ABSTRACT

The report examines the features of the system of public procurement in Malaysia. The system to a certain extent conforms with international standards based on open competition and accountability, but it is also tailored to reflect the needs and values specific to Malaysia. This is reflected in the protection given to local companies and in the preferences for the Bumiputera businesses.

The features of procurement system have been reflected in the urban public transport development. The report focuses on the development of new KVMRT and LRT lines. A balance has been achieved between the involvement of foreign companies and domestic companies, often in consortium or joint venture partnerships, while provision has been made for extensive Bumiputera involvement. However, key issues have arisen with regard to the appropriate procurement management model and the funding arrangements for the various projects. The report also examines procurement in the development of the rural infrastructure with the key features being the division of the infrastructure program into small scale projects, the reservations or set asides for small Bumiputera companies within the locality, and the contribution of community associations in shaping the projects. Another feature of the procurement system discussed are the prominence of Chinese companies in infrastructure projects, especially under its Belt and Road Initiatives, and the benefits and drawbacks in allowing such companies such an influential role in infrastructure development.

The report covers the accession of Malaysia to the multi-lateral FTA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes public procurement. The accession has been made possible by concessions to Malaysia to protect domestic businesses and preserve Bumiputera preferences in the procurement system. The report also examines the relevance of the procurement chapter in the recent FTA between the EU and Vietnam to Malaysia’s future FTA’s. Lastly, the report identifies the continuing weaknesses in the system of public procurement, despite the advances referred to. Amongst them are failings in procurement planning, specification drafting, and selection of suppliers, contractors and consultants, and the supervision of projects. This often spills over into poor quality products and works, delayed or unfinished projects and under-utilization of products and fatalities. Corruption in its various forms also remains a big concern as well as excessive costs and borrowing requirements in large infrastructure projects. The report suggests strengthening of institutional controls and accountability and increased will within government and administration to deal with the failings. Lastly the report suggests prospects for change under the new Malaysian government especially in relation to corruption, costs of infrastructure development and the role of Chinese companies in the infrastructure sector.
## CONTENTS

1. **FRAMEWORK OF PUBLIC PROCUREMENT IN MALAYSIA** .......................... 4
   - Introduction ........................................................................................................... 4
   - Procurement in the Malaysian economy .............................................................. 4
   - Types of procurement .......................................................................................... 5
   - Funding for different types of procurement .......................................................... 8
   - Procurement from Bumiputera companies ............................................................. 8
   - Use of offsets ......................................................................................................... 9
   - The procurement process .................................................................................... 10
   - Registration of suppliers and contractors ............................................................. 11
   - Procuring entities and procurement boards .......................................................... 11
   - Action against defaulting companies .................................................................. 13
   - Accountability in procurement .......................................................................... 14

2. **PROCUREMENT IN URBAN PUBLIC TRANSPORT** .................................... 17
   - Overview ............................................................................................................... 17
   - KVMRT SBK and SSP Lines .................................................................................. 18
   - KVMRT Circle Line ............................................................................................. 21
   - LRT3 ...................................................................................................................... 22

3. **PROCUREMENT IN RURAL INFRASTRUCTURE DEVELOPMENT** .......... 24
   - Improving the rural infrastructure ..................................................................... 24
   - Sectors in rural infrastructure development .......................................................... 24
   - Features of rural infrastructure procurement ....................................................... 26

4. **IN VolVEMENT OF CHINA IN INFRASTRUCTURE PROCUREMENT IN MALAYSIA** .......................... 29
   - Belt and Road Procurements .............................................................................. 29
   - Other infrastructure procurements ..................................................................... 29
   - Benefits and drawbacks of Chinese involvement in infrastructure projects ........ 30

5. **PUBLIC PROCUREMENT IN MALAYSIA’S FREE TRADE AGREEMENTS (FTA’s)** .................. 31
   - Adjustment of policy ........................................................................................... 31
   - Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) .......................................................... 31
   - Permanent concessions in CPTPP granted to Malaysia ........................................ 32
   - Transitional concessions in CPTPP granted to Malaysia ...................................... 33
   - Relevance to Malaysia of the FTA’s between EU and Singapore and Vietnam .... 34
6. PROBLEMS AND CHALLENGES in MALAYSIAN PUBLIC PROCUREMENT

- Weaknesses in everyday procurement identified in AG’s reports .............................................. 36
- The problem of corruption in procurement .............................................................................. 40
- Concerns over costs of infrastructure projects ...................................................................... 41

7. CONCLUSION AND PROSPECTS ................................................................. 43

- Summary .............................................................................................................................. 43
- Prospects ............................................................................................................................. 44

8. REFERENCES ..................................................................................................................... 46
1. FRAMEWORK OF PUBLIC PROCUREMENT IN MALAYSIA

Introduction

Public procurement of goods, services and public works (including public infrastructure projects) in Malaysia is governed by the Financial Procedures Act 1957, and the Government Contract Act 1949. These are amended, supplemented and clarified by a range of administrative instruments, which include Treasury Instructions, Treasury Circulars, and Federal Central Contract Circulars. The methods of procurement, procedures to be followed and the guiding principles are laid down in these instruments. They apply to procurement by all federal and state ministries/department, local authorities within the States, and federal and state statutory bodies. They do not officially apply to government-linked companies (GLC’s), but are to a significant extent followed by them.

Procurement policies and regulations are formulated by the Government Procurement Division of the Ministry of Finance (MOF). Contract awards may be made at the federal level by MOF, or by line agencies (ministries/departments, statutory bodies, and GLC’s), and in the case of most public works, by the Public Works Department, known as the contract awarding authority. Day to day procurement management is undertaken by the line agencies or the Public Works Department, known as the implementing agencies, but under the oversight of the Prime Minister’s Department. Often (with exception of high value procurements), the contract awarding authority and implementing agency are one and the same and both are identified as procuring entities. Procurement is also undertaken by ministries/departments in the state government and also state-owned statutory bodies, as well as by local councils within the states.

The principles, types and methods of public procurement in Malaysia both conform to important international standards but also reflect political values and norms specific to Malaysia. The core objective is to secure value for money based on fair competition. The other objective is to create business opportunities for both local and bumiputera companies and to generate local employment opportunities and in so doing be a means of developing the Malaysian economy.

Procurement in the Malaysian economy

Public procurement plays a significant role in the economic development of Malaysia. In 2016 RM78 billion was spent on procurement. This comprised 31 per cent of gross public expenditure (combining development and operating spending), accounting for about 6 per cent of GDP. Although the percentage is small, the priority given to local companies in contract awards, as mentioned below, and the resultant chain of sub-contracting and supply services especially in high value contracts generates a good deal of business and employment. The impact of procurement is no more evident than in public infrastructure projects. These raise the productive capacity of the economy. In addition, contractors awarded projects draw upon construction and product development.
networks. These sustain many other businesses engaged in construction and engineering and in manufacturing construction materials, equipment and tools. The impact on the wider economy is maximised by offset packages, mainly provided by large foreign companies offered a government contract, as discussed below.

**Types of procurement**

As in most countries, the means of procurement in the Malaysian public sector varies according to the nature and volume of the goods, services and works to be procured, the expected contract value, and the range and capacity of suppliers and contractors.

**Tenders**

The main means of procurement is the competitive tender applicable to contracts above RM500,000. This requires prospective suppliers and contractors to submit sealed bids that include both a price offer and an offer of the types and quality of the goods, services and works to be supplied or undertaken. The bids are required to conform to the specifications (details of the products, services and works) as laid down by the procuring entity.

Tenders may be divided into the following:

- **International open tenders**: international companies may bid on their own alongside domestic companies, or in conjunction with domestic companies in a consortium or joint venture (JV). International open tenders are adopted if there is evidence that few Malaysian companies on their own have the capacity to meet the demands of the contract. This could apply to high value procurements of specialised products, services and works (MOF, 2010).

- **Domestic open tenders**: only domestic companies may bid. Domestic tenders are adopted if there is evidence that sufficient Malaysian companies are capable in terms of resources, expertise and experience of meeting the demands of the contract. The Treasury Circular PK1 emphasises the priority that should be given to procurement from local manufacturers or local distributors (MOF, 2015).

- **Bumiputera reserved tenders**: only Bumiputera companies may bid as further discussed below.

- **Selective tenders**: they can be adopted in international, domestic, and Bumiputera tenders, in which bidders are required to be screened in a pre-qualification test, making only those who are pre-qualified eligible to bid. The pre-qualification attests to the track record of a bidding company (recent history of similar projects), its financial health (assets, liabilities, cash flow etc), technical resources (especially in works procurement), current and impending work commitments, competence and qualifications of key management and technical staff, and occasionally testimonials from a third party to verify the suitability of the company to tender. Selective tendering is adopted in high value and complex procurements (MOF, 2010).

- **Restricted tenders**: specific supplies/contractors are specially invited to submit bids. Such tenders can be adopted if there are few suitable suppliers/contractors available to undertake the project, or the products, services and works are required urgently given that selection in this type of tender is less time consuming.
In some cases restricted tenders are adopted following the failure of a supplier/contractor to complete a contract satisfactorily. In 2013, the contractor appointed for building a police training center in 2008 was terminated due to unsatisfactory progress in completing the project and was replaced by another contractor through a restricted tender. The project was eventually completed in 2016 (AG, 2016b).

**Requests for proposals**

In certain public procurements in Malaysia, mainly relating to planning and management services and the design of infrastructure and buildings, undertaken by consultancy firms, the procuring entity may not provide details of the scope and specifications of the project. Instead, the entity issues a request for proposals (RFP). It is then left to the bidders (proponents) to develop a detailed set of proposals regarding the services and designs required. The proposals may be submitted with or prior to a price offer. The RFP’s usually involve negotiation to fine tune both the proposals and price offer. Like normal tenders, RFP’s may require a pre-qualification, and may be open to foreign companies or restricted to domestic companies, or reserved for Bumiputera businesses (Ismail et al, 2014).

**Direct negotiation**

In a number of high value procurements direct negotiation is undertaken with a single pre-designated company or consortium/joint venture (JV). This may be justified if the procurement is urgent or there are few if any reputable and suitable suppliers/contractors to undertake the contract. Negotiations focus on such matters as the price, scope and specifications, the technical proposals, delivery or completion schedules and contract variation. There is no selection through competitive tender (Wee et al, 2011; GAN Integrity Solutions [GAN], 2018). Direct negotiation is sometimes favoured too in selecting companies to undertake a design and build infrastructure project. An example was the second part the upgrading project in 2014-2015 of the Pantai Regional Sewage Treatment Plant near Bandar Baru Sental. The project was procured by direct negotiation between the Ministry of Energy, Green Technology and Water and the pre-designated company, BEWG (M) Sdn. Bhd., on a design and build method (AG, 2016b).

**Quotations**

For low value procurements (above RM50,000 up to RM500,000 for goods and services, and above RM20,000 up to RM500,000 for works), the procuring entity calls for a quotation (known as a request for a quotation or RFQ) rather than a tender. Quotations require a company just to quote a price and demonstrate its compliance with specifications. The company offering the lowest price wins the contract (providing it is compliant with the specifications). This is a useful means of procurement for readily available off-the-shelf goods, standard products or services or small-scale public works of limited value, with simple and straightforward specifications. The key features are that price is the dominant and in some cases the exclusive consideration (Wee et al, 2011).
Two types of quotations may be adopted. One is the open quotation in which the RFQ is advertised and all companies within specified categories (usually SME’s) may respond to the invitation with at least 5 quotations required. The other is a restricted quotation in which 5 or more suppliers or contractors are specially invited to submit a price offer for the goods, services or works to be procured. Many quotations in Malaysia are reserved for Bumiputera SME suppliers and contractors, as illustrated in rural infrastructure procurement discussed below. (MOF, 2010; Rohana et al, 2010; Khairul & Chamhuri, 2012).

**Balloting**

Also applicable to low value procurements is balloting. Small local or Bumiputera suppliers and contractors are invited to express an interest in delivering a product, service or works. After screening of the applicants for their suitability and the price they offer, those considered most suitable or offering the lowest prices are put into a pool from which a random draw is made. The company or companies drawn from the pool are then awarded the contract (Government Procurement Division, 2014). Balloting is practiced in selecting Bumiputera contractors for small value projects in the construction of the KVMRT rail network and in rural infrastructure contracts, as will be discussed below.

**Direct purchasing**

In some cases, a procuring entity may consider only one supplier and contractor – a procedure known as direct purchasing or single sourcing. This is allowable and most commonly used for supplies and services up to RM50,000 and for small scale works up to RM20,000. Of course, the supplier/contractor chosen for a direct purchase must deliver at an acceptable quality and charge a reasonable price. There have been occasions, arguably in contravention of the procurement regulations, when a supplier/contractor has been selected for a direct purchase even though the contract value is above the thresholds for direct purchasing (MOF, 2010; Khairul & Chamhuri, 2012).

**Local content**

Whatever type of procurement of goods and works is adopted, there is a strong emphasis on promoting local production and manufacturing. According to Treasury Circular PK1. Procuring entities must ensure that suppliers provide goods with as much local content as possible so long as they accord with Malaysian Standards (MS). Foreign produced goods, components and supplies which are required can only be used if none are locally produced. Specifications should be tailored to suit locally produced goods, components, and supplies. In works procurement, contractors are likewise required to use locally sourced suitable materials, equipment and tools when available (MOF, 2015).

**E-procurement**

A major change to public procurement in Malaysia has been the adoption of E-procurement (ePerolehan). This enables suppliers, service providers and contractors and procuring entities to conduct on-line the different aspects of a procurement transaction from quotations to tenders and RFP’s. The main platform is the
The portal allows procuring entities to advertise procurements, while companies can download tender documents and undertake pre-qualification if necessary, and can submit their quotations, tenders and proposals on-line with the ability to check the status of their applications after submission. Furthermore, through the ePerolehan portal, businesses can undertake procurement registration or renew their registration with the MOF and pay their registration fees. In addition, on the MOF website are found soft copies of Treasury Circulars providing information about the rules and procedures governing procurement. Also disclosed on-line on the same website and/or the websites of certain procuring entities are bid outcomes (lists of companies recently awarded contracts). Another platform of E-procurement is the Construction Industry Development Board (CIDB) E-services portal, which performs many of the functions stated above with respect to construction contractors. It can be appreciated that the adoption of E-procurement serves the underlying principles of procurement policy in Malaysia by widening competition, increasing transparency and ensuring better value for money (Maniam et al, 2009; Khairul & Chamhuri, 2012; MOF, 2018a; CIDB, 2018).

**Funding for different types of procurement**

Many low value procurements involving direct purchasing and quotations for products with a useful life of less than one year are funded from the operating budget of the Government. The majority of procurements are funded from the development budget. A further source of funding may be a ‘soft loan’ (low interest) from the MOF to the procuring entity. For high value tenders such as costly infrastructure projects worth billions of RM, the funding may be secured by short and mid-term debt issue including Sukuk issued by a Special Purpose Vehicle, DanaInfra Nasional Bhd (DanaInfra), as discussed below (DanaInfra, 2018a; Saadiah, 2014). In addition, in one forthcoming infrastructure project, examined below, the contractors are required to initially fund the project and only receive payment over a number of years and not when the project is completed.

**Procurement from Bumiputera companies**

Special treatment is accorded to the Bumiputera business community in public procurement through a range of preferences (Economic Planning Unit [EPU], 2016a). The preferences are indicated in Treasury Circular PK1.

The main preference are set-asides in which the procurement of certain goods and services are reserved only to Bumiputera suppliers and contractors. These include goods and services up to RM100,000, and any works project up to RM50,000, and other goods, services and works when it is evident that Bumiputera companies can be suitable suppliers and contractors. Furthermore, in works procurement, set aside quotas exist. At least 50 per cent of works projects with a value between RM50,000-350,000 within a financial year are set aside for Bumiputera contractors, while the quota is 30 per cent for projects worth more than RM350,000 (McCrudden & Gross, 2006; Rohana et al, 2010; MOF, 2015; Grier, 2015; Ministry of Trade and Industry [MITI] 2015).

The second type of preference are preferential price margins for goods provided by Bumiputera suppliers. The extent of the margin of price (MOP) varies according to the value of the procurement and whether the supplier is a distributor or a manufacturer of the goods. In tenders for goods manufactured as well as supplied by a
Bumiputera company, the MOP is 10 per cent for contracts worth up to RM10 million, 5 per cent above RM10 million up to RM100 million, and 3 per cent above RM100 million. If the Bumiputera company is the supplier of the goods and not the manufacturer and also the supplier of services, the MOP’s are 10 per cent in contracts worth above RM100,000 up to RM500,000 (below RM100,000 there is an automatic set aside for Bumiputera companies), 7 percent above RM500,000 up to RM1.5 million, 5 per cent above RM1.5 million up to RM5 million, 3 per cent above RM5 million up to RM10 million, and 2.5 per cent above RM10 million up to RM15 million, with no MOP above the last threshold (McCrudden & Gross, 2006; MOF, 2015; Grier, 2015; MITI, 2015).

Use of offsets

Under Malaysia’s public procurement regime, when a foreign or a large local company is awarded a high value procurement contract, the procuring entity may require offsets under the Industrial Collaboration Programme (ICP) as outlined in the Treasury Circular PK1/2013. These are additional measures the company (the offset provider) is required to undertake in return for being awarded the contract, and are designed to benefit local smaller businesses and agencies in different sectors and build local capacity and expertise. The recipients of offsets may be businesses or agencies linked to the procurement (direct offsets), but other businesses and agencies not linked to the procurement may benefit (indirect offsets) (MOF, 2013; Zailani, 2014).

Offsets may include the transfer of technology and knowledge. In such cases the offset provider shares with offset recipient’s information about its technology, and when the technology is under patent relaxes the restriction and allows the recipients under licence to reproduce and use it. Offsets may too include training programs conducted by the offset provider and participation of recipients in the research and development programme of the provider. The offset package may further entail a requirement for sub-contracts to be awarded to local businesses and for a procured product to be locally assembled, with components to be locally purchased or manufactured. Other offsets are the permission for local business to participate in the global market and supply network of the offset provider, and the purchase by the provider of the equity and debt of local companies (MOF, 2013, 2015; Zailani, 2014).

Offset programmes are managed by two bodies, the Offset Management Unit (OMU) in the procuring entity and the Technology Depository Agency (TDA), and sanctioned by a special Offset Committee (OC) of the procuring entity set up for each procurement to which an offset may be relevant. At the initial stage, the OMU decides if a procurement should attract any offsets. If so, the bidders are then invited to provide offset proposals along with their bid submission. These may be fine-tuned through negotiation with each bidder, and are then vetted by the OMU of the procuring entity and the TDA. The evaluation is forwarded to the OC for endorsement. After this, the OC sends an evaluation report of the various offset packages to the tender evaluation committee and/or the Procurement Board of the procuring entity. The evaluation is taken into account as one of the criteria in selecting the successful bidder (MOF, 2013; Zailani, 2014).

The contract for an offset package is distinct from the main procurement contract and is signed separately. The implementation of the offset programme is monitored by the OMU/TDA. The use of offsets has figured
previously in the award of defence contracts and more recently in rail construction and rolling stock procurement. In addition, the tenderer and the procuring entity must agree on the value of the offset. However, this value in cash terms and as a percentage of the contract value (often publicly disclosed) is not the actual cost to the provider, but its so-called credit value. The actual cost to the provider is determined and then notionally multiplied by credit multiplier to reach a notional amount and percentage of the contract value (the multiplier could be 2, 4, 6 or any number). The more important the offset is to the recipient the greater the multiplier. The notional credit value of the offset is the value agreed by the provider and recipient at the outset.

**The procurement process**

As in most countries, the initial stages in the procurement process are the identification by a procuring entity of the need for each procurement anticipated for the forthcoming financial year, following which it draws up an annual procurement plan. After this it is necessary to obtain funding approval for each procurement from the MOF, and in the case of procurements over RM50 million, approval of the project plan from the Economic Planning Unit (EPU) in the Prime Minister’s Department, especially with regard to cost and necessity (EPU, 2018). The plan may include specifications which detail the delivery time or period, quantity, and specific features of the product and services to be acquired and works to be undertaken the drafting of specifications is conducted by the specifications committee linked to the Procurement Board. In the case of RFP’s in place of specifications a statement of broad requirements is drawn up (MOF, 2010; Government Procurement Division. 2014). the specifications may also be vetted by the EPU.

The following stage is advertising the tender, RFP or quotation as widely as possible in the interest of fair competition and transparency. The traditional outlet has been newspapers. For domestic and Bumiputera reserved procurements, advertising in one Malay language daily is required. In the case of international tenders and RFP’s, it is necessary to issue notices in one Malay language and one English daily. As in most developed and emerging economies, a more important advertising outlet are the internet portals, particularly the websites of the procuring entity, the ePerolehan portal, E-services portal of the CIDB, and in the case of international tenders and RFP’s international procurement advertising websites, an example being global tenders.

After this, registered companies and where necessary those which have pre-qualified submit their tenders, proposals and quotations. The evaluation committee then assess the submissions and make recommendations to the Procurement Board. While in quotations, price is the dominant consideration as mentioned above, in tenders, various criteria are applied. These include price and compliance with specifications. Whether included or not in the specifications, the quality factor is of prime importance covering the functionality, durability, upgradability, after sales service and warranties and ease of usage of the product, service and works to be provided. Further considerations are, as mentioned above, the extent of local content and other offsets. Often procuring entities in the Malaysian public sector put price above the quality factor, so the lowest bidder is awarded the contract even when the quality offered may not be the best. The weightage given to price is frequently due to budget constraints in the procuring entity. When the selection is made, the
winning bidder is required to put down a performance bond ranging from 2.5 to 5 per cent of the contract value depending on the nature and value of the procurement (MOF, 2010; Skrine, 2012; Government Procurement Division, 2014).

Registration of suppliers and contractors

Suppliers of goods and services to public agencies and contractors for public works and infrastructure projects are required to be registered for that purpose, which shows that a company has met basic criteria as a viable and sustainable business. All companies must first be registered with the Companies Commission of Malaysia (CCM). Suppliers of goods and services must then be registered with the Government Procurement Division of the MOF. With the registration indicating the type of goods and services that a company can supply (field code) (Government Procurement Division, 2014).

Contractors for public works and infrastructure projects must first obtain an overall registration certificate that covers public and private contracts. The main registration authority is the CIDB. The contractors are registered for a particular work head(s) (e.g. civil engineering, building, mechanical & electrical and given a grade to indicate tendering capacity (the maximum value of the contracts they can be awarded), from Grade 1 (contracts not exceeding RM200,000) to Grade 7 (unlimited) (Malaysia Productivity Corporation [MPC], 2016; QADKAM Worldwide, 2018).

Furthermore, those who wish to quote or tender specifically for a construction and engineering project with a public agency must have an additional registration, viz. a Government Procurement Working Certificate (SPKK), also issued by the CIDB. The grades for the SPKK, are slightly different from the general registration grades, and are limited to six, ranging from the lowest Grade F (only allowing a tendering capacity up to RM200,000) to the highest, Grade A (allowing a tendering capacity above RM10 million). In addition, Bumiputera contractors are required to have a Bumiputera Status Certificate (Sijil Taraf Bumiputera or STB) issued by the Contractor and Entrepreneur Development Division of the Ministry of Works (MPC, 2016).

To be eligible to bid in international tenders foreign companies normally must have a Malaysia business registration and/or be incorporated as a Malaysian company. They then can be registered with the Procurement Division, or with the CIDB if they are construction companies. However, in some cases, exemption from local registration or local incorporation is allowed for large foreign companies tendering for extensive construction projects (MPC, 2016).

Procuring entities and procurement boards

Value thresholds and procuring entities

In keeping with procurement reforms in most modern states, the government has delegated responsibility for contract awards of low to medium value to ministries/departments at the federals level, as mentioned above. These comprise contract awards for goods and non-consultancy services up to RM50 million. In the case of works, the contract value threshold is RM100 million. The thresholds are higher for statutory bodies and GLC’s
owned by the Minister for Finance Inc. These may make contract awards for goods, non-consultancy services, and works up to RM300 million. The PWD usually assumes responsibility for contract awards up to RM100 million on behalf of line ministries/departments. In addition, line agencies and the PWD may make awards to professional consultancy services for infrastructure projects valued up to RM300 million, and/or if the value of the research and survey is no more than RM5 million (MOF, 2011).

High value awards are the responsibility of the MOF as the contracting authority viz. goods and non-consultancy services above RM50 million, and works above RM100 million. In the case of statutory bodies and GLC’s owned by the Minister for Finance Inc., the MOF makes awards for contracts above RM300 million. It also makes awards to professional consultancy services for infrastructure projects valued above RM300 million, and/or if the value of research and survey work is each more than RM5 million (MOF, 2011).

As mentioned above, even when MOF has awarded a contract, the PWD or the line agency may be designated as the implementing agency.

**Procurement Boards**

Within the procuring entities, Procurement Boards are set up, whose function is to make contract awards. Members are appointed by the Minister for Finance (Chief Ministers of the respective States appoint the State Procurement Boards). The Head of the Board is usually a Head of Department or a Controlling Officer, who is responsible for the overall management of funds earmarked for procurement.

In most procuring entities, there are two Procurement Boards: A and B. They are supported by a group of committees each dealing with a particular stage in the procurement process, e.g. drafting specifications, opening tenders, proposals and quotation submissions, and evaluating them. The Procurement Boards decide on the terms of the contract and the companies to be awarded contracts.

Procurement Board ‘A’ is empowered to decide on tenders up to the maximum of RM50 million for goods and non-professional services (the maximum allowed for a line agency), and up to the maximum of RM100 million for works (the maximum allowed for the PWD). The line agency and the PWD may make awards to professional works consultants if the infrastructure project is valued at no more than RM300 million and the research and survey work are each valued at no more than RM5 million. The membership of Procurement Board A includes a permanent representative from the MOF to ensure that all procurement principles, policies, rules and regulations and procedures are adhered to.

Procurement Board B is authorised to decide on procurements at or below RM20 million for goods, non-professional services and works procurements. It may also make awards to professional works consultants if the works project is valued up to RM20 million and/or the research and survey works is valued up to RM2 million. Procurement Board B can make awards without the presence of a representative from the MOF (MOF, 2010; 2011; 2015). Any decisions of Procurement Boards which are not unanimous must be forwarded to the MOF for final approval.
**Common user items**

The purchase of common user items (standard products readily usable across the board in the public sector) is not undertaken by line agencies but centrally through the Procurement Division of the MOF, being designated as Federal Contracts. These are awarded through local tenders, and occasionally through direct negotiation. When such a contract has been awarded for a particular common user item, all ministries/departments whether federal or State are required to use the common user item. Common user items include foodstuff, office furniture and vehicle spare parts (MOF, 2015).

**Action against defaulting companies**

**Infringements**

In the event of default (infringement of contractual obligations and procurement regulations), suppliers and contractors incur penalties. The body responsible for deciding if default has occurred, and, if so, what the penalty should be is the Disciplinary Action Committee (DAC) in the MOF. This can only be done on receipt of a formal complaint of infringement from the procuring entity with supporting evidence (MOF, 2018b).

A range of infringements outlined in Treasury Circulars come under the purview of the DAC. Amongst them are the rejection of a quotation or tender award, failure to carry out a contract or to carry it out for the whole of the period specified in the contract, and non-compliance with product, design, service and work specifications. Equally serious, are false declarations and submission of false information in registration, in pre-qualifications and in quotation, tender, and proposal submissions. Other serious infringements are a failure to comply with the terms of the registrations or to renew them during the period of a contract. Specific reference in the Treasury Circulars is made to false disclosures by a company to secure Bumiputera status, lack of subsequent compliance to the Bumiputera registration criteria and a failure to renew the registration during the period of the contract. Further defaults which incur penalties are the assignment of a contract to another business without the consent of the procuring entity (novation) and a failure to pay the performance bond (MOF, 2018b).

**Penalties for default**

44 defaulting companies against which penalties were levied between 2013 and 2017 are listed on the MOF website. The most common type of default committed by 20 companies was a failure to accept a contract or quotation award or to provide any of the goods specified in the contract at all. 14 of the 44 companies were found to have defaulted by non-compliance with the specifications of the product or service procured. This entailed not supplying goods of the specified type and standard, providing a lesser quantity than specified, and providing a service for a shorter period than required. A further 9 of the companies were penalised for false disclosures especially for registration and pre-qualification purposes (including falsely amending certificates). One company committed default by failing to repay a debt under a court order (MOF, 2018).

A range of penalties exist from warnings of 6 months or 1 year, to suspensions of the procurement registration (maximum of 5 years), and in the most serious cases cancellation of the procurement registration (maximum
5 years). The suspension prevents companies and partnerships from submitting quotations, tenders and proposals for the period of the suspension, after which the eligibility to do so is restored. Cancellation likewise prevents a company from participating in a procurement, but when the period of cancellation expires, it is not guaranteed that eligibility would be restored. In addition, when a suspension and cancellation take effect, the directors, partners and owners cannot register a new company for procurement purposes. In addition, when a registration is cancelled, they may be blacklisted, this means that any company or partnership to which they are connected as directors, partners and owners is also debarred from participating in any procurement (MOF, 2018).

Of the 44 defaulting companies referred to above, 10 companies had their procurement licence cancelled for 2-5 years, 16 companies were suspended usually for 1-2 years, and 18 companies were given warnings of 6-12 months. Refusal of a contract when awarded or failure to undertake it attracted the least severe penalties usually a warning, Non-compliance gave rise to suspensions of 1-2 years and occasionally a cancellation of the registration for 2 years, while fraud and dishonesty in submissions lead to cancellation of the registration for 3 years or more with the CEO and directors blacklisted (MOF, 2018).

**Accountability in procurement**

**Government Procurement Division**

Procuring entities are accountable for the way procurements are conducted and for the outcomes achieved. One agency of accountability is the Government Procurement Division of the MOF, which, among its many functions, monitors the way procurements are managed, enforces procurement rules based on the Treasury Circulars, and provides guidance to procuring entities on how to implement those rules. It also vets and amends if necessary contract awards of Procurement Boards A, which are of high value, or those decided without the unanimity of Board members, as mentioned above.

**Malaysian Anti-Corruption Commission (MACC)**

The second agency of accountability is the MACC whose functions and powers are provided under the Malaysian Anti-Corruption Commission Act, 2009 (MACCA). One power is to investigate evidence of corrupt practices by public official's as well private individuals and organisations. These include corrupt practices in procurement transactions. In doing this the MACC is further supported by the Witness Protection Act of 2009 and the Whistle-blower Act of 2010, which encourage disclosures of information relating to possible corruption and provides protection to those who report such evidence. Also supporting the efforts of the MACC is the Anti-Money Laundering and Anti-Terrorism Financing Act, 2001.

Actions which are corrupt are stipulated in the MACCA, in the Penal Code and in other instruments and include solicited and unsolicited bribery by officials, fraudulent actions and embezzlement of funds earmarked for a procurement. It is also obligatory for members of Procurement Boards and procurement-related committees to declare any conflict of interest in a procurement. When a member (or a person in his/her family) has a private
or financial interest in any company participating in a tender, RFP, quotation or direct purchase, must disclose that interest and in consequence must withdraw from the Board or committee and take no further part in its proceedings. The types of ‘interest’ are not specified but presumably include shareholdings, bond holdings, directorships, and the promise of future employment or a future directorship, amongst others. In addition, members of Procurement Boards and procurement-related committees are required to sign an Integrity Pact, along with both bidders and also consultancy firms hired to manage a procurement. By doing this, they undertake not to engage in corrupt practices such as bribery, collusion or embezzlement, and to declare any conflict of interest with companies or partnerships participating in a procurement.

If sufficient evidence is assembled, the investigation papers are forwarded to the Legal and Prosecution Division of the MACC. Its brief is to assess the evidence to determine if there are grounds for a prosecution and if so, with the consent of the Public Prosecutor, to conduct case trials, including appeals. The courts in which many corruption cases are heard, including appeals, are the Special Anti-Corruption Courts set up in 2011 mainly to expedite the prosecution process. While both the MACC and the Special Anti-Corruption Courts deal with the whole range of alleged corrupt practices, cases involving procurement transactions and procurement officials are an important aspect of their work.

**Auditor General (AG)**

The third agency to which procuring entities are accountable is the National Audit Department under the AG. In addition to the attestation and compliance audits, it also conducts performance audits of different ministries/departments and statutory boards to check if ‘the Federal Government’s activities/programmes/projects have been carried out efficiently and economically to achieve their desired objectives/goals’ (AG, 2016a). Another type of audit, the Government Companies’ Management Audit, is designed to evaluate whether ‘the Federal Government Companies have been managed in a proper and efficient manner as well as achieving their objectives’ (AG, 2016a).

These audits often focus on procurement, and over the years have revealed several weaknesses in the procurement system, which will be discussed below. A recent initiative of the AG is to implement an Accountability Index This rates the compliance to financial regulations, including the management of procurement expenditure of ministries/departments and thus acts as a measure of the extent of control of procurement funding (National Audit Department, 2018).

**Prime Minister’s Department**

Procuring entities are accountable as well to the Prime Minister’s Department (PMD). In the procurement of projects worth more than RM50 million, the planning, designs, method of procurement and system of implementation are submitted to the EPU of the PMD for vetting and approval, as indicated above, The Unit is particularly concerned in its value laboratory programme to appraise both estimated costs and the contract value after tender or negotiation to ensure they are within expectations and ensure value for money (EPU, 2018). Furthermore, the implementation of a project is monitored by the Development Division of the PMD, which is
authorised to intervene if implementation is unsatisfactory and impose remedial measures. During 2014 and 2015, the Development Division intervened in 6 projects where the progress was unsatisfactory and undertook measures to remedy the problems or expedite the project. This included re-tendering of 2 projects with damages levied against the defaulting contractor (AG, 2016b; PMD, 2018).

**Malaysia Competition Commission (MyCC)**

A further agency should be mentioned, viz MyCC. The agency does not hold procuring entities to account but rather suppliers and contractors if they have engaged in collusion or bid rigging when tendering for contracts. It is the responsibility of the procuring entities to report any such evidence so that investigations can take place. Collusion in public procurement in Malaysia is discussed below (MyCC, 2014).
2. PROCUREMENT IN URBAN PUBLIC TRANSPORT

Overview

Much attention has been given to procurement in the urban public transport (UPT) sector. Developing this sector has been identified as a continuing priority in the 11th Malaysia Plan (2016-2020) currently in force, as it was in the preceding Plan (10th Malaysia Plan 2011-2015). The priority underpins the commitment to developing UPT in both the Government Transformation Programme 1.0 and 2.0, in the Economic Transformation Programme and in the Strategy Paper No. 13. The detailed framework for developing UPT is elaborated in the National Land Public Transport Master Plan, 2012-2030. The Land Public Transport Commission (SPAD) was set up in 2010 as a statutory body to oversee the implementation of the Master Plan and to plan and regulate the UPT sector and enforce the relevant laws and regulations.

The development of the UPT is concentrated in the Greater Kuala Lumpur/Klang Valley area but UPT is being enhanced in other urban areas in Malaysia such as Penang and Johor Bahru. Under the Master Plan the three aspects of urban transport (rail, buses and taxis) have been and continue to be extended, upgraded and integrated.

The ownership of both the operating assets (e.g. buses, taxis, and in the case of rail services trains, power supply equipment, cables, and signalling systems) and the non-operating assets (e.g. for rail services tunnels, viaducts, tracks, depots and stations, and for buses interchanges, depots and termini) are vested in the three UPT companies: Keretapi Tanah Melayu Bhd (KTM), Prasarana Malaysia Bhd (Prasarana), and MRT Corp, although there are other smaller public transport companies. All three are GLC’s wholly owned by the Minister for Finance Inc. Two of the companies, KTM and Prasarana, as well, operate their own assets through wholly owned subsidiaries such as KTM Komuter (KTM), Rapid Rail Sdn Bhd (Prasarana) and Rapid Bus Sdn Bhd (Prasarana). Prasarana through Rapid Rail operates the assets of the MRT Corp, as mentioned below. As owners and operators they are subject to the licensing, regulatory control and performance standards laid down and administered by SPAD (Prasarana, 2018; MRT Corp, 2018a; KTM, 2018).

As asset owners, the three companies undertake their own procurements though subject to Government control, in which members of the Government head or sit on the Procurement Boards. In recent years, KTM, Prasarana, and MRT Corp, have each been active in procurement with regard to building new rail networks, upgrading existing ones, purchasing new train vehicles and buses, and building new passenger facilities in the rail and bus networks.

Their procurement practices are broadly aligned with government procurement policy. Where the procurement is high value and specialised and could not be delivered by a Malaysian company, then an international tender is held. One example is the purchase of modern rail locomotives and multi-train sets from foreign manufacturers. In these tenders, Chinese, German and Japanese rail engineering companies have been prominent (Railway Gazette, 2010; 2017). Where a local company cannot deliver a high value contract on its
own (such as a major rail works package), but has the resources and expertise to contribute to it, then a
consortium/JV with a foreign company is favourably considered. When the UPT procuring entity is confident
that a sufficient number of local companies have the track record, resources, liquidity, and expertise to deliver
a contract, then a domestic tender is held. With many UPT contracts categorised as works, then the quota
system for Bumiputera companies is applied and set asides are authorised for those companies. When large
foreign companies are awarded contracts for major packages, they may be required to provide offsets for local
companies and agencies, referred to below.

Examples are given below of procurement and contract management in the development of two new rail
networks in the Kuala Lumpur conurbation: the KVMRT and the LRT3.

**KVMRT SBK and SSP Lines**

A centrepiece of the UPT development is the building of a Mass Rapid Transit network in the Klang Valley and
greater Kuala Lumpur conurbation, known as the KVMRT. The KVMRT network as presently planned consists
of three lines: Sungai Buloh-Kajang Line (SBK), Sungai Buloh-Serdang-Putrajaya Line (SSP), and the forthcoming
Circle Line. The building of the first line (SBK Line) is completed and the line is now operational. The second
line (SSP Line) is currently being built, while the third line (the Circle Line) is being presently planned and is
subject to a feasibility study.

**Separation of asset ownership and operational responsibility**

MRT Corp was set up in 2011 as a GLC to develop the network and to own the assets. These comprise the
operating assets (e.g. trains, power supply equipment, cables, and signalling systems) and non-operating
assets (e.g. tunnels, viaducts, tracks, and station structures). The operator of the completed SBK Line and the
SSP Line is a separate company, Rapid Rail Sdn Bhd, the subsidiary of Prasarana, as already mentioned (MRT
Corp 2017a).

**Procurement and funding model for the SBK and SSP Lines**

As a developer and owner, MRT Corp is responsible for the procurements required in building and operating the
lines. The consideration of tenders and the award of contracts is the responsibility of the One-Stop Procurement
Committee (OSPC). Some of its meetings have been chaired by the Prime Minister, which indicates direct
Government involvement in the procurement process.

A conventional procurement model has been adopted for both lines, rather than a design-build-operate-transfer
mode (in which a partner in the consortium/JV responsible for the construction is given a concession to
operate under a lease) (The Star Online, 2017). However, a key feature of the procurement model is the use of
a project development partner (PDP). The PDP plays a central role in drafting designs and specifications and in
supervising the implementation of the work and ensuring its timely completion. It is paid a fee of 6 per cent of
the contract value if the final cost is equal or lower than the targeted cost, with a lesser percentage if it is above.
The PDP chosen for both lines is a local JV, MMC Corp and Gamuda, The procurement of the goods and works
for both lines is divided into work packages, each dealing with a specific aspect of the development through a separate tender (Lokman & Ooi, 2016).

The procurement for the SBK line was divided into 91 work packages. Many of the tenders were international open tenders, a number of which involved a partnership with a Malaysian registered company. Others were domestic tenders in which only Malaysian registered companies were eligible to bid, of which some were Bumiputera reserved tenders. Nearly all were subject to pre-qualification (CMC Group, 2012).

In the construction of both KVMRT lines, the funding is obtained from a Special Purpose Vehicle, DanaInfra mentioned above. It was set up in 2011 as a finance company wholly owned by the Minister for Finance Inc. Designated as an Infrastructure Financing Entity (IFE), its remit is to issue Sukuk to fund costly infrastructure projects. For the KVMRT construction works for both lines, DanaInfra has issued Islamic Commercial Papers (short-term up to one year) and Islamic Medium Term Notes in total worth RM46 billion. The debt is guaranteed by the Government (DanaInfra, 2018a, b).

**International and local participation**

In the 91 tenders for main works packages of the SBK Line, 18 contracts went to foreign companies: 8 of these were awarded to foreign companies in a consortium or JV and 10 were awarded to a single foreign company or its Malaysian subsidiary. In the 46 tenders for main works projects for the SSP Line (up to December 2017), 9 were awarded to foreign companies as part of a consortium/JV, 7 of which involved a partner local company and 2 comprised just foreign companies. None were awarded to a single foreign company. This represented a slight proportionate increase in the engagement of foreign companies compared to the SBK Line (MRT Corp, 2017b).

These figures suggest that foreign companies played and continue to play a significant but not the major role in the development of the KVMRT network. The large majority of contracts still go to local companies, either as sole contractors, contractors in a consortium/JV and as well as sub-contractors. Local companies have achieved a leading role either because the tenders are restricted to them or they are given additional points in the evaluation by virtue of being local. In fact, in the construction of the SSP Line, the MRT Corp stated that it ‘encourages’ participation of Malaysian-owned companies or JV’s in the international open tenders, indicating ‘they will get a competitive edge, where they will receive additional points in the evaluation’ (Go, 2016). Moreover, with a few exceptions, in the tendering for the construction of the SSP Line, foreign companies in order to pre-qualify were required to form a consortium or JV with a local company, with the weightage of the work undertaken by the local company to be at least 30 per cent. The award of high value contracts to local companies, together with offset packages mentioned below, indicates the use of procurements to develop the national economy and in creating business and employment opportunities (Go, 2016).
**Bumiputera participation**

Alongside the commitment to the participation of local companies in the construction work, measures have been in place to ensure significant involvement of Bumiputera companies in line with the Government’s Bumiputera preference policy in procurement. In the construction of the SBK Line, the Government stipulated that at least 43 per cent of the total value of the contracts was to be awarded to Bumiputera companies (MRT Corp, 2017c). By May 2016, 43 of the 91 main work packages awarded went to Bumiputera companies, comprising 50 per cent of the total value of the contracts. In the construction of the SSP Line, the Government has increased the Bumiputera stake to 45 per cent. By December 2017, half of the 46 main work packages awarded and 48 per cent of their total value went to Bumiputera companies (MRT Corp, 2017b, c). As an example, in the construction of the SBS a key work package for a viaduct construction was reserved for a Bumiputera company (MRT Corp, 2012).

Priority has also been given to involving small and medium Bumiputera companies in the construction of the lines. For the SBK Line, the Bumiputera applicants for the minor works packages were restricted to those in registration grades 1-4 (the last being eligible for projects not exceeding RM3 million). By September 2016, a total of 265 work packages worth RM182 million for small scale works and acquisitions of necessary products had been awarded to Bumiputera companies (MRT Corp, 2017c).

For the SSP Line, Bumiputera eligibility for small works contracts was extended to include companies in the higher grades of 5 and 6 (the latter being eligible for projects up to RM13 million). Expressions of interest in small works packages were advertised in December 2015 for contractors in Grades 1-4 with 1,222 contractors responding, of whom 892 passed the screening test. Expression of interest in work packages for companies in Grades 5 (not exceeding RM5 million) and Grade 6 (not exceeding RM10 million) were advertised in September and October 2015. 165 companies submitted applications of which 115 passed the screening test (MRT Corp, 2017c).

In some selections a balloting system has been adopted involving suitable Bumiputera applicants with CIDB grades 1-4. In the construction of the SBK Line, balloting began in 2013. In the case of the SSP Line, balloting began in June 2017 (5 ballots were held in 2017). The process begins with an invitation to Bumiputera construction and engineering firms registered with the CIDB to express interest in a project. Applicants are screened and those who are validated by the screening are balloted. A ballot is carried out for each project and the company whose name is drawn is awarded the project (MRT Corp, 2017d). For example, in the fifth ballot held in October 2017, 404 contractors were shortlisted and a ballot was drawn for 8 contracts worth RM2 million. The balloting will continue until the Line is completed in 2022 (MRT Corp, 2017d).
Use of offsets

With the involvement of major overseas engineering companies in the construction of the MRT, priority has been given to ensuring benefits accrue to local companies, agencies and industries so as to enhance the development of Malaysia’s economy, human capital and technology. As an example, the award in 2013 of six main works contracts in the construction of the SBK Line has been accompanied by an agreement by the successful bidders to provide a series of offset packages. These include the award of sub-contracts, training programmes, technology and knowledge transfer, local assembly of products, investment in domestic companies, global market access and the use of local components. The offset packages had a credit value of RM3.53 billion (CMC Group, 2012; EE, 2013; Malaysia Digest, 2013; Gho, 2016).

KVMRT Circle Line

Procurement and funding model

In the construction of the Circle Line, the turnkey model has been adopted in preference to the PDP/works package model used in the construction of the SBK and SSP Lines. The turnkey model requires only a single overarching main contractor to be selected in an international tender, which will be responsible for the entirety of the project, the procuring entity will not hire a PDP to oversee the project and will not divide the project into conventional works packages. Instead, the turnkey contractor itself will undertake part of the work and sub-contract other parts, as well as managing and supervising the work and delivering the entire project at the agreed date (Azman, 2017; MRT Corp, 2018b).

An international tender was held with four bids received - all from consortiums/JV’s, with Malaysian companies being one or more of the partner firms in three of the cases. Two bids have been shortlisted: the Malaysian MMC-Gamuda-GK Consortium, and the China Communications Construction Company Limited/China Communications Construction Company (Malaysia) Sdn Bhd JV. The choice was made on the basis of the technical capability of the bidders, given the demanding technical requirements of the tunnelling work of the project Azhar, 2018a).

Another feature of the Circle Line procurement is that the successful contractor is not to be paid the bulk of contract sum during or at the end of the building work. The aim is, if feasible, for 90 per cent of the payment (estimated to be RM30 billion) to be spread over 30 years with the first payment 8 years from the completion of the project. Thus, a bidder to be selected must raise a loan and thus obtain a financing partner who is able to raise the capital required. Reportedly, the MMC-Gamuda-GK consortium may raise capital from DanaInfra, while the Chinese consortium may raise it from Chinese banks (DanaInfra, 2018b; Azhar, 2018a).

If no satisfactory financing partner can be obtained by any of the bidders who otherwise can meet the requirements of the project, then it is possible the Government will resort to its previous funding model of payment to the contractor on completion with the capital raised through a Sukuk issue by DanInfra or from the development budget (Leong, 2017).
LRT3

Another important component of the urban transport system in the Kuala Lumpur conurbation are Light Rapid Transit (LRT) lines. The Ampang Line was opened in 1996 and the Sri Petaling Line opened 1998, with both recently expanded. Importantly, a third line is currently being constructed from Kota Damansara to Cheras (LRT3). The owner of the assets is Prasarana. Rapid Rail as a subsidiary of Prasarana, will operate the LRT3. Unlike the KVMRT, asset ownership and the operating franchise in the LRT are vested in the same company group (Azhar, 2017; Tee, 2017).

Tender and funding model for the LRT3

The tender model adopted for the LRT3 is the same as that in the construction of the SBK and SSP lines of the KVMRT, viz. the use of a PDP (MRCB George Kent Sdn being chosen in a tender comprising 7 bidders) and the division of the project into work packages with a separate tender for each. As a central feature of this model, major responsibility in designing the scope and specifications has been assigned to the PDP which will monitor and evaluate the construction of the line, and ensure that it is completed on time at the agreed contract value. In return, MRCB George Kent Sdn as the PDP will receive 6 per cent of the cost of the project if it is equal to the targeted cost, and a lesser percentage if it is above the targeted cost. On the other hand, it will receive a bonus on top of the 6 per cent if the cost is less than the target. The PDP model separates, as with the SBK and SSP Lines, the design function from the construction work. The alternative model of a turnkey project without a PDP was not adopted (Sharidan, 2015; LRT3, 2016a; Tee, 2017).

The works for LRT3 have been divided into 59 main packages. The dominant component are the civic works consisting of 12 packages. In evaluating tender submissions, priority is given for the first time in rail construction to the use of green technology, including the implementation of rainwater harvesting technology, noise reduction systems, better energy management system and natural ventilation in the design of stations (LRT3, 2016b).

In line with government policy in international tenders involving specialised high value products or works, the evaluation will give particular consideration to any submission from a consortium/JV which includes a local company. This has been reflected in the procurement through an international tender of rolling stock (42 driverless trains). The contract was awarded to a consortium of CRRC Zhuzhou, Siemens China, and Malaysian partner Tegap Dinamik with a contract value of RM1.56 billion (Smith, 2018). In addition, in eight major civic works packages, the contracts were awarded to local construction companies, not to foreign companies. It was evident that these companies had the experience, resources and expertise to undertake the work (Azhar, 2017). This reflects the Government’s priority in hiring local construction engineering companies in large infrastructure projects when they have proven experience, expertise, resources, cash flow and funding. The local orientation is further reflected in the allocation of minor works packages which are reserved for Bumiputera companies, as discussed below (LRT 3, 2016b; Azhar, 2017; Tee, 2017).
**Bumiputera participation**

The involvement of Bumiputera contractors varies between the main and minor work packages. In the award of the first 8 main work packages, only one package went to a Bumiputera company with a contract value equal to 11 per cent of the total value of the LRT3 main contracts. This was a lower percentage than in the contract awards for the SBK and SSP Lines. However, as with the KVMRT construction, a significant number of 120 minor work packages have been set aside for Bumiputera contractors. 164 of these companies in CIDB grades G2-G4 have been pre-qualified to tender for these contracts. The aim is that 45 per cent of the minor work packages will be allocated to small and medium Bumiputera companies. They will be allowed to tender for projects from RM200,000 to RM3 million, depending on grade. However, unlike the award of Bumiputera reserved contracts for the KVMRT, the awards will not be by balloting but through competitive bidding by the pre-qualified Bumiputera companies (LRT3, 2016b; Azhar, 2017; Tee, 2017).

**Penalties for late completion**

According to media reports, an additional provision is to be introduced into the work packages for LRT3, involving heavier penalties for late completion, known as Liquidated and Ascertained Damages (LAD), ranging from RM100,000 to RM200,000 per day. It is feared that the small companies with minor contracts or sub-contracts could ill-afford to pay LAD penalties. A particular concern is that the main contractors will pass on the damages to the smaller sub-contractors. It has been suggested that this may put off small Bumiputera contractors from participating in the works packages despite the commitment to ensuring that a significant percentage of the minor contracts and sub-contracts are awarded to them (Azhar, 2017; Tee, 2017).
3. PROCUREMENT IN RURAL INFRASTRUCTURE DEVELOPMENT

Improving the rural infrastructure

Policy commitments

A key objective in Government policy is to upgrade the standard of living and generate business and employment opportunities in rural Malaysia, which have lagged behind those in the urban areas. This has been mapped out in various Malaysia Plans since the early 1970’s including the present 11th Malaysia Plan (section 7), as well as in the Government Transformation Programme 2.0, the Strategy Papers Nos. 4 and 15, and the Rural Development Master Plan of 2010.

Central to this objective is the comprehensive development of the physical infrastructure in the rural communities, covering roads, water supply, sewerage, electrification, housing, and public amenities. In each of these sectors, the necessary provision has been limited or lacking, seriously retarding development. To remedy this, a great deal of rural infrastructure procurement has been undertaken and continues to be carried out.

Main agencies

The main procuring entity in rural infrastructure development is the Ministry of Rural and Regional Development (KKLW). The Procurement Division of the Ministry through its Tender Boards and procurement-related committees is responsible for the management of the procurement process including drafting of specifications, award of contracts and supervision of projects. However, it is normal for the Procurement Division to work in conjunction with other relevant ministries/departments and statutory boards within the States and with the Public Works Department.

For example, in the rural electrification scheme in Sarawak, the Ministry of Public Utilities, Sarawak determines the list of electrification projects. The KKLW and its appointed consultants draft the designs and specifications, which then must be approved by the Sarawak Electricity Board (SEB). The KKLW awards the contracts, and, together with its consultants, monitors the implementation of the projects. However, at the end of the process the SEB tests and commissions the new installations and equipment.

Sectors in rural infrastructure development

Village and rural roads

Under the Village Roads Program (JPD) and Rural Roads Programme (JALB), extending tarmacked road coverage in rural areas has been and continues to be given high priority. The focus is to connect villages, link villages to towns and main highways, and provide access to key amenities such as health care centres, schools, mosques and recreational centres (EPU, 2016a; Performance Management and Delivery Unit...
During the 10th Malaysia Plan (2011-2015), rural road coverage expanded by 11.7 per cent from 45,905 kms in 2009 to 51,262 kms in 2014. During the period of the 11th Plan (2016-2020), the goal is to build a further 3,000 kms particularly in Sabah and Sarawak as well as in Orang Asli areas in Peninsular Malaysia. In 2017, the target was to build 787 kms of rural roads, but 828 kms were eventually built exceeding the target by 5 per cent (Civil Service Delivery Unit [CSDU], 2017).

**Rural water supply and sewerage**

A further objective of the rural infrastructure program is to maximise the supply to the rural population of clean and treated water. This has involved laying more pipelines, replacing old ones, installing better pumping equipment, the building or upgrading of treatment plants, installing water meters and water storage tanks in household plots (EPU, 2016b, c; PEMANDU, 2011; 2013; 2017). During the 10th Malaysia plan period, 24 treatment plants were built and 38 upgraded, 10,000 water meters were installed, and 4,288 kms of pipelines were replaced. This has been complemented by improving the infrastructure for treating and conveying sewerage. The provision of an increased supply of treated water and better sewerage management are still ongoing. In 2017, the target was to deliver safe water to 3,000 additional households but by the end of the years 4,306 had benefited, the target being exceeded by 44 per cent (CSDU, 2017).

**Rural electricity supply**

Another aspect of rural infrastructure procurement is the provision of reliable electricity supply to remote villages, especially in Sabah and Sarawak. This involves developing the grid network in rural areas through improving connectivity and building sub-stations to ensure 24 hour reliability. It also entails installing renewable sources of energy such as solar-based generating panels and micro hydro plants (Nasrudin et al, 2010; Borhanazada et al, 2013; Mahmud & Blanchard, 2016). The renewable sources are especially important in the States mentioned above as dense rain forest and unfavourable topography create major obstacles to extending the grid network into the remote areas so creating dependence on local renewable sources (EPU, 2016b; PEMANDU, 2011; 2013; 2017). For example, in 2014 a procurement was undertaken to install a range of solar hybrid panels and equipment in the villages of Sugut in Sabah. The procurement was by open tender in which large contractors with a G7 grade were eligible to bid, and who were then subject to a pre-qualification. The new solar power systems were intended to benefit the housing schemes in the villages (KKLW, 2018). A similar procurement was undertaken in 2017 in the villages of Long Pasia in Sabah, again restricted to G7 contractors, with similarly a pre-qualification test. In 2017, the target set was to provide reliable electricity supply to 8,271 extra households but as it turned out 8,110 households were provided for, just below the target by 2 per cent (CSDU, 2017).
**Rural housing**

The KKLW has been concerned to tackle continuing sub-standard housing of many rural households. The aim is to provide better housing for vulnerable groups such as senior citizens, single mothers with dependents, people with disabilities and infirmities, those affected by natural disasters and other poor households. The programs involve building new houses, upgrading those in disrepair, and repairing houses affected by flooding and storms (KKLW, 2018). The aim is to construct and repair 47,000 rural houses by 2020. In 2017, the target was to build or repair 12,524 rural houses, but the number achieved was only 8,429 which was 67 per cent of the target (CSDU, 2017). The erection and repair of rural houses is closely linked to the other infrastructure schemes such as the provision of water supply, electrical supply and new or upgraded roads (PEMANDU, 2017).

**Features of rural infrastructure procurement**

**Quotations and ballots**

A wide range of procurement methods have been employed in improving rural infrastructure including quotations, balloting, tenders and direct negotiation.

<table>
<thead>
<tr>
<th>Year</th>
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<th>Quotations (%)</th>
<th>Tenders (%)</th>
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<td>16</td>
<td>100</td>
</tr>
</tbody>
</table>

+ the Table does not include procurements through direct purchase and direct negotiation.

*2018 figures from 9 January – 16 May 2018.

Source: Calculated from procurement notices, KKLW, 2018b.

As indicated in Table 1, the large majority of infrastructure procurements in rural development implemented by the KKLW are quotations for small scale contracts with a value of no more than RM500,000. They are based on a simply stated scope or specifications of works to be undertaken within a small locality. Contractors in specific categories discussed below are invited to quote a price as well as signify compliance to the work scope or specifications. The company submitting the lowest compliant offer wins the contract. Unlike tenders, the price offer or quotation is the dominant consideration. From 2014 to May 2018, quotation notices comprised annually between 66 per cent and 93 per cent of all procurement notices (excluding direct purchase and direct negotiation).

A significant minority of small infrastructure procurements involved balloting of applicants, with a random draw made from a pool of eligible and suitable applicants to determine who is to be awarded a contract. Those
selected in the ballot cannot participate in any further ballot during the year of the award. Balloting began in 2015 and since then the proportion of ballot notices per year varied from 10 to 24 per cent of all procurement notices. Works procured through ballots were repairs and upgrading of houses, while the procurements for building and upgrading of village and rural roads were based on quotations.

The division of rural infrastructure procurement into small projects procured through small quotations and ballots allows opportunities for local small businesses to participate in the procurement process. In quotations, a set aside is stipulated reserving the contract to those companies with CIDB grades G1 and G2, indicating a limit on their tendering capacity up to RM200,000 and RM500,000 respectively. In the case of ballots, the contract is reserved for contractors with only a G1 grade indicating contract value up to RM200,000. In both G1 and G2 procurements, eligible participants are all small construction companies with limited resources and expertise (KKLW, 2018b). If by contrast large work packages were put together (instead of small projects), covering a bigger geographical area and subsuming a greater range of construction activities, then local small construction companies would be squeezed out.

In addition, almost all the quotations and of course all the ballots advertised specify that only Bumiputera contractors were eligible to participate, with priority given to those who are locally based in the district or State. The set asides in favour of small, Bumiputera construction companies are the result of the desire to maximise the opportunities for such businesses, to generate local employment opportunities and thus to foster a Bumiputera business community in rural localities.

**Tenders**

Of course, for particularly large and technically specialised projects, tenders are unavoidable. From 2014 to 2017, tender notices averaged 6 to 7 per cent of yearly procurement notices issued by the KKLW, but in the first four months of 2018 the figure jumped to 16 per cent of all notices. About 30 per cent were for consultancy tenders rather than direct construction tenders. More than half of the construction tenders involved medium value contracts, and were reserved for contractors with a particular CIDB grade within the range from G3 (tendering capacity of RM1 million) to G6 (tendering capacity RM10 million), depending on the size of the contract (KKLW, 2018b).

The companies who were eligible to participate in high value tenders (above RM10 million) were required to have the highest CIDB grade of G7 which allows no limit on the tendering capacity. In some cases, they were required to be pre-qualified with a strong emphasis on being financially healthy. For example, from 2014 to 2016, several projects were undertaken to develop grid lines in Sabah (6 areas) and Sarawak (9 areas). The procurement was conducted through a domestic open tender, with only companies with a G7 CIDB grade allowed to bid. The bidders were subject to a pre-qualification. To pass the pre-qualification each company was required to have assets which were net of liabilities of more than RM5 million or capital in excess of RM2.5 million or liquid assets in excess of RM1.5 million. Also required was a track record of similar projects over 5 years with an average annual value in excess of RM7.5 million (KKLW, 2018b).
Awards to Bumiputera companies

The construction tenders issued by the KKLW for medium value projects (companies with CIDB grades G3 to G6) were reserved for Bumiputera companies, which as well were to be based if possible in the local district or State. In nearly all of the high value construction tenders (grade G7), the Bumiputera requirement was still specified but not the requirement to be based in the immediate district or State (KKLW, 2018b). For example, those tenders referred to above with respect to installing hybrid solar generating equipment and expanding the grid networks in Sabah and Sarawak were all reserved for large Bumiputera contractors with a G7 CIDB grade. It is evident that the tender procurements undertaken by the KKLW, like the procurements through quotations and ballots, are intended to provide opportunities for the local Bumiputera construction companies and the local workforce, and to likewise foster the development of a rural Bumiputera business community.

A few of the tenders of the KKLW did not relate directly to construction work but concerned the hire of consultants to advise and manage construction procurements, while a few more related to the hire of companies providing specialist services.

It should be pointed out that some of the high value procurements involve direct negotiation with a pre-designated construction company without any tender. For example, the rural electrification schemes comprising 751 projects for Sarawak between 2009 and 2014 entailed procurement through both tender and direct negotiation. However, no published record is kept of the number of direct negotiations which the KKLW engages in.

Local participation

In rural infrastructure procurement, there is a commitment to involving local communities in the initial stages. This can help to identify the problems or the shortfalls in the existing infrastructure, how the local people are affected as a result, and what is required to overcome these problems. For example, in the rural electrification project in Sarawak, district representatives and the Development and Security Committee are involved in identifying and planning the electrification projects (AG, 2015). In rural housing schemes, the district authorities apply for a housing assistance program to the KKLW and State agencies. If approval is given, the needs of the community are discussed in district focus groups (DFG's) which also receive applications for low cost houses from individual households. The findings and applications are then conveyed to the KKLW and other relevant agencies at which point if the request is approved the procurement process may begin (KKLW, 2018a).
4. IN VolvEMENT OF CHINA IN INFRASTRUCTURE PROCUREMENT IN MALAYSIA

Belt and Road Procurements

A number of high value infrastructure procurements in Malaysia in recent years have involved Chinese companies, many under China’s Belt and Road Initiatives. This is a program implemented by China to promote connectivity across Southeast Asia and other regions to facilitate free flow of trade and people. They cover railways, ports, tunnels and bridges and may be listed as follows:

- East Coast Rail Line: the construction tender was awarded to the state owned China Communications Construction Company (CCCC) – this is most prominent project and extends over 600 kms; the reported project cost is RM55 billion which may be increased to over RM80 billion (the project is currently under review). (Yen, 2017; Jaipragas, 2017).
- The Melaka Gateway port development: construction tenders awarded to Chinese firms PowerChina, Shenzhen Yantian Port Group and Rizhao Port Group; the reported project cost is RM15 billion.
- Kuala Linggi International Port development, a gas and oil storage terminal: the construction tender awarded to the China Railway Group; the reported project cost is RM12.5 billion.
- The Kuantan Port expansion: project was awarded to a joint venture, Malaysia’s IJM and China’s Guangxi Beibu International Port Group (GBIPG), in partnership with the Federal Government, (with a further award of an operational concession to IJM and CBIP); the reported project cost is RM4 billion.
- Penang undersea tunnel connecting Penang to mainland Malaysia: project awarded to China Railway Construction Corporation; the reported project cost is RM3.7 billion.
- Penang second bridge: project awarded to China Harbour and Engineering Company; the reported project cost is RM4.5 billion.
- The supply of driverless trains in the LRT3 project mentioned above: project awarded to CRRC Zhuzhou and Siemens China; the reported work package cost is RM1.56 billion (Palma, 2018a; Jaipragas, 2017; Straits Times, 2017).

Other infrastructure procurements

Additional infrastructure procurements in which Chinese companies are prominent outside the Belt and Road initiatives include a land reclamation project in Penang, resort development in Sabah, two residential developments in Johor, the building of specialist business parks in Pahang and Sarawak, the development of a methanol and methanol derivatives plant in Sarawak, the construction of power plants in Selangor and an hydro-electric dam at Bakun in Sarawak, and the laying of oil and gas pipelines in Peninsular and East Malaysia (now under review) (Palma, 2018a; Jaipragas, 2017; Straits Times, 2017).
Benefits and drawbacks of Chinese involvement in infrastructure projects

The value of these infrastructure projects is estimated to be above RM400 billion but which may turn out to be significantly higher. The award of the projects to Chinese companies is partly due to their experience and expertise as large-scale infrastructure providers, and equally their ability to raise finance through loans from Chinese banks (Azhar, 2018b). For example, the East Coast Rail Link will be financed by the contractor China Communications Construction Company, on the basis of ‘soft’ loans from the Chinese Export-Import Bank, while the Kuala Linggi International Port will be financed by the contractor the China Railway Group (Yen, 2017; Jaipragas, 2017). However, as noted below, certain of these projects together with other infrastructure projects are currently under review as to their commercial viability and cost.

However, it is feared that such projects in which Chinese companies are prominent may squeeze opportunities for local engineering companies, are too dependent on foreign credit, and are excessively costly and thus may not pay their way (Bevins, 2018; Palma, 2018a; Palma, 2018b). Equally, it has been muted that the Chinese companies have not provided anywhere near enough offset packages (e.g. the use of locally manufactured materials and products and the employment of local professional personnel). Moreover, many infrastructure facilities such as pipelines, ports and rail networks are strategic assets which arguably should be as much as possible under national sovereign control even at the construction stage of the project. Also construction and management of ports raised geo-political questions in view of the tensions over Chinese expansionism in the South China Sea.
5. PUBLIC PROCUREMENT IN MALAYSIA’S FREE TRADE AGREEMENTS (FTA’s)

Adjustment of policy

An important challenge facing Malaysia is whether to incorporate public procurement in an FTA either bi-lateral or multilateral. Until recently the various FTA’s Malaysia has been signatory to did not cover public procurement. These include 6 bi-lateral FTA’s, and of lesser scope the multi-lateral FTA with the ASEAN Free Trade Association (as well as the various FTA’s between ASEAN and a small number of countries) (MITI, 2018). Furthermore, Malaysia did not join the WTO’s Government Procurement Agreement (GPA) which was set up in 1995 to create a common procurement market covering medium and high value contracts amongst the signatory states. The reason for this is the desire to protect the public procurement market in Malaysia so as to retain maximum opportunity for domestic and Bumiputera suppliers and contractors. Malaysia though has now observer status in the GPA.

However, in 2016, Malaysia was a signatory to the Trans-Pacific Partnership Agreement, which incorporated public procurement. Even though the TPPA has been abandoned due to the unwillingness of the US government to ratify it, it has been revamped with certain modifications under the name Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), without the US and so far South Korea. Public procurement is covered in Chapter 15 (Ministry of Foreign Affairs and Trade, New Zealand, 2018).

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Core principles and provisions

The CPTPP Chapter 15 to a significant extent replicates provisions in the WTO’s GPA. The key principle is non-discrimination, which guarantees:

Goods, services and suppliers from any member country (Party) will receive treatment no less favourable than the treatment that the Party, including its procuring entities, accords to: (a) domestic goods, services and suppliers; and (b) goods, services and suppliers of any other Party.

Moreover,

no Party, including its procuring entities, shall: a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or (b) discriminate against a locally established supplier on the basis that the good or service offered by that supplier for a particular procurement is a good or service of any other Party’ (WTO Centre (2018a).

The CPTPP Chapter 15 prescribes tendering as the means of procurement which includes open, selective and limited tendering (the last only under certain clearly defined circumstances). Negotiation is permitted if ‘no
tender is obviously the most advantageous’, providing after the conclusion of the negotiation, that opportunity is given for ‘the remaining participating suppliers to submit any new or revised tenders’ (WTO Centre, 2018a).

The Agreement also stipulates requirements in drafting specifications, criteria in evaluating bids, tender documentation, setting time periods for bid submission, and publicising contract awards. Importantly, it mandates the names of successful bidders to be published and that on request explanations be given to unsuccessful bidders on why their bids failed. A further provision requires Parties to create a bid review mechanism to enable appeals against a bid outcome to be made (WTO Centre, 2018a).

Permanent concessions in CPTPP granted to Malaysia

To enable Malaysia to reconcile it national interests to the requirements of the CPTPP Chapter 15, it has been granted certain concessions allowing it to derogate from certain aspects of the CPTPP and to preserve its preferential systems. These are elaborated in the Schedule of Malaysia (Annex 15-A).

Bumiputra and local preferences

In the Malaysian schedule to CPTPP Chapter 15, the Bumiputra price preferences have been retained, varying inversely with the value of the procurement as follows

a) The MOP’s accorded to Bumiputra suppliers who manufacture their own goods remain the same. Thus, in the procurement of such goods valued up to RM10 million, a 10 per cent MOP is applied, 7 per cent for procurements from RM10 million up to RM100 million, and 3 per cent for procurements above RM100 million.

b) Likewise, the Bumiputra suppliers who import their goods from CPTPP countries retain the same MOP’s as currently applicable to all Bumiputra suppliers. These vary from 7 per cent for goods worth above RM500,000 up to RM1.5 million, to 2.5 per cent for goods worth above RM10 million up to RM15 million. Above that value, no MOP can be applied to Bumiputra companies.

c) Bumiputra suppliers which import goods from countries outside the CPTPP can only claim a price preference which is half that of each MOP accorded to goods from CPTPP countries. The significantly lower MOP’s for goods from outside the CPTPP is designed to incentivise Bumiputra suppliers importing goods, to acquire them from CPTPP countries (WTO Centre, 2018b).

A further concession is to grant local non-Bumiputra companies small preferential margins equal to the MOP’s accorded to Bumiputra companies importing goods from countries outside the CPTPP, as stated above. The same MOP’s are also accorded to companies in CPTPP countries bidding for public contracts in Malaysia. In both cases the companies will enjoy a price advantage over companies from outside the CPTPP but still much lower than the price advantage of Bumiputra companies importing goods from CPTPP counties (WTO Centre, 2018b).
Exemption of certain goods and programs

As is normal in FTA’s which include public procurement, the Malaysian Government has negotiated permanent exemption from the CPTPP Chapter 15 of certain goods, services and works and of certain public programs. For example, included in the exemptions is any procurement in rural development programs in areas with less than 10,000 residents and poverty eradication programs for households earning below Malaysia’s Poverty Line Income. Also exempted are construction services that are carried out to maintain or improve hillside surfacing for periodic maintenance, or to improve existing slopes or construct new slopes due to natural disaster, flood, landslide, ground subsidence and other emergency and unforeseen circumstances. Of course, goods and services with a security-related component are exempted to. All told 15 categories of goods and service and public programs are exempted (WTO Centre, 2018b).

Exemption of sub-central public entities and other government entities

For the time being, Malaysia has excluded sub-central entities from the CPTPP Chapter 15, which comprise State entities and local authorities (city, municipal and district authorities). A possible reason is to retain access of companies within the State and local authority jurisdictions, which otherwise could not compete against companies from other Parties, and thus to preserve business and employment opportunities at the State and local level. Also exempted are statutory boards (with the exception of four mentioned in Malaysia’s Schedule, Section C), as well as GLC’s (WTO Centre, 2018b).

Transitional concessions in CPTPP granted to Malaysia

Thresholds for covered procurement

The CPTPP Chapter 15 as with most FTAs which include procurement, lays down value thresholds at or above which non-discrimination applies (referred to as covered procurement). Below these thresholds the provisions of Chapter 15 do not apply. This restricts the coverage to medium and high value procurements.

However, the value thresholds allowed for Malaysia indicated in its Schedule are initially much higher than allowed for several other Parties (mainly developed economies), and will only be gradually reduced to those of these Parties. For Malaysia the covered procurements of goods have been accorded a threshold value from the first year at or above 1.5 million Special Drawing Rights (SDR) (RM8.49 million) which will be reduced to SDR800,000 (RM 4.528 million) at the beginning of the fifth year. This will be further reduced to a final threshold of SDR 130,000 (RM735,800) at the beginning of the eighth year. In the case of services, the initial threshold is SDR2 million (RM11.32 million), reduced to SDR1 million (RM5.66 million) at the beginning of the fifth year, and reduced further to SDR500,000 (RM2.83 million) at the beginning of the eight year, to finally settle at the threshold of SDR130,000 (RM735,800) at the beginning of the tenth year. For construction services, the initial threshold is SDR63 million (RM 356.58 million) which will be gradual reduced in four stages to SDR14 million (RM79.24 million) at the beginning of the 21st year. These final thresholds will then bring Malaysia into line with those of Australia, Brunei, Canada, New Zealand and Singapore and slightly higher than those allowed for Japan and Chile (WTO Centre, 2018a).
Offsets

The CPTPP stipulates that ‘with regard to covered procurement, no Party, including its procuring entities, shall seek, take account of, impose or enforce any offset, at any stage of a procurement’. However, transitional arrangements have been agreed for Malaysia whereby it can require offsets from companies of the other Parties which will be gradually reduced over several years. Initially the credit value of the offset may be equivalent to 60 per cent of the contract value, dropping in stages to 40 per cent and 20 per cent until the beginning of the thirteenth year when no offset is permitted (WTO Centre, 2018a, b).

The permission given to Malaysia to be exempt from the thresholds of other Parties and to require offsets for several years enables domestic suppliers and contractors to gradually adjust to the competition for government contracts from bigger and more resourceful companies from these Parties, which have larger economies of scale and more advanced technology. In the meantime Malaysian suppliers and contractors can develop their capital resources, expertise, technology and production methods to equal or exceed those of the other Parties. (WTO Centre, 2018b).

Appeals and dispute resolution

Two other transitional measures have been incorporated into Malaysia’s schedule of the CPTPP. It is exempted for three years from setting up an impartial judicial and administrative authority, independent of any procuring entity, whose function is to review complaints from companies who have failed to secure a government contract. In addition, Malaysia is not required to be subject to the CPTPP dispute settlement mechanism for five years (WTO Centre, 2018b).

Relevance to Malaysia of the FTA’s between EU and Singapore and Vietnam

An FTA between EU and Malaysia may be reconsidered in view of two recent FTA’s between the EU and Singapore and Vietnam (both not yet ratified), each of which include a chapter on public procurement. The FTA between the EU and Singapore is a straightforward and comprehensive one but contains few special concessions either permanent or transitional to either Party. The FTA between the EU and Vietnam is also comprehensive but contains a number of transitional and permanent concession to protect businesses in Vietnam being a less developed economy. This might be a pointer to how Malaysia could arrive at an FTA with the EU (European Commission, 2016; Grier, 2016).

The EU Vietnam FTA sets higher initial thresholds for covered procurement in favour of Vietnam: for goods it is initially SDR1.5 million to be lowered eventually to a permanent threshold of SDR130,000; for construction the initial threshold is SDR40 million to be scaled down to a permanent threshold of SDR5 billion. The transitional period to reach the final threshold in goods is 5 years and in construction 15 years. For goods the thresholds for covered procurement are the same as Malaysia’s thresholds in the procurement chapter of the CPTPP, but for construction the initial and final thresholds are lower than Malaysia’s thresholds in the CPTPP. Moreover, the transition period to reach the permanent threshold is much shorter in the EU – Vietnam FTA: for
goods it is 5 years (compared to Malaysia’s transition period of 10 years, and for construction it is 15 years (compared to Malaysia’s transition period of 21 years). The transitional concessions for covered procurement and the final threshold for construction are thus less generous in the EU – Vietnam FTA than in the Malaysia’s Annex to the procurement chapter in the CPTPP (European Commission, 2016; Grier, 2016).

Another transitional concession to Vietnam is the allowance given to its procuring entities to request offsets (measured in terms of credit value) ‘in any form, including price preference programs, up to 40 per cent of the contract value, going down to 30 per cent after 10 years until the end of the 18th year’. Although the initial offset value is lower than Malaysia’s in the CPTPP, the interim contract values are higher during the transition period. However, the transition period leading to no offsets is 18 years in the FTA compared to 13 years secured by Malaysia in the CPTPP. Overall the concession relating to offsets are more generous to Vietnam in the FTA than allowed for Malaysia in the procurement chapter of the CPTPP.

The EU – Vietnam FTA provides for a dispute settlement mechanism only after 5 years. This is the same as provided for Malaysia in the procurement chapter of the CPTPP. However, under the FTA, Vietnam is required to set up a domestic review body from the outset whereas Malaysia under the procurement chapter of the CPTPP is required to do so only after three years.

Under a permanent concession in the EU – Vietnam FTA, Vietnam may provide preferences to benefit SMEs, in bidding for government contracts to supply goods and services (excluding construction) whose value is estimated at SDR260,000 or less. To qualify for the preference an SME must employ 500 or fewer permanent employees. However, the type and degree of the preferences are not stated in the text of the Agreement. Furthermore, the procurement chapter of the EU – Vietnam FTA exempts fewer Vietnamese products, programs and agencies from its provisions than those exempted for Malaysia under the procurement chapter of the CPTPP. The key programs exempted for Vietnam include ‘measures for the health, welfare and the economic and social advancement of ethnic minorities’ ((European Commission, 2016).

Could the procurement chapter of the EU – Vietnam FTA serve as a template for a procurement chapter in a future FTA between Malaysia and the EU and other large economies? This is hard to tell. The provisions in the FTA on offsets would likely be acceptable to Malaysia. But the lower thresholds on covered procurement and the shorter transitions to permanent thresholds may be unacceptable given Malaysia’s desire to protect local businesses and construction companies. In addition, the preferences for SME’s and ethnically based business in the FTA lack specific guidelines and are perhaps too general to be acceptable to Malaysia with its focus on getting a clear-cut set of preferences for the Bumiputera community. Malaysia would perhaps seek the type of precise preferences laid down in its annex to the procurement chapter of CPTPP, in line with its longstanding preferential policy. This may prove to be an issue not easily resolvable in negotiations with the EU.
6. PROBLEMS AND CHALLENGES in MALAYSIAN PUBLIC PROCUREMENT

In the foregoing analysis of public procurement in Malaysia, several problems and challenges were revealed. These weaknesses are mainly referred to in the activities reports of the AG, and enumerated in Table 2, with some also mentioned in the list of defaulting companies published on the MOF website.

Weaknesses in everyday procurement identified in AG’s reports

Pre-planning and specification drafting

An important failing in procurement is the lack of sufficient planning. As shown in Table 2, in 11 out of 53 procurement programs/projects audited in the AG’s 2015 and 2016 activities reports, prior planning of the procurement did not occur or was inadequate. The plan framework includes the purposes of the procurement, the uses and benefits to the end user agencies the estimated costs, types of product, services or works to be procured, the evaluation criteria, types of product, services or works to be procured, the evaluation criteria, the type of companies best able to deliver, the time frame for delivery, and post-contract responsibilities of the chosen supplier/contractor.

In the Industrial Training Institute Upgrading Project undertaken by the Ministry of Human Resources, the AG made a point in 2016 that ‘detailed planning should be done before procurement to ensure the equipment and facility can be used optimally’ (AG, 2017).

A related concern is the lack of cooperation in the planning of multi-agency procurements. The conclusion of the AG’s activities report in 2015 concluded that in such cases ‘integrated planning ... needs to be carried out at the early stage of project implementation in particular for gigantic programmes/activities/projects’. The report further urged that the relevant agencies ‘need to be consulted before projects are implemented. Such consultations are needed to ensure all basic facilities are provided and programmes/activities/projects are implemented smoothly’ (AG, 2016b).

A further shortcoming identified by the AG, as shown in Table 2, is poor specification drafting, also part of the planning framework, identified in 6 of the programs/projects. As a result, specifications are: a) too vague and general, b) do not take into account all aspects of the goods, services and works to be procured (including the all-important quality factor), c) indicate an insufficient amount or quantity to be procured, and d) fail to meet the precise needs of the end users. Poor specification drafting by procurement officials may itself arise from the lack of comprehensive pre-planning, from insufficient attention to the needs of the end users, lack of familiarity with the goods, services and works to be procured, and a lack of expertise in procurement management.
<table>
<thead>
<tr>
<th>Table 2: Weaknesses in procurement of goods, services and works identified in AG’s activities reports, 2015 and 2016</th>
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<tr>
<td><strong>AG report 2015 Series 1</strong></td>
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<tr>
<td>Little or no prior planning of procurement</td>
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<td>Poor drafting of specifications</td>
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<tr>
<td>Poor selection of consultant, supplier, or contractor</td>
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<td>Weak supervision of procurement projects</td>
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<tr>
<td>Non-compliance to scope, specifications &amp; terms of contract</td>
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<td>Low quality of product, service or works</td>
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<td>Delayed completion or non-completion of delivery or project</td>
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<td>Splitting of contracts</td>
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<td>Under-utilisation of products and facilities procured</td>
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<tr>
<td>No of procurement projects/programs which were audited in 2015 &amp; 2016</td>
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Source AG, 2016a, b; 2017.
**Selection of consultants, suppliers and contractors and supervision of projects**

Table 2 shows that in 14 of the audited projects, the AG referred explicitly to the poor selection of consultants, suppliers and contractors. Those selected whether by direct negotiation or tender or other means did not offer best value for money in terms of cost, quality, and reliability in completing the project, and lacked the capability to deliver at the standard required in a government contract.

On the matter of consultant selection, the AG in the 2016 activities report referred to the construction of a vocational secondary school stating:

> MOE (Ministry of Education) should ensure that the appointed consultants are qualified and experienced in order to avoid any construction and furniture design flaws, delay in determination of electrical load for workshop and low quality of construction works (AG, 2017).

With regard to contractor selection, the AG audit of the construction of a Technical Service Centre for military aircraft maintenance in 2015, stated that the Ministry of Defence as the procuring entity should ‘ensure the appointment of contractors is made based on their experiences, qualifications and capabilities to execute the project’ (AG, 2016b).

The AG in the 2015 and 2016 activities reports identified, as well, 15 cases of poor supervision and monitoring of the procurement project. When goods were received, sometimes no assessment was undertaken to determine if they were compliant with specifications and in good working order. In works projects, it was pointed out that in certain cases the contractor’s performance was not monitored, which resulted in his failure to adhere to the scope of the project, follow the designs, use materials and equipment specified, and maintain good standards of workmanship. The conclusion of the 2015 activities report saw as a major weakness ‘lack of monitoring/supervision by responsible parties (and) and lack of technical expertise’ (AG, 2016b). Moreover, the reports further indicated that not all suppliers and contractors who were unsatisfactory were subject to disciplinary action.

The responsibility for weak supervision was not only that of the procuring entity but also in the case of works projects that of the consultants. It was observed that on occasions the consultant for the project failed to monitor the contractor properly. Amongst the shortcomings were a failure to require improvements in the quality of workmanship, corrections of deviations from design plans, and the remedy of defects after completion of the project.

**Compliance with specifications and contractual terms and low quality of product and works**

According to the AG’s activities reports and the MOF list of defaulting companies mentioned earlier, the most serious problem in public procurement in Malaysia is the failure of certain suppliers/contractors to comply with the product, service and scope/design specifications or with the terms of the contract. As indicated in Table 2, the AG’s 2015 and 2016 reports referred to 26 procurement programs/projects where this occurred. Non-compliance related to the features, attributes and quantity of goods to be procured. Typically, in works projects,
as evidence of non-compliance, fewer facilities were built than in the agreed scope, design drawings were not properly followed, and the materials and equipment used deviated from those specified.

Linked to non-compliance was the low quality of goods procured and also in works projects poor standards of construction. The issue of quality was explicitly raised in 9 procurement projects in the 2015 and 2016 audits and in the conclusion of the 2015 report, specific references was made to ‘unsatisfactory works quality’ (AG, 2016b).

**Delays and non-completion of projects**

As indicated in Table 2, the AG activities reports also highlighted 12 procurements, mainly works projects, which were delayed beyond the scheduled date of delivery/completion or not completed at all. An example of delayed completion was the construction of the Rawang Bypass in Bandar Rawang, started in 2005, the scope of which was increased in 2011. Six extensions of time (EOT) were granted to the contractor covering nearly 6 years. The project was only completed in November 2017, eliciting the comment from the AG that ‘the project took a long time to complete’ (AG, 2017). Delays may arise for various reasons: slowness of the procuring entity to sign contracts or agree variations, changes in design, the contractor’s poor organisation, his lack of resources and expertise and inability to maintain an adequate cash flow, and the tardiness of sub-contractors.

In some cases, contractors were unable to continue a project, which was then re-assigned to another company (novation). An example was the construction of a police training centre at Bentong, Pahang. The project was delayed for more than 7 years, and was completed in 2016. Although most of the construction had been completed, the contractor could not continue in 2013 and another contractor appointed by restricted tender to complete the work (AG, 2016b). Non-completion may be due to the absence of technical resources and expertise in the construction company or its inability to undertake the work at the tendered or negotiated price.

**Utilization**

A further concern in the procurement system is the extent to which the goods procured and facilities created are utilised. As shown in Table 2, the AG in the 2015 and 2016 activities reports identified 8 instances of under-utilization of newly constructed facilities and newly purchased items and equipment. Amongst these is the Herbal Products Development Project undertaken by the Ministry of Agriculture and Agro-based Industry. The 2015 report pointed out that 25 building units constructed in the Pasir Raja Herbal Park, Dungun, Terengganu valued at RM3.84 million were not utilized for 2 years 4 months from the date of completion, while laboratory equipment and assets valued at RM1.14 million in the Institute for Medical Research were not used for 4 to 5 years. The 2015 audit of the Ministry of Health’s Orthopaedic Treatment Programme found that the stock of implants purchased were under-utilised (AG, 2016a). Three reasons may be given for non- or under-utilization. One is poor project planning, in which end user needs were not sufficiently considered, lack of proper specification drafting which results in facilities and equipment of little practical value, and lack of conformity to designs and specifications with the same result. A further factor is the lack of a system of on-going
maintenance and repair so that facilities and equipment fall into disrepair and become obsolete. Provision for maintenance and supplier guarantees are important aspects of the procurement plan and specifications.

**Splitting of contracts**

A further concern raised by the AG in the activities reports of 2015 and 2016 was the splitting of contracts in contravention of the procurement regulations prohibiting it. Splitting involves dividing a project or product into several smaller projects or quantities. The value of the procurement of each case is thus reduced to the extent that a less a competitive form of procurement is permissible such as quotations or direct purchases. For example, in the works procurement for the Industrial Training Institute Upgrading Project, undertaken by Ministry of Human Resources, worth RM10.42 million, the contract was split into 48 quotations and 17 direct purchases to avoid a competitive tender process. Another procurement by the KKLW (Desa Lestari Programme), in 2015 and 2016 amounting to RM2.08 million was split into 6 quotations to avoid a tender. In the two cases identified above, the AG called for disciplinary action to be taken against the procurement officials involved (AG 2016; 2017).

**Direct negotiation**

As mentioned above significant procurement contracts continue to be awarded through direct negotiation. GAN Integrity which assesses corrupt and anti-competitive practices in different countries, recently noted that in Malaysia, ‘the awarding of major infrastructure and public works contracts is often done without competitive bidding or open tenders’ (GAN, 2018). The AG’s activities reports in 2015 and 2016 indicate that in 17 of the 53 procurement programs/projects which were audited direct negotiation was adopted, direct negotiation may be justified if there is a need to hire a domestic company and only one is capable of undertaking the contract. The risk is that the absence of any competition could lead to less value for money, lack of transparency and even corruption, and may be adopted when an open tender is feasible. The AG in her 2016 activities report expressed the opinion that the practice of ‘direct negotiations without clear justification should cease immediately’ (AG, 2017).

**The problem of corruption in procurement**

Corruption continues to be a concern in public procurement. As stated by the GAN Integrity report on Malaysia in 2016, ‘the public procurement sector presents businesses with high corruption risks’ (GAN, 2018). The World Economic Forum in The Global Competitiveness Report, 2017-2018 rated the responses to its executive survey of businesses which indicated a moderate but not an extreme amount of corruption. These included the ‘diversion of public funds to companies, individuals, or groups due to corruption’, ‘undocumented extra payments or bribes’ for government contracts, and ‘favouritism to well-connected firms and individuals when deciding upon policies and contracts’ (World Economic Forum, 2018). In addition, of 1,000 firms surveyed in the World Bank’s Enterprise Surveys in 2015/2016, 51.4 per cent stated that they were ‘expected to give gifts to secure government contract’ (World Bank Group, 2016).
Two recent cases of alleged corruption in procurement entailing bribery, embezzlement, fraud and cronyism/nepotism may be mentioned. One is the alleged embezzlement of funds earmarked for development projects to be carried out by the Sabah Water Department. RM114.5 million of embezzled money has been confiscated by the MACC. The embezzlements were combined with kickbacks or bribes worth 27 to 30 per cent of the value of projects and as well with the award of contracts to cronies and family members. Three senior managers and a spouse of one of them are being currently prosecuted (The Straits Times, 2017; Avila, 2018).

The other case concerns the RM6.3 billion undersea tunnel project of Penang State Government and the hiring of a consortium for the feasibility study and design work. The high cost of the study and design work (RM305 million) has led to a corruption probe by the MACC. This has raised fears of irregular payments, bribery, embezzlement and fraud. The payments include potentially profitable land allocations for development purposes to the consultancy firm. Senior politicians and administrators in the State, the chief executive and an engineer of the consultancy firm, and various business leader are involved in the investigation (Muhammad & Ilah, 2018).

Collusion or bid-rigging is another form of corruption engaged in by certain suppliers and contractors. They form a collusion ring arranging among themselves to restrict competition in tenders and to drive up the price. Typical forms of collusion are: a) cover pricing – bidders in the collusion ring disclose to each other their proposed bid price for a tender to enable one of them to submit a slightly lower but still high bid and win the contract; b) bid suppression – bidders withhold or withdraw bids or submit invalid or non-compliant bids except one bidder who then submits a compliant but high bid and wins the contract; c) rotational bidding - bidders agree to take turns to submit a bid for each of a series of tenders over a number of years, with the other bidders at each tender withholding their bids; d) segmented bidding – bidders in the collusion ring segment the procurement market by regions or types of goods and allow each bidder exclusive access to a specific segment. Rewards for firms who deliberately fail to gain a contract or do not bid at all may include a percentage of the contract sum or a sub-contract (Rohana et al, 2010; MyCC, 2014; The Star Online, 2013; Jones, 2016).

It is difficult to tell how much collision occurs in public procurement in Malaysia. MyCC has held a number of forums on collusion in public procurement, signifying it was an area of concern. At one forum in November 2017, the Chief Executive Officer of MyCC stated that it had received and was investigating a ‘number of complaints which involved bid rigging issues’. He further noted: ‘the risk of bid-rigging tended to be higher in relation to high value government contracts, especially in industries where there are only a few suppliers, where government procurement occurs on a regular basis and where there is little innovation in the products’ (Borneo Post, 2017).

**Concerns over costs of infrastructure projects**

There has been concern over the capital and operation costs of the large infrastructure projects. This issue has been given top priority by the new Pakatan Harapan coalition Government in Malaysia, under Prime Minister Mahathir Mohamad, but was raised during 2017 as well. The East Coast Rail Link has now been suspended
with a view to reducing its 'excessive' costs. The contract value was set at RM55 billion but a detailed review by the new Government indicated the cost to be in excess of RM80 billion taking into account land acquisition, interest and other fees. The new finance minister Lim Guan Eng has stated that 'the ECRL project will only become financially and economically feasible if there is a drastic price reduction of the project by CCCC (China Communications Construction Company)' (White, 2018; Palma, 2018a). The LTR3 will continue if costs are slashed from RM31.65 to RM16.63 billion, while the oil and gas pipeline projects in both Peninsular Malaysia and East Malaysia have been suspended and will only be reactivated if the costs are also decreased (Tan, 2018; Palma, 2018a; Palma, 2018b). The proposed high speed rail link between Singapore and Malaysia is on hold too with the possibility of cancellation because of the costs involved (Tan, 2018). The fear is that the borrowing to meet the capital costs and also the operating costs of these projects will be in excess of the revenue they generate and will have to be met ultimately from the Government budget. For example, operating costs of the East Coast Rail Line has been cited by the Minister for Finance in the Malaysia Parliament as RM600 million to RM1 billion annually, well above the breakeven point (Straits Times, 2018). This could add to the budget deficit and ratchet up the national debt (already recalculated by the new Government at about 80 per cent of GDP, a significantly higher than previously disclosed).
7. CONCLUSION AND PROSPECTS

Summary

The foregoing analysis discusses the system of public procurement in Malaysia. To a certain extent but not totally, it conforms to the standards of public procurement which are internationally recognised. However, the system has been adjusted to reflect the particular values and needs within Malaysia. Noticeable are the degree of protection given to domestic suppliers and contractors and the promotion of the interests of the Bumiputera business community through a system of preferences such as set asides and MOP’s.

Many of the features of the procurement system are reflected in the development of the urban public transport system such as the KVMRT and LRT3 networks. A conventional model of procurement has been adopted instead of the design-build-operate-transfer model. In the construction of the SBK, SSP and LRT3 Lines, the model has been based on a PDP/work package arrangement. In the construction of the Circle Line, the alternative less expensive turnkey arrangement is to be used. While there is a significant participation of large foreign companies in the construction work, domestic companies play a key role especially in consortiums/JVs in domestic-foreign partnerships. The interests of the domestic economy are further enhanced by the provisions of offset packages by foreign companies. The Bumiputera business community has benefited mainly by set asides and sub-contracts in many of the work packages.

The funding is partly based on the development budget and partly based on sukuk debt issue. However, in the case of the forthcoming Circle Line, payment of the contractors is to be delayed for several years and spread over subsequent years. This places an onus on bidders to show an ability to raise capital and avoid burdensome servicing costs before payment is made.

Aspects of the public procumbent system are also exemplified in the procurements relating to the development of the rural infrastructure. The areas of infrastructure development cover rural road building and upgrading, increasing clean water supply, improving management of sewerage, ensuring reliable electrical supply to remote villages and settlements, and the building of affordable housing in rural areas. The highlights of rural infrastructure procurement are the number of small scale projects based on quotations and balloting, and the reservation of nearly these projects for Bumiputera business located in the State and the district. It was evident that the infrastructure program was in part designed to promote a rural and village based Bumiputera business community.

A particular feature of infrastructure procurement is the involvement of China in the construction of so called Belt and Road and other high value projects. These projects have drawn upon the know-how and resources of Chinese construction and engineering companies and their ability to raise finance through Chinese financial institutions, but concerns have been raised in relation to costs and affordability, offsets packages and other issues.
An important advance has been Malaysia’s recent accession to the CPTPP (though not yet ratified) which includes public procurement. This may increase the degree of competition and transparency in the procurement system whilst opening up opportunities for Malaysian companies to access lucrative procurement markets in the other Parties. To protect the Malaysian business community, concessions have been granted to cushion the impact of greater competition from more resourceful suppliers and contractors in the other Parties. Some concessions are permanent whilst others are transitional. Amongst them are the preferences for Bumiputera companies. This may provide a template for the incorporation of procurement in other FTA’s.

Despite the advances in public procurement through E-procurement, greater accountability, clearer and more coherent rules, and attempts to tackle corruption, several weaknesses remain, many highlighted by the AG. These include inadequate pre-planning, poor drafting of scope and specifications, and poor selection of suppliers, contractors and consultants, as well as weak supervision of projects by procuring entities and consultants. A further problem is the failure of suppliers and contractors to comply with scope, specifications and contractual terms, and the delivery of below standard goods and works. Other weaknesses include delays in delivery of goods and in the progress of works, in some cases non-completion of projects, under or non-utilisation of goods procured and facilities built, the splitting of contracts to avoid competition, and too many instances of direct negotiation. Corruption remains an on-going problem including bribery, embezzlement, cronyism and nepotism, fraud, and collusion, while the alleged excessive costs of key infrastructure projects has also become a critical issue.

These problems can only be tackled by combination of initiatives. These may include better training of procurement officials, more commitment to pre-planning, more accurate costing, improved internal controls and internal audits of the procurement process, and increased priority to evaluating the quality of goods delivered and the standard of works completed. This must be accompanied by stricter penalties against procurement officials who fail to adhere to the procurement regulations and suppliers and contractors who fail to follow scope, specifications and contract terms. The staffing and expertise in the MACC may be increased given that high level cases of procurement corruption are complex and require a great deal of investigative work. Underpinning such initiatives is the necessary will to improve the system of procurement and enforce controls at the highest levels of government and the bureaucracy.

**Prospects**

The new Government in Malaysia, has indicated likely changes in procurement policy. The prospects are that continuing corruption in procurement, as well as in other areas of public administration, will be tackled more effectively and alleged malpractice will be more vigorously investigated without political interference. The catalyst for this is the exposure and investigation of suspected corruption in 1MDB. A more effective anti-corruption program in part depends on equipping both the MACC and the Public Prosecutor with greater capacity such as improving software systems to manage and retrieve data, and increasing the administrative
and legally qualified personnel with expertise to investigate cases, assemble evidence and conduct a prosecution. As part of the effort to reinforce accountability in the procurement system, it is also possible the National Audit Department will be given a stronger remit to expose possible corruption and waste in procurement. This again will depend upon further capacity building in the National Audit Department.

The second likely change in procurement is to ensure costs of infrastructure projects are affordable and do not lead to unmanageable debt. The review and suspension of East Coast Rail Line, the high speed rail link between Malaysia and Singapore, and the oil and gas pipeline projects, and the review of the LTR3 all point to a more cautious and realistic approach to infrastructure development (Tan, 2018; Palma, 2018a; Palma, 2018b)).

A third possible change in procurement policy may be to reduce the role of Chinese companies in infrastructure projects and if and when they are appointed as contractors, to ensure that their costs are realistic and they provide better offset packages. A further aim is that their prominence in infrastructure development does not compromise Malaysian sovereignty or accentuate contentious geo-political issues.

However, it is expected that the emphasis on local and Bumiputera protection in procurement will remain, and the set asides and price preferences in favour of Bumiputera companies will not be reduced. This is reflected in the procurement concessions won by Malaysia in the CPTPP in favour of local and Bumiputera companies.
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