments are made where appropriate.
- ii) Lack of public and stakeholders' participation at pre-tender stage: For the purpose of an efficient participation in the bid submission, the RGC should organize transparent and regular dialogues with the stakeholders.
- iii) The RGC should try to 1) submit the brief of procurement projects with the annual budget documents to the parliament for review; 2) publish the brief execution and planning reports of procurements projects as well as potential procurement projects; and 3) involve the citizens more on the procurement process as well as the budgeting process for public procurement expenditure.

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<sup>96</sup> See for example, *the Lao PDR Public Procurement Law 2017, Article 46*, which provides a time limit of fifteen days for the procuring entities to resolve the complaints before to submit it to relevant government agencies, while not specifying time limits for the latter submission.

<sup>97</sup> See for example, *Singapore Government Procurement Act 1997*, establishing a Government Procurement Adjudication Tribunal for handling case related to breach of duty of a contracting authority, available online at: <https://sso.agc.gov.sg/Act/GPA1997#:~:text=An%20Act%20to%20give%20effect,and%20for%20purposes%20connected%20therewith.>

## **g. Openness and Inclusiveness**

- i) Lack of mechanism to encourage participations from international tenderers:  
The RGC may consider removing the requirement to register with the MEF to be eligible to participate in any public procurement project for International Competitive Bidding.
- ii) The public procurement contracts, which have been executed without going through proper procurement process under the applicable laws and regulations, shall be considered as void by the DRAFT PPL.
- iii) The RGC should consider introducing provisions in favor of participation of SMEs.<sup>98</sup>
- iv) The RGC should align public procurement cycle with national socio-economic policies.<sup>99</sup> For instance, the Draft PPL Art. 54 may be reformulated in a way that incorporate the sustainable procurement concept by adding that “the environmental characteristics of the subject matter” may be used by the procuring entity as a selection criterion in the bidding documents. Alternatively, the implementing regulation may enumerate such criteria, but it will provide less impact as being a general concept in the law.
- v) As well, the DRAFT PPL should also consider about decentralization of public procurement save for any procurement that require large bargaining power for efficient and effective purchase. Therefore, the social accountability at local administration can be adopted for enhancing public participation in procurement.

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<sup>98</sup> See for example the *Indonesia Presidential Regulation on Government Procurement (2018)*, Art. 29 on advance payment for small businesses; the Chapter IX on Small Businesses, Domestic Products, and Sustainable Public Procurement, available online at: <https://jdih.lkpp.go.id/regulation/download/terjemahan-resmi-peraturan-presiden-nomor-16-tahun-2018/1>

<sup>99</sup> See for example *the Lao PDR Public Procurement Law 2017*, Art. 45 on Domestic Preference, available online at: [http://ppmd.mof.gov.la/storage/1632981237.Laos%20PDR%20Public%20Procurement%20Law\\_English\[23\].pdf](http://ppmd.mof.gov.la/storage/1632981237.Laos%20PDR%20Public%20Procurement%20Law_English[23].pdf)

## Conclusion

At the moment, Cambodia is drafting a new public procurement law. Taking the opportunity that the new PPL has not been adopted, this study was commenced in order to assess the legal framework of public procurement in Cambodia as well as the new draft law in order to identify any gap or loophole in the law that may affect the principle of transparency for public procurement as well as may impose risks of corruption. In term of methodology, this study has reviewed the publicly available legislations in Cambodia in relations to public procurement in comparison with legislations and other essential principles of public procurement and international best practices. Upon the assessment, this study has identified issues as discussed in Part II above and suggested recommendations as provided in Part III. The recommendations provided under this report is for the RGC to take into consideration while drafting the PPL and other relevant legislations for the purpose of improving public procurement system in Cambodia.

Decentralization of public procurement is not addressed in the Draft PPL. At the sub-national level, public procurement is governed by another set of instruments<sup>100</sup>. There is a joint competency of the MOI and the MEF over matters related to public procurement at the Capital, Provincial, District, Khan Administrations level. The MOI retains its competency over the matters related to administrative matters at the sub-national level, while the MEF, through the Provincial Department of Economy and Finance, has a competency over the: i) review and approval of the procurement plan of the Municipality, District, Khan Administrations; and ii) review and approval of the procurement of the Municipality, District, Khan Administrations that fall under the competency of the MEF .The RGC has adopted a reform strategy for public procurement from 2019 to 2025. Under such adopted reform strategy, the RGC aims, inter alia, at decentralizing the procurement process and procedures except for certain type of procurement that requires centralization for cost efficiency. However, the DRAFT PPL does not address in a specific manner matters related to such decentralization process.

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<sup>100</sup> See Sub Decree No. 13 (2015) on Procedures of Establishment, Organizing and Functioning of Procurement Committee and Procurement Unit; Inter-Ministerial Prakas No. 324 SHB PK dated 01 April 2013 on Procedure of the Establishment, Organizing and Function of Procurement Committee and Procurement Unit of Capital, Provincial, District, Khan Administrations; and other guidelines.



## List of References

No.	Law
1.	Draft Law on Public Procurement (Draft Version 1 dated 18 July 2022) as provided by API
2.	Law on Public Private Partnership dated 18 November 2021
3.	Law on Public Procurement dated 14 January 2012
4.	Law on Finance and the Management of the Asset of the Local Government dated 31 May 2011
5.	Law on Public Financial System dated 04 April 2008
6.	Law on Concession dated 10 September 2007
7.	Law on the Establishment of the Ministry of Economy and Finance dated 20 January 2000
No.	Sub-Decree
1.	Sub-Decree No. 105 ANKr.BK dated 18 October 2006 on Public Procurement
2.	Sub-Decree No. 13 ANKr.BK dated 23 February 2015 on the Procedure on the Establishment, Organization and Functioning of the Procurement Committee and Procurement Unit
3.	Sub-Decree No. 21 ANKr.BK dated 21 February 2018 on the Formality and Procedure for Filing Complaint and the Resolution of Complaint against Procurement
4.	Sub-Decree No. 181 ANK.BK on Promulgating the Standard Operating Procedure for Implementing All Externally Financed Projects/Programs
No.	Prakas
1.	Prakas No. 045 SHV.BrK dated 31 January 2005 on the Execution of the Decentralization of Public Procurement Matter
2.	Inter-Ministrial Prakas No. 324 SHV.BrK dated 01 April 2013 on the Provision of Right to Decision Making on Procurement Project to Capital, Provincial, District and Khan Administration
3.	Prakas No. 1844 SHV.BrK dated 26 December 2014 on the Determination of Budget for Procurement Execution
4.	Prakas No. 249 SHV.BrK dated 03 March 2015 on the Establishment of Procurement Team under the Budget Unit
5.	Prakas No. 986 SHV.BrK dated 31 August 2016 on the Security Deposit for Bidding and Security Deposit for the Implementation of Agreement
6.	Prakas No. 987 SHV.BrK dated 31 August 2016 on Code of Ethics for Procurement
7.	Prakas No. 988 SHV.BrK dated 31 August 2016 on the Implementation of the Guidebook on the Post Procurement Examination
8.	Prakas No. 851 SHV.BrK dated 28 August 2017 on Procurement Planning
9.	Prakas No. 1613 SHV.BrK dated 24 December 2018 on the Management of the Performance of Obligation under Public Procurement Agreement
10.	Prakas No. 1614 SHV.BrK dated 24 December 2018 on the Procedure of the Registration, List Clearance, and Announcement of Black List
11.	Prakas No. 010 SHV.BrK dated 14 January 2019 on the Limitation of Budget for Decision Making on Procurement Project
No.	Decision
1.	Decision No. 001 SHV.ALSa dated 23 February 2012 on the Implementation of the Law on Public Procurement

2.	Decision No. 002 SHV.ALSa dated 14 January 2014 on the Implementation of Public Procurement
3.	Decision No. 013 SHV dated 06 November 2015 on the Implementation of Procurement on Certain Products and Services Necessary Immediate Use at the Beginning of the Budget Year
4.	Decision No. 002 SHV.ALSa dated 06 November 2015 on the Methodology and Procedure for Procurement by City, District and Khan Administration
5.	Decision No. 015 SHV dated 23 November 2015 on the Seizure of Deposit during the Execution of Public Procurement Project at City, District, Khan, Commune and Sangkat Administration
6.	Decision No. 013 SHV dated 12 December 2017 on the Procedure for the Classification of Construction Type and Classification of Construction Team
7.	Decision No. 001 SHV dated 05 March 2019 on the Provision of Security Deposit for Bidding and Security Deposit for the Implementation of Public Procurement Agreement
8.	Decision No. 006 SHV dated 17 July 2019 on the Preparation of Annual Procurement Plan
9.	Decision No. 002 SHV.ALSa dated 28 January 2014 on the Methodology and Procedure for Procurement by City, District and Khan Administration
<b>No.</b>	<b>Guidelines</b>
1.	Guideline No. 014 SHV on the Procedure for the Determination of Pre-Conditions for Tenderers dated 31 May 2019
<b>No.</b>	<b>Books and Articles</b>
1.	<i>Asia Development Bank, ADB Procurement Policy: Goods, Works, and Non-consulting and Consulting Services, 2017</i>
2.	OECD, <i>OECD Recommendation of the Council on Public Procurement, 2015</i>
3.	OECD, <i>Compendium of Good Practices for Integrity in Public Procurement, 2014</i>
4.	Standard Operation Procedure on Procurement for All Externally Financed Projects/Programs in Cambodia, Volume I, 22 July 2020
5.	Standard Operation Procedure on Procurement for All Externally Financed Projects/Programs in Cambodia, Volume II, 05 October 2020
6.	United Nations, <i>Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 2012</i>
7.	United Nations Office on Drugs and Crime, <i>Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention Against Corruption, 2013</i>

## Comparative Instruments

### National Legislations of ASEAN Members

No.	Legislation
1.	Government Procurement Act 1997 of Singapore
2.	Indonesia Presidential Regulation on Government Procurement promulgated on 22 March 2018
3.	Public Procurement Law of Laos dated 2 November 2017

### Other Regional and National Legislations

No.	Legislation
1.	Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007
2.	Public Procurement Law of Turkey dated January 2012

### International Instruments

No.	Legal Instruments
1.	United Nations, UNCITRAL Model Law on Public Procurement dated 2011

## Provisions Containing Implementing Legislations

ANUKRET/SUB-DECREES			
PPL	DPPL	Provision	Comments
Art. 8	8	The <b>procedures for establishment of procurement committee</b> shall be determined by a Sub-decree.	Sub-Decree No. 13 ANKr.BK dated 23 February 2015 on the Procedure on the Establishment, Organization and Functioning of the Procurement Committee and Procurement Unit
Art. 9	9	The <b>procedures for establishment, organization and functioning of the procurement unit</b> shall be determined by a Sub-decree.	Sub-Decree No. 13 ANKr.BK dated 23 February 2015 on the Procedure on the Establishment, Organization and Functioning of the Procurement Committee and Procurement Unit
Art. 62	Art. 65	The formalities and procedures of the complaint and resolution at the institution implementing procurement and the Ministry of Economy and Finance shall be determined by a Sub-decree.	Sub-Decree No. 21 ANKr.BK dated 21 February 2018 on the Formality and Procedure for Filing Complaint and the Resolution of Complaint against Procurement
Art. 74	Article 80.	Sub-decree No. 105 S.E., dated 18 October, 2006, on the Public Procurement and existing legal standard documents relevant to the public procurement shall be valid until a new normative document supersedes in accordance with the spirit of this law.	Sub-Decree No. 105 ANKr.BK dated 18 October 2006 on Public Procurement
Prakas			
N/A	Art. 5	The <b>roles and responsibilities of the GDPP</b> shall be determined by Prakas of the Minister of Economy and Finance.	1). Check the current Prakas on GDPP; 2). If not, New
Art. 9	See below	In case the budget unit is granted <b>the right to be financial manager</b> authorized by the principal financial manager of its ministry, institution, the Minister of Economy and Finance may, as deemed necessary, issue the <b>Prakas on Delegation of Power to the budget unit</b> of that ministry or institution to carry out procurement.	Prakas No. 557 SHV.BrK dated 18 May 2015 to establishment procurement committee and procurement unit, page 747 on page 747 1/2
	Art. 9	The <b>criteria and procedures of establishing procurement committee and procurement unit or procurement team of the budget unit with full delegation</b> shall be determined by Prakas of the Minister of the Ministry of Economy and Finance (MEF).	New
Art. 10	Idem	The methods for the procurement of goods, construction and services shall be conducted in compliance with Article 11, Article 12 and Article 13 of this law. <b>The condition for limiting budget and procedures for implementation of each procurement method</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No. 1844 SHV.BrK dated 26 December 2014 on the Determination of Budget for Procurement Execution
Art. 25	Art. 26	The <b>procedures for recruitment of a consultant</b> shall be determined by the Prakas of the Minister of Economy and Finance.	<i>Could not be identified</i>

Art. 27	Art. 28	The <b>procedures for categorization and classification of bidders</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No. 1614 SHV.BrK dated 24 December 2018 on the Procedure of the Registration, List Clearance, and Announcement of Black List Decision No. 013 SHV dated 12 December 2017 on the Procedure for the Classification of Construction Type and Classification of Construction Team
Art. 28	Art. 29	The <b>procedures for prequalification of bidders</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No.851 SHV.BrK dated 28 August 2017
Art. 29	Art. 30	The <b>procedures for post qualification</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No.851 SHV.BrK dated 28 August 2017
Art. 30	Art. 31	The <b>procedures for blacklisting and removal from the blacklist and announcement of blacklist</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No. 1614 SHV.BrK dated 24 December 2018 on the Procedure of the Registration, List Clearance, and Announcement of Black List
Art. 31	Art. 32	The <b>procedures for planning the procurement</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No. 851 SHV.BrK dated 28 August 2017 on Procurement Planning
Art. 39	Art. 39	The <b>sample of bidding document</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No.325 SHV.BrK dated 27 March 2014
Art. 41	Art. 41	<b>Formalities and price of bidding documents</b> shall be determined by the Prakas of the Minister of Economy and Finance.	There's no Prakas of the Minister of Economy and Finance
Art. 43	Art. 40	The <b>bid security</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No. 986 SHV.BrK dated 31 August 2016 on the Security Deposit for Bidding and Security Deposit for the Implementation of Agreement
Art. 45	Art. 47	The <b>procedures for evaluation of bidding proposal</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Inter-Ministrial Prakas No. 324 SHV.BrK dated 01 April 2013 on the Provision of Right to Decision Making on Procurement Project to Capital, Provincial, District and Khan Administration
Art. 47	n/a	The <b>procurement work to be inspected and decided by the Ministry of Economy and Finance</b> shall be determined by the Prakas of the Minister of Economy and Finance with the exception of the procurement work carried out by the capital/provincial/municipality/district/Khan administration which shall be determined by a Joint Prakas of the Minister of Economy and Finance and the Minister of Interior.	Inter-Ministrial Prakas No. 324 SHV.BrK dated 01 April 2013 on the Provision of Right to Decision Making on Procurement Project to Capital, Provincial, District and Khan Administration
Art. 47	n/a	The procurement work to be inspected and decided by the Ministry of Economy and Finance shall be determined by the Prakas of the Minister of Economy	Inter-Ministrial Prakas No. 324 SHV.BrK dated 01 April 2013 on the Provision of Right to Decision Making on Procurement Project to

		and Finance with the exception of <b>the procurement work carried out by the capital/provincial/municipality/district/Khan administration</b> which shall be determined by a Joint Prakas of the Minister of Economy and Finance and the Minister of Interior.	Capital, Provincial, District and Khan Administration
N/A	Art. 50	The <b>large-scale procurement projects with a strategic nature and specific technical aspects for management and projects with high securities</b> shall be determined by a Prakas of the Minister of Ministry of Economy and Finance.	New
Art. 51	Art. 55	The <b>procedures for the implementation of procurement work through electronic system</b> shall be determined by the Prakas of the Minister of Economy and Finance.	New: Electronic Government Procurement
Art. 53	Art. 56	The <b>preparation of procurement contract</b> shall follow with the provisions of this law, and in line with the conditions set forth in the <b>bidding document and sample contract</b> determined by the Prakas of the Minister of Economy and Finance.	MEF's Standard Operation Procedure for Procurement
N/A	Art. 54 new	The <b>timeline, rules, and methodology for the implementation of Sustainable Procurement</b> shall be determined by a Prakas from the Minister of the Ministry of Economy and Finance.	New
Art. 57	Art. 60	<b><i>The special circumstances and the method of price adjustment during the implementation of a contract</i></b>  The <b>special circumstances in which the contract price</b> may be subject to change shall be determined by the Prakas of the Minister of Economy and Finance.	<i>Could not be identified</i>
Art. 58	Art. 61	<b><i>The amount and the forms of the performance security guarantee</i></b>  The <b>performance security</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No. 986 SHV.BrK dated 31 August 2016 on the Security Deposit for Bidding and Security Deposit for the Implementation of Agreement
Art. 59	Art. 62	The <b>procedures for establishment of the Committee for Delivery and Acceptance committee</b> shall be determined by the Prakas of the Minister of Economy and Finance.	<i>Could not be identified</i>
Art. 64	Art. 70	The <b>procurement code of conduct</b> shall be determined by the Prakas of the Minister of Economy and Finance.	Prakas No. 987 SHV.BrK dated 31 August 2016 on Code of Ethics for Procurement
N/A	Art. 68 new	<b>Procedures of procurement post review</b> shall be determined by a Prakas of the Minister of Ministry of Economy and Finance.	New



### Suggestion for Adoption New Provision

ANUKRET/SUB-DECREES			
PPL	DPPL	Matter	Comments
-	-	Confidentiality Obligation and Definition of 'confidential information'	Whereas transparency is one of the key principles for good public procurement, there could be information that are deemed as confidential information, which could not be disclosed to the public. However, the definition of the term "confidential" information shall be 1) clearly defined under the DRAFT PPL; or 2) clearly referred to under any other special laws such as the law on data privacy or the law on information.
-	-	There is no transparency on negotiated procedure and single-source procurement	The DRAFT PPL shall require the negotiated procedure and single-source procurement to be published.
-	-	The DRAFT PPL requires for the bidding announcement to be published and clarified; however, the DRAFT PPL does not provide for any publication of project execution.	The DRAFT PPL should establish an online portal for publishing or sharing all information in relations to public procured projects from the pre-stage to execution and completion stage. As well, a proper record keeping process should be established as a principle under the DRAFT PPL
-	-	The DRAFT PPL provides the power or authority to the MEF to manage, oversee and review the public procurement process. Therefore, conflict of interest exists while balance of power is absent.	The DRAFT PPL should consider delegating the authority of review or audit on public procurement process to a separate independent authority besides MEF.
-	-	The DRAFT PPL does not provide sufficient legal ground or provisions for 1) encouraging SMEs to participate in public procurement; 2) aligning public procurement with socio-economic policy; 3) harmonizing public procurement projects with budget cycle; and 4) decentralizing public procurement as planned.	The DRAFT PPL should provide the legal provisions to enable for 1) encouraging SMEs to participate in public procurement; 2) aligning public procurement with socio-economic policy; 3) harmonizing public procurement projects with budget cycle; and 4) decentralizing public procurement as planned. Moreover, the DRAFT PPL should consider adopting the mechanism of social accountability at local administration for enhancing public participation in public procurement.
-	-	The DRAFT PPL does not provide any legal protection for whistle blower of corruption or non-compliance in public procurement as well as any risk assessment framework.	The DRAFT PPL should establish a risk assessment requirement as well as framework to identify any potential risk in procurement procedure. As well, there should be a proper whistle blowing policy as well as legal protection for whistle blower.



-	-	In relation to the right to file complaint, only bidders have this right. Interested third party, such as the citizens who may be affected by the execution of the procurement contract or may be unhappy with the result of the procurement object, are not entitled to such rights under the PPL and DRAFT PPL.	The DRAFT PPL should adopt a provision in the complaint handling section to allow interested third party to file a complaint as well.
-	-	The DRAFT PPL does not provide a legal ground to void any public procurement contract, which has been entered into in non-compliance to the legal requirements. Therefore, the private bidders or investors might collude with the government officers to sign the contracts without any legal risks.	The DRAFT PPL should provide for a provision to void any public procurement contract, which has been entered into in non-compliance with the legal requirements.
-	-	The DRAFT PPL only stipulates about the principal requirements while leaving other procedural or detailed substantive requirements for the competent authorities to issue the regulations on. Therefore, the enforcement over any non-compliance to detailed requirements as the enforcement via administrative sanctions only rather than legal redress.	The DRAFT PPL should at least set forth certain minimum requirements to guide the competent authorities in setting the detailed requirements under regulations such as the requirements for bidding announcement (i.e. content and timeline), disclosure requirements and timeline for legal redress. With such minimum requirements, the private party as well as any interested third party can submit any complaint of non-compliance to the court for legal redress in terms of compensation and criminal investigation besides administrative enforcement procedure.
11	11	The DRAFT PPL sets the public competitive bidding as the “ <i>preferred method</i> ” to be carried out in public procurement” (Art. 11). The UNCITRAL Model Law sets the open tendering as the default procurement method. As a default method, there are no conditions for its use; it is always available, and thus the use of any other procurement method requires justification.	‘Public competitive bidding’ should be the default method.
27	28	Under this provision, only the tenderer that have registered with the MEF to be eligible to participate in any public procurement project. This provision may create difficulty to potential foreign bidders to participate in the bidding process.	The MEF should discuss with the MOC on whether a certain flexibility could be provided to foreign bidders – e.g. requiring them to register only after being determined as a successful bidder.
47	50	The PPL and the DRAFT PPL do not mention anything about the requirement to publish a notice on the entry into	These two matters should be regulated.

		force of a procurement contract. As well, there is no provision requiring the procuring entity to provide a specific reason to the failed bidders.	
-	-	The DRAFT PPL provides for the right to redress; however, it does not specifically stipulate about 1) alternative dispute resolution such as arbitration; 2) the statute of limitation for such redress; and 3) the right of the interested third party to complain.	The DRAFT PPL should provide for 1) alternative dispute resolution such as arbitration; 2) the statute of limitation for legal redress; and 3) the right of the interested third party to complain.

