



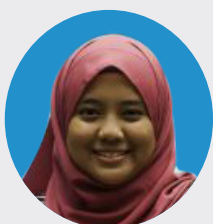
An assessment of select procurement initiatives in the National Anti Corruption Plan 2019-2023

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I. NACP: an honest look at corruption



In response to calls for a more effective plan to address corruption, the National Anti-Corruption Plan (NACP) was launched on January 29th, 2019 by the National Centre for Governance, Integrity and Anti-Corruption (GIACC) under the Prime Minister's Department (PMD). The goal of the NACP is to create a corruption-free society governed by the principles of integrity, accountability and transparency. The NACP serves as the primary anti-corruption policy framework for different government agencies and ministries so that they may develop their own Organisational Anti-Corruption Plan (OACP).

The NACP has identified six key corruption-prone risk areas; political governance, public sector administration, public procurement, legal and judicial, law enforcement, and corporate governance. Based on corruption trends from 2013 to 2018, the public sector was found to be more vulnerable to corruption with a vulnerability rate of 63.30%, compared to the private sector (17.06%). One reason cited is that due to weak governance in the public procurement system.

From 2013 to 2018 the MACC (as cited in the NACP, 2019) found that the procurement sector recorded the highest number of complaints (42.8%) received by the Malaysian Anti-Corruption Commission (MACC).

Since procurement makes up a large chunk of corruption complaints, the NACP has set forth Strategy 3 titled "Increasing the Efficiency and Transparency in Public Procurement" which contains 16 initiatives that attempt to address issues in the public procurement regime. Furthermore, there are other initiatives within other strategies that will help address the problems in procurement.

Hence, this brief paper will give an overview of the current procurement regime. Next, the paper will briefly look into cases of corruption, negligence, and non-compliance in procurement. This paper will provide a full list of Strategy 3's 16 initiatives and will attempt to evaluate a few select issues and initiatives within the strategy, alongside relevant initiatives from other Strategies. With reference to previous literature on public procurement in Malaysia, this paper will provide a general evaluation of those specific initiatives. This paper then provides recommendations to improve these initiatives.

2. Malaysia's procurement regime and corruption



Public Procurement

The Organisation for Economic Co-operation and Development (OECD, 2017) defines public procurement as the purchase(s) made by Government and state-owned enterprises on goods, services and works.

This could involve giving out contracts for the construction, operation and maintenance of public facilities such as schools and hospitals, or infrastructure projects such as highways, water treatment plants, power plants and so forth.

Current procurement regime in Malaysia

Malaysia's procurement regime is governed by several laws and instruments namely the Financial Procedure Act 1957, the Government Contract Act 1949, Treasury Instructions, Treasury Circular letters and Federal Central Contract Circulars. These apply to procurement by all federal and state governments, local authorities within the states and statutory bodies but exclude state-owned and government-linked companies (GLCs) (Jones, 2013, p. 2). Previous research by IDEAS (Murniati, 2014, p. 8) notes that on paper, these are fairly robust regulations and instruments that already provide the principles for transparency, value for money, and fair dealings in contracting activities but the challenges lie in implementation. Others have suggested that these fragmented regulations and instruments have themselves led to inconsistencies and a lack of accountability in procurement procedures (Xavier & Xavier, 2018).

Procurement is divided into three categories namely; works - the construction and engineering activities; goods (or supplies), the supply of raw, intermediate or finished goods; and services, the engagement of labour, expertise and consultants for various purposes (Ministry of Finance, 2010)

There are three main methods of procurement; direct purchase, quotations/closed tenders, and open tenders. The method used depends on the type of procurement and the cost of the procurement.

Table 1: Types and methods of procurement in Malaysia

Type of Procurement	Methods of procurement		
	Direct Purchase	Quotation/Closed Tender	Open Tender
Goods and Services	Up to RM20,000	RM20,000 to RM500,000	Above RM500,000
Works	Up to RM20,000	RM20,000 to RM500,000	Above RM500,000

Source: C4 Table; Malaysia Treasury Circular PK2.

One feature specific to Malaysia's procurement regime is the preferential treatment for Bumiputeras suppliers which is regulated by the Treasury Circular No.4/1995. Bumiputeras are given exclusive access to goods and services contracts below RM100,000 and works contracts below RM50,000. For goods and services contracts from RM100,000 to RM15 million, as the price of the contract increases, Bumiputeras receive a regressive margin of preference from 10% till 2.5% (Murniati, 2014, p. 6).

Procurement is a significant part of Malaysia's government spending. Jones (2013) estimates that Malaysia spends more than RM150 billion each year in procuring goods, works and services, almost one-fifth of its nominal GDP. This is higher than most Organisation for Economic Cooperation and Development (OECD) countries, who spend on average of 12% of their GDP on public procurement (OECD, 2017).

3. Corruption in public procurement



Source: <https://www.nst.com.my/news/>

Biannual Malaysian Auditor General (AG) reports frequently highlight cases of procured goods, services and works that are being paid for well above market prices, being delivered or completed late, under-utilised, and were of substandard quality (Jones, 2013, p. 2). An evaluation of three AG reports from 2015 to 2016 (Jones, 2018, p. 36-37) found that most weaknesses (a total of 26) were due to non-compliance in the scope, specification and terms of contracts. Other recurring weaknesses found were; weak supervision of projects; poor selection of consultant, supplier and contractors; delays in completion of projects; and little to no planning for procurement.

For example, according to the 2016 AG report, the Ministry of Defense purchased 12 EC725 helicopters and had planned to build an infrastructure project to operationalize, maintain and house these helicopters. The project was offered to Bella Builders Sdn. Bhd. for the price of RM108.89 million. It was scheduled to be completed by 31 January 2014. However, as of 8 December 2016, the project failed to be completed despite multiple extensions of time given. The total cost of the project increased by 16.9% to RM127.29 million. The AG found that the Tender Assessment Committee recommended company did not meet the Need Statement. Their management of the contract was weak; flawed equipment construction and installation, and failure to delivery on time. Bella Builders' contract was terminated and a rescue contractor was later appointed to complete the project (Yap, 2018, p. 16).

In a more recent example, the 2017 AG Report Series 2 reported that several facilities and equipment were underutilised in the Malaysia Arts School of Johor, which was completed on the 15 November, 2013. For instance, 30 (6.1%) out of 490 equipment such as banquet chairs, sewing machines, and flag poles valued at RM34,834 were not being used. The reasons cited were that some items were unnecessary, there was no staff skilled to handle the equipment, or it was not practical to use said equipment. The Audit report also found that built-in furniture (such as closets, clothes hangers and cabinets) at eight locations around the school valued at RM144,225 were not being used or were used for other purposes. Some of the reasons cited were that some furniture was mounted too high and hard to reach. Other furniture was unneeded - they were used for storing school files instead (National Audit Department, 2017, p. 359-362).

Corruption remains a concern in public procurement, as demonstrated by the fact that 42.8% MACCs complaints were procurement related. The MACC also found that from 2012 to 2014, the majority of recorded cases were due to political interference within procurement in the construction sector (NACP, 2019). A GAN Integrity report on Malaysia in 2016 (as cited in Jones, 2018, p. 40) states that “the public procurement sector presents businesses with high corruption risks.” The Center to Combat Corruption and Cronyism (C4) (Yap, 2018, p. 37) has outlined several forms of corruption in procurement such as kickbacks (bribery), excess payments, bid rigging, the use of ‘shell companies,’ and the misrepresentation of facts.

One case was the misappropriation of funds for projects intended to be carried out by the Sabah Water Department. The MACC confiscated RM114.5 million of misappropriated funds which were combined with bribes worth 27% to 30% of the value of projects. Contracts were also awarded to cronies and family members (Jones, 2018, p. 41).

Corruption is partly exacerbated by the lack of independence and effectiveness of external oversight mechanisms such as the MACC, as evidenced by their inability to fully launch investigations against high ranking officials without reprisal. For example, the MACC’s chief Abu Kassim was sacked and was unable to hold former defense and prime minister Najib Razak accountable for the Scorpene and IMDB scandals, and the ECRL project (Yap, 2018, p. 38).

Strategy 3 of the NACP

Several initiatives within the NACP Strategy 3 “Increasing the Efficiency and Transparency in Public Procurement” can help address several key problems affecting procurement. For example, initiative 3.1.5 seeks “to introduce legislation on public procurement in regulating the procurement activities, improving efficiency resource utilisation, safeguarding public and national interest as well as protecting the rights of contracting parties.” This initiative should lead to the tabling of a singular, unified Government Procurement Act (GPA) rather than two separate laws governing the procurement regime.

There are also possible gaps and weaknesses in certain initiatives that could hamper the government’s effectiveness in addressing problems in procurement. Though this may be due to lack of detailed information on these specific initiatives. Moreover, there has been literature on public procurement, particularly a recent research paper produced by the Center to Combat Corruption and Cronyism (C4) which lists out a comprehensive set of recommendations to improve procurement. In the remainder of this paper we will consider the most significant potential gaps in the proposed NACP strategy and how these can be addressed, with particular reference to the comprehensive recommendations identified by C4 and with particular attention the role of transparency in tackling corruption in public procurement. Listed below are the two strategic objectives with the full list of 16 initiatives under Strategy 3 relating public procurement;

Table 2: Strategic Objective 3.1 - Strengthening Public Procurement Framework

No.	Initiative	Lead Agency	Milestone/Timeframe
3.1.1	To introduce a comprehensive procurement policy on disclosure of conflict of interest during procurement process	Ministry of Finance (MOF)	Within 1 year (Jan 2019-Dec 2019)
3.1.2	To ensure all client departments and regulators to carry out projects based on the advice and recommendation provided by Technical Department such as the Public Works Department and related technical agency	1. Ministry of Finance (MOF) 2. Prime Minister's Department (PMD) 3. Public Works Department (PWD) 4. Related Technical Agency	Within 1 year (Jan 2019-Dec 2019)
3.1.3	To strengthen the current Integrity Pact to be in line with international standards	1. Ministry of Finance (MOF) 2. Ministry of Economic Affairs (MEA) 3. Malaysian Anti-Corruption Commission (MACC)	Within 2 years (Jan 2019-Dec 2020)
3.1.4	To enhance the Project Monitoring System II in monitoring the project management cycle for better effective and efficient in all government projects	Prime Minister's Department (PMD)	Within 5 years (Jan 2019-Dec 2023)
3.1.5	To introduce legislation on public procurement in regulating the procurement activities, improving efficiency resource utilisation, safeguarding public and national interest as well as protecting the rights of contracting parties	Ministry of Finance (MOF)	Within 5 years (Jan 2019-Dec 2023)
3.1.6	To create accountability and transparency in defining the exercise of power of Minister as stipulated in legal provisions especially in procurement and financial system	1. Ministry of Finance (MOF) 2. Ministry of Economic Affairs (MEA)	Within 5 years (Jan 2019-Dec 2023)

Table 3: Strategic Objective 3.2 - Greater Procurement Transparency, Enabling Better Identification and Mitigation of Corruption Risks, Market Distortion and Anti-Competitive Behaviour

No.	Initiative	Lead Agency	Milestone/ Timeframe
3.2.1	To introduce a more transparent mechanism in preventing information leakages in procurement process	Ministry of Finance (MOF)	Within 1 year (Jan 2019-Dec 2019)
3.2.2	To introduce standard clauses in project procurements' undertakings in order to protect Government' interest in all projects/contracts involving Government, Statutory Bodies, and State-Owned Enterprises (SOEs). In the event of breach of contract(s), the Government can, at any given time, terminate or/and file a civil suit against the party(ies) to the contract	Ministry of Finance (MOF)	Within 1 year (Jan 2019-Dec 2019)
3.2.3	To ensure appointment of rescuing contractors through open tender	Ministry of Finance (MOF)	Within 1 year (Jan 2019-Dec 2019)
3.2.4	To introduce mechanism in curbing leakages in governmental funds (Aid Funds) and grants	Ministry of Finance (MOF)	Within 2 years (Jan 2019-Dec 2020)
3.2.5	To establish procurement complaints mechanism for aggrieved parties	Ministry of Finance (MOF)	Within 2 years (Jan 2019-Dec 2020)
3.2.6	To introduce a checks and balances mechanism in procurement dealings with the involvement of Integrity Unit and Internal Audit Officers	1. Ministry of Finance (MOF) 2. Ministry of Economic Affairs (MEA) 3. Malaysian Anti-Corruption Commission (MACC) 4. National Audit Department (NAD) 5. Malaysian Institute of Integrity	Within 2 years (Jan 2019-Dec 2020)
3.2.7	To amend rules and regulations in monitoring the wrong doings by contractors and project consultants (Consultant Engineer)	1. Ministry of Works 2. Malaysian Anti-Corruption Commission (MACC) 3. Malaysian Institute of Integrity 4. Construction Industry Development Board (CIDB)	Within 2 years (Jan 2019-Dec 2020)
3.2.8	To introduce 'E-Work' system in monitoring project management, project approval(s) and value analysis	1. Ministry of Finance (MOF) 2. Ministry of Works	Within 5 years (Jan 2019-Dec 2023)
3.2.9	To enhance the technology-based procurement system (e-perolehan) in order to reduce human intervention between parties	Ministry of Finance (MOF)	Within 5 years (Jan 2019-Dec 2023)
3.2.10	To monitor jointly with law enforcement agencies and Public Works Department the mismanagement of Government projects in Sabah and Sarawak	Public Works Department (PWD)	Within 5 years (Jan 2019-Dec 2023)

The strategy includes a number of welcome initiatives, including strengthening rules around conflict of interest and integrity. However, the strategy could also be strengthened, to ensure that reforms address the systemic risks of corruption in the procurement system. Specifically, the strategy should be developed to ensure;

- Clear evidence is established for public procurement needs and made available to the public;
- The requirement for the use of open tender is widened and strictly enforced;
- The complaints mechanism is available to the public and has broad authority to investigate; and
- An ecosystem of transparency in government is developed through introduction of a Freedom of Information Act.

Clear evidence base for procurement projects

It is important to ensure that projects – particularly large-scale projects – are conducted on the basis of clear evidence. This is important for ensuring that public projects are undertaken only where there is a clear justification and that taxpayers' money is spent effectively. Corruption can more easily occur where government agencies do not have to be transparent about the reasons a project is being undertaken. This is a crucial part of building public trust in public procurement – in the past major projects have been embarked upon without clear justification which has undermined support from the public and other stakeholders.

Assessments should be undertaken to ascertain the economic, social and environmental impact of a given project. The assessment should be carried out on an independent and transparent basis with reports made available to the public. This level of transparency is essential to building public trust in the procurement process and ensuring the public and other stakeholders have the necessary information to scrutinise project implementation, further reducing the scope for corruption.

Ensuring open tenders are the main method of procurement

Competitive open tenders are generally recognized as guaranteeing the best value for money for government agencies and the public, both in price and in quality of procurement (Jones, 2013, p. 7). While the procurement regime clearly lays out the guidelines for which method of procurement to use depending on the cost and type of procurement, AG reports frequently highlight cases of procurement being conducted through direct purchases and negotiations even when the contract cost would entail the use of open tender. The 2015 and 2016 AG's Activities Reports found that 17 out of 53 procurement programs and projects were conducted via direct negotiation (Jones, 2018, p. 40).

For instance, the 2011 AG Report (as cited in Yap, 2018, p. 12) found that Kuching New Prison Project, which initially started in May 1997 and costed RM165 million, was awarded to WMM Holdings Sdn. Bhd. through direct negotiations. In a more recent example, the 2017 AG Report Series 2 reported that at University Malaysia Perlis (UniMAP), nine contracts worth RM840,000 for building renovation, air conditioner installation and other works at the Faculty of Engineering Technology were split into smaller contracts to circumvent the use of tenders (National Audit Department, 2017, p. 521).

The use of direct negotiations beyond its price threshold may only be justified if there are a low number of qualified suppliers (Jones, 2018). The problem with direct negotiations are its' opaque processes which provides opportunities for actors to bypass objective criteria for assessment and the selection of vendors. This can create opportunities for cronyism, nepotism, bribery and corruption (Yap, 2018, p. 22; Murniati, 2014, p. 4). Direct negotiations bypasses the normal processes and evaluation criteria, this can result in contracts being awarded to unqualified contractors

and suppliers (Jones, 2013). The end-product is the provision of substandard goods, works and services often with late delivery.

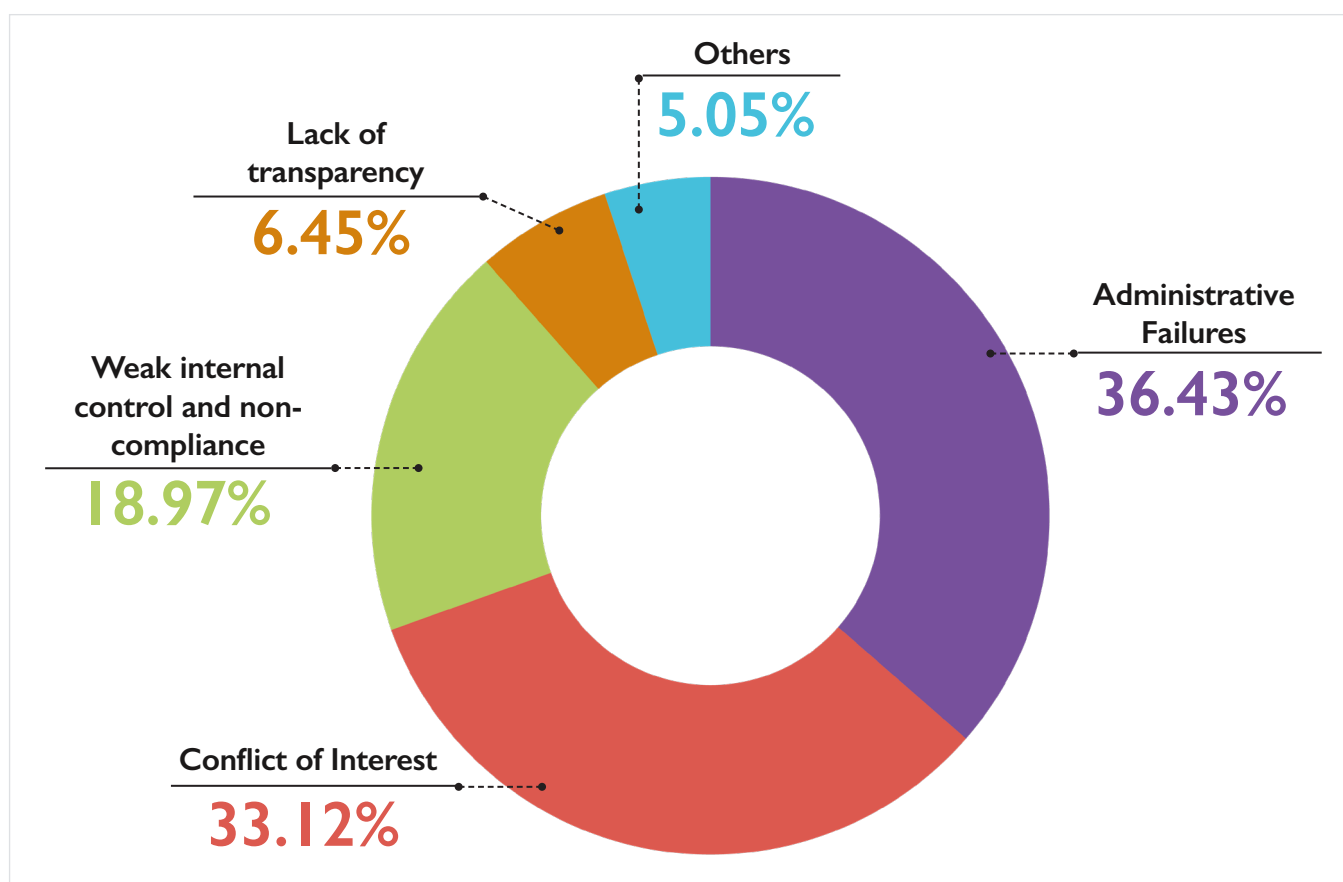
In the case of Kuching New Prison, the project was expected to be completed by August 2000. However, WMM Holdings received a Notice of Termination by July 2002 for failing to complete the project even with an approved extension of time. TSR Bina Sdn. Bhd. was then appointed through open tender as a rescue contractor - assigned to revive abandoned projects by which the total cost of the project had increased by RM56.11 million to RM221.11 million. The project took a total of 11 years and 2 months to be completed (Yap, 2018, p. 12).

Yet, the strategy does not put forth an initiative which prioritizes the use open tenders as the main method of procurement. In fact, the only mention of 'open tender' is in initiative 3.2.3; "to ensure appointment of rescuing contractors through open tender." The use of rescue contractors should be a solution to an occasional problem. Otherwise, open tenders should be treated as the primary method of procurement. The fact that the NACP does not explicitly refer to open tender in this way may be due to the fact that a policy mandating the use of open tender is nominally in place. However, as the evidence above illustrates, this policy is not sufficiently enforced. The strategy should therefore prioritise stricter enforcement of the requirement for open tender. In particular any agency derogating from the requirement for open tender should publish their rationale for doing so.

Moreover, notes the rules of evaluation utilized by tender committees (boards) to select a bidder are quite comprehensive, it is difficult to ascertain the degree to which these rules are followed by procurement officials in selecting the best bidder due to the non-disclosure of results from committees (Yap, 2018, p. 30). The strategy should therefore include the requirement that the decisions of tender committees be published, including justification for the contractor selected, to facilitate public scrutiny and encourage enforcement of the use of open tender.

On another note, C4 (Yap, 2018, p. 23) notes that the current procurement threshold for open tenders is relatively high at RM500,000 for the procurement of goods, works and services. Comparatively, Singapore's threshold for use of quotations is for contracts between SGD\$3,100-\$70,000. The threshold for quotations should therefore be lowered to RM200,000 to promote the use of open tenders.

Figure 1: Content analysis of 20,000 complaints received by the MACC from 2013-2018



Source: MACC; NACP 2019

Establishing an effective complaints mechanism

Bidders, contractors, and the general public have often sought a responsive and independent body to voice their recurring complaints concerning procurement. Thus, the NACP proposes initiative 3.2.5 “to establish procurement complaints mechanism for aggrieved parties.”

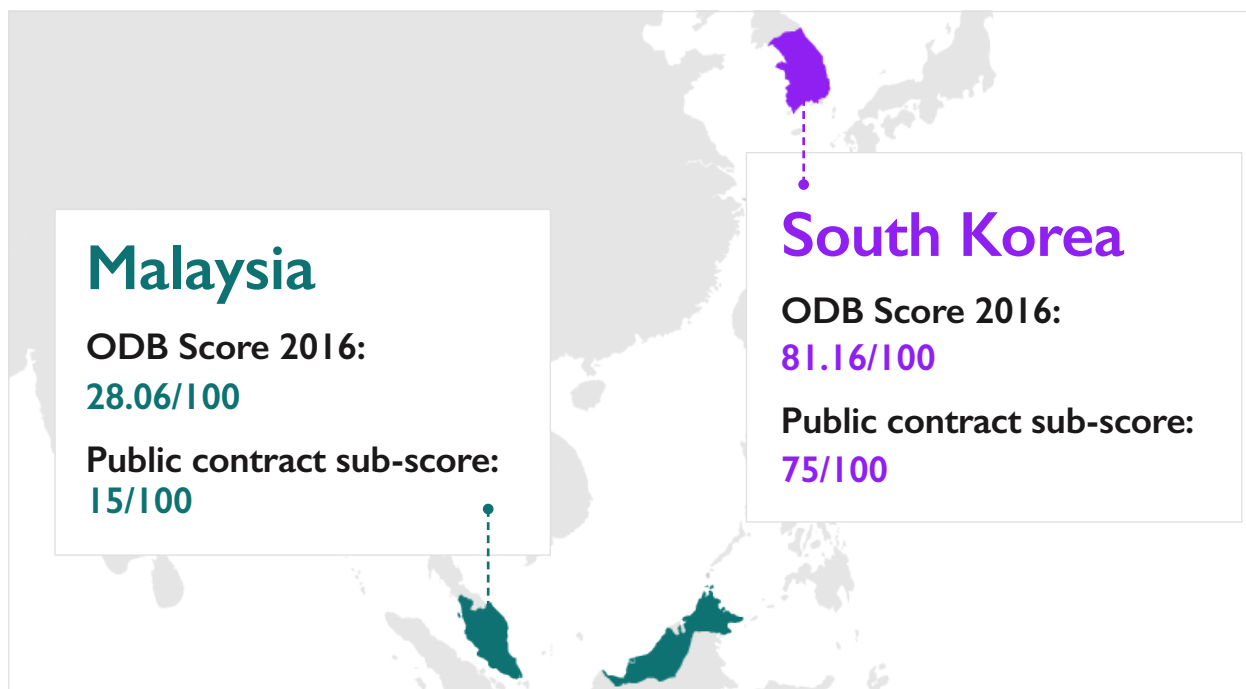
While this is a positive initiative, for a procurement complaints mechanism to be effective and hold officials accountable, it must be fully independent and empowered to act. It should go beyond a simple complaints mechanism and should have the authority to conduct broad investigations, access government information, hold public inquiries, call witnesses and refer cases of criminal activity to law enforcement. In other words, the complaints mechanism should be developed into the more robust Ombudsman concept proposed by C4 (Yap, 2018).

Linked to complaints and investigations, it is necessary to ensure that the new mechanism has the power to issue sanctions that can act as a meaningful deterrent. Sanctions should be strengthened and must apply equally to both high and low-ranking elected officials and bureaucrats (Murniati, 2014, p. 9).

The bigger picture: Nurturing a transparent and accountable ecosystem

Corruption in Malaysia has been exacerbated by the general lack of transparency and open access to government documents. According to the Open Data Barometer (2016), an index which measures how the government publishes open data for accountability, innovation and social impact, Malaysia had a poor overall score of 28.06/100, and scored low open information quality for Public Contracts (15/100).

Figure 2: Malaysia's score in the Open Data Barometer 2016



Sources: Open Data Barometer 2016, 4th Edition

In a drive to increase transparency, the plan introduced initiative 1.2.8 which aims to “introduce new legislation on Freedom of Information (FOI)” within a milestone of five years, led by the Ministry of Communications Multimedia Malaysia. The five-year milestone raises a few concerns. For several other short-term (one and two-year) initiatives in NACP to be effectively implemented, there needs to be open, easily accessible and comprehensive free access to wide range of government data and information.

In the context of procurement, an FOI Act is important tool to improve transparency and would help reduce cases of non-compliance in procurement. For instance, bidders would be able check the contract's full detailed evaluation criteria, and check competing bidders proposals. Moreover, the full disclosure of results from committees would allow bidders to evaluate previous winning proposals through detailed information on past projects. This would help bidders form better, more cohesive and detailed plans that satisfies the contracts requirements. The general public, media, civil society organisations, independent government agencies such as the MACC should be able to easily and freely access information on contracts to monitor and check on procurement activities (Murniati, 2014, p. 5-6).

Furthermore, the FOI would require the amendment of certain restrictive laws such as the controversial Official Secrets Act (OSA) 1972. The OSA has been abused by the previous administration to freely hide and classify any politically sensitive data and information from the public. It was also used to prosecute figures who leaked documents classified as 'official secrets', as was with the case of Rafizi Ramli when he was convicted for leaking the IMDB AG Report. Despite presence of the Witness Protection Act of 2009 and the Whistleblower Act of 2010, the OSA has been a deterrent to whistleblowers and investigative journalists seeking to monitor and expose illicit government activities.

The new government has thus far been ambivalent towards OSA. On one hand, the Buku Harapan states that they would "revise" the OSA. Yet, Prime Minister Mahathir later stated the government would maintain the OSA, though he pledged that they would not abuse the law unlike the previous administration (The Straits Time, 2018, August 28). Nevertheless, the OSA should ultimately be amended prevent the law from being abused in the future and so that it would not contradict with a proposed FOI Law.

Conclusion

Based on these select initiatives, this paper proposed the following recommendations to improve these aspects and initiatives within Strategy 3:



Demonstrate clear evidence for procurement projects:

Government should undertake rigorous assessments of the economic, social and environmental impact of proposed projects and make the findings available to the public.



Ensure that open tenders are the main method of procurement:

In order to get the best value for money in procurement, the use of competitive open tenders should be prioritized unless there is a justifiable reason (e.g. only one qualified supplier) for using direct negotiations or quotations



Lower the threshold for open tenders:

To promote the use of the open tenders, the threshold for the procurement goods, works and services should be lowered to RM200,000.



Provide for the full-disclosure of results from tender committees:

This measure would allow bidders and procurement officials to review and evaluate past winning proposals, the technical specifications past projects, price details and so on.



Ensure the proposed complaints mechanism has the necessary powers:

Regardless of the title, the mechanism should have the power to conduct investigations, access government information and issue meaningful sanctions.



Amend the OSA:

The government should review and amend certain restrictive clauses within the OSA so as not to contradict with the introduction of the FOI law. This would allow whistleblowers, journalists and the public to freely check on procurement activities.



Table a Freedom of Information (FOI) Act as soon as possible:

Several proposed initiatives in the NACP may not be feasible unless information is openly accessible and readily available. Hence, the government should hasten the introduction of a FOI law.

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