

Foreign Aid Procurement Policies of Development Partners in Africa: The Case of Ghana

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Abstract

Major development projects in many African countries are often financed by development partners through development aid procurement. Development partners implement specific procurement policies aimed at promoting development in countries receiving aid. This article examines the policies of development partners applicable to aid funded procurement. It argues that some development partner policies could limit the policy space available to implement prioritized development goals domestically.

Keywords

Public procurement, donors, foreign aid, Africa, Ghana, development aid, development policy, anti-corruption, World Bank, development partners

INTRODUCTION

Major development projects in many African countries are often financed by external development partners through foreign aid, which is also referred to as development aid. Aid is a significant component of government expenditure in African countries and has funded more than 40 per cent of government expenditure over the last two decades.¹ Development aid to Africa supports several development projects, from capital intensive projects such as building infrastructure to low value and basic needs such as educational materials and clean drinking water, which domestic resources are usually inadequate to finance.

For the purpose of this analysis, development aid refers to official development assistance given by foreign governments and governmental agencies (as defined by the Organisation for Economic Cooperation and Development (OECD)) and does not include aid from private organizations.² Development

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1 DA Bräutigam and S Knack “Foreign aid, institutions, and governance in sub-Saharan Africa” (2004) 52 *Economic Development and Cultural Change* 255 at 257. Note that the percentage of expenditure may be higher in certain countries.

2 See: <<http://stats.oecd.org/glossary/detail.asp?ID=6043>> (last accessed 10 July 2017).

aid can take the form of financial or technical assistance, as discussed below. Aid enables the acquisition of goods and services needed for domestic development projects. Public procurement rules are followed in order to secure these goods and services. These include rules on whether or not to buy the goods and services from international or domestic markets. They also involve decisions on how to obtain best value for the aid funds.

The size of public procurement in Africa overall is estimated at between 9 and 13 per cent of GDP;³ in Ghana, public procurement represents about 17 per cent of GDP.⁴ This figure is comparable to that in many other African countries such as Nigeria, Kenya, Malawi and Zambia.⁵ Public procurement rules are essential in disbursing aid funds in a manner that could achieve specific development objectives, while also balancing the different interests of stakeholders involved in the process. The application of procurement rules is also important in achieving specific objectives, since large sums of money are usually involved in aid procurement and development projects are often complex in nature.

Over the last few decades, many African countries including Ghana, Uganda and Kenya have been reforming their procurement systems in order to improve efficiency in the management of general public finances.⁶ These reforms include the adoption of a regulatory framework and policies on capacity building for the procurement function. These are usually accompanied by the establishment of a central supervisory and policy making function to oversee procurement activities. These reforms are usually recommended by development partners who often provide technical and financial support for the implementation of reforms. For example, the procurement legislation of Ghana and of many other African countries, including Ethiopia, Nigeria and Kenya, is based on the 1994 edition of the UN Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services (Model Law), which was recommended and often financed by development partners such as the World Bank.⁷ In Sierra Leone,

3 W Odhiambo and P Kamau "Public procurement: Lessons from Kenya, Tanzania and Uganda" (2003, OECD working paper no 208) at 10.

4 World Bank *Ghana 2007 External Review on Public Financial Management*, vol 2 (2008, public procurement assessment report) at 2.

5 Bräutigam and Knack "Foreign aid, institutions", above at note 1 at 255.

6 B Basheka "Public procurement reforms in Africa: A tool for effective governance of the public sector and poverty reduction" in KV Thai (ed) *International Handbook of Public Procurement* (2009, Taylor & Francis) 132 at 139.

7 S Arrowsmith and G Quinot *Public Procurement Regulation in Africa* (2013, Cambridge University Press), part 1 (Country studies); S Arrowsmith and C Nicholas "The UNCITRAL Model Law on Procurement of Goods, Construction, and Services" in S Arrowsmith and J Tillipman (eds) *Reform of the UNCITRAL Model Law on Public Procurement Regulation for the 21st Century* (2010, West) 1 at 1; S Williams-Elegbe "The World Bank's influence on procurement reform in Africa" (2013) 21/1 *African Journal of International and Comparative Law* 95.

the adoption of procurement legislation in 2004 is reported to be the idea of development partners.⁸

The aim of development partners' procurement policies is usually to promote the general development of economies in developing countries, including in Africa. These objectives are often similar to those of the national objectives in many aid recipient countries in Africa.⁹ Moreover, donors are accountable to their tax-payers and those providing the funds for development. In order to fulfil these accountability requirements, donors expect efficient and transparent procurement procedures for disbursing aid funds. However, donors have a general lack of confidence in the national procurement systems of many African countries. Indeed, several risks, including inadequate capacity, corruption and a lack of accountability, limit the efficiency of national systems through which aid funds could be spent. For example, aid funds may be channelled away from the projects for which they were provided. As a result, donors have become dissatisfied with regulated procurement in many African countries, which has motivated donors to step in and become involved in procurement regulation.

This article examines development partners' regulatory policies applicable to aid procurement in developing African countries, using Ghana as a case study. In practice, aid procurement is often treated differently from other general procurement activities. Development partners' policies on procurement funded in Africa are usually different from those policies in the donor's domestic territory. This is usually the case with bilateral donors. For example, applicable policies under the EU's external aid regime are significantly different in many respects from the procurement rules applicable within the internal EU market.¹⁰ This situation is comparable to the case of other bilateral donors such as the USA. Donors' decisions to finance a particular project in one specific sector instead of another could have significant implications for the nature of development in the domestic system.

The aim of this article is to outline some issues arising from the implementation of procurement policies of development partners in Africa. The issue of how development partners' procurement policies affect development in Africa is important, since many developing African countries rely on development aid to finance major domestic projects, as indicated above. This is also an issue that underpins the fundamental purpose of development aid, which is to eliminate poverty and promote general development in recipient countries.

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- 8 L Hayes *Old Habits Die Hard: Aid and Accountability in Sierra Leone* (2008, Eurodad) at 22.
- 9 S Arrowsmith "National and international perspectives on the regulation of public procurement: Harmony or conflict" in S Arrowsmith and A Davies (eds) *Public Procurement: Global Revolution* (1998, Kluwer Law International) 3.
- 10 F Borson "EU procurement policy under development aid financing" (2016) 11/3 *European Procurement & Public Private Partnership Law Review* 220. For an analysis of the key differences between the procurement rules applicable within the internal EU market and those applicable to EU external aid, see P Trepte *Public Procurement in the EU: A Practitioner's Guide* (2007, Oxford University Press), chap 10.

A number of international and regional initiatives, including the Development Assistance Committee (DAC) under the OECD, have focused on the effectiveness of development aid policies generally.¹¹ This article begins by outlining the context of the domestic procurement system in many African countries, particularly those undergoing reform. It then discusses the policies of development partners aimed specifically at loan funded procurement, before analysing development partners' other general policies. The article highlights some potential problems arising from the application of donors' policies, before concluding with some comments.

DOMESTIC CONTEXT OF PROCUREMENT

The nature of the procurement environment within a specific geographical location is an important factor in the achievement of procurement policy objectives.¹² For example, factors such as technological facilities and levels of integrity, as well as ethical values, could impact the effectiveness of procurement policies. As indicated above, over the last few decades, many African countries have been undertaking major reforms in their procurement systems. These reforms have been driven largely by donors, although domestic demands for reforming inherent inefficiencies in the procurement system have also contributed.¹³ As part of the reform process, procurement in many African countries, including Ghana, Kenya and Uganda, is regulated by policy formulation and supervised by a central oversight function.¹⁴ The actual implementation or conduct of procurement is carried out in line with a decentralized system of administration. This means that purchasing is carried out at a local level by the officers who need the goods, works and services, without reference to anyone else within the procuring authority. It will be seen that this approach has placed significant procurement responsibility with capacity challenges on public entities, many of which were not prepared for this role. Some of the key features in the domestic context of procurement in many reforming African countries are summarized below.

First, a significant component of the reform process and a key feature of procurement reform in many African countries is the development of new legislation on procurement or amendments to existing legislation to provide a coherent regulatory framework. In many cases, this legislation is based on internationally recognized best practice such as the Model Law. Donors sometimes recommend the adoption of the Model Law to partner countries and often provide both technical and financial support for the development of

11 E Nwogwugwu "Towards the harmonisation of international procurement policies and practices" (2005) 3 *Public Procurement Law Review* 131.

12 S Arrowsmith and D Wallace *Regulating Public Procurement: National and International Perspectives* (2000, Kluwer Law International) at 18.

13 Bashheka "Public procurement reforms", above at note 6 at 143.

14 Arrowsmith and Quinot *Public Procurement Regulation*, above at note 7, part 1 (Country studies).

the necessary legislation, as indicated above. The legislation is usually legally binding and enforceable, as is the case in countries such as Ghana, Nigeria, Kenya and Uganda.¹⁵ The procurement legislation in these countries requires competitive bidding as the preferred bidding method and also provides a remedies system for addressing any violation of the rules.¹⁶ This legislation prohibits discrimination, requiring participants in the procurement process to be treated equally and fairly, and also introduced transparency requirements into the procurement process.¹⁷

Indeed, an assessment of the regulatory framework in many procurement reforming African countries shows significant improvements in the regulatory framework, which is an important step in the reform process.¹⁸ However, there seems to be a general lack of adequate institutional structures to facilitate implementation of the regulatory framework.¹⁹ This could be explained, to some extent, by the limited domestic resources available for implementing the institutional structures. Although donors' policies do not exclude institutional reforms, domestic institutional changes have received little attention compared with the legal and legislative reforms required. Indeed, institutional reforms are usually costly to implement and probably provide little result-based evidence for the purposes of donors' accountability requirements. Institutional reforms may involve changes in attitudes and behaviours, which are difficult to impose and take time to show any meaningful improvement. Donors appear to have emphasized legal and regulatory reforms within aid recipient countries. For example, procurement legislation adopted by reforming countries in Africa, such as Liberia, Nigeria, Tanzania and Zambia, usually consists of statutory instruments that are legally binding and enforceable by law, as indicated above.²⁰

Moreover, donors may not recognize sanctions for corruption or other violations of the procurement procedure issued by national authorities, except in the case of judicial decisions of a court of competent jurisdiction (as distinct

15 Ibid.

16 E Caborn and S Arrowsmith "Procurement methods in the public procurement systems of Africa" in Arrowsmith and Quinot (eds) *Public Procurement Regulation*, above at note 7, 261; G Quinot "A comparative perspective on supplier remedies in African public procurement systems" in Arrowsmith and Quinot, id, 308.

17 Ibid.

18 CL de Mariz, C Ménard and B Abeillé *Public Procurement Reforms in Africa: Challenges in Institutions and Governance* (2014, Oxford University Press), chap 6; S Williams-Elegbe "Beyond UNCITRAL: The challenges of procurement reform implementation in Africa" (2014) 1 *Stellenbosch Law Review* 1.

19 Ibid. A Doig, D Watt and R Williams "Why do developing country anti-corruption commissions fail to deal with corruption? Understanding the three dilemmas of organisational development, performance expectation, and donor and government cycles" (2007) 27 *Public Administration and Development* 251.

20 Liberia, Public Procurement and Concessions Act (2005), sec 1(5); Nigeria, The Public Procurement Act (2007), sec 15(2); Tanzania, The Public Procurement Act (2011), sec 2 (2); Zambia, The Public Procurement Act (2008), sec 3(2).

from sanctions issued by administrative authorities).²¹ This implies that sanctions such as debarment, which are usually issued by administrative institutions in many African countries including Ghana, may not be recognized in donor funded procurement. This could undermine state sovereignty and the authority of national institutions to regulate public procurement effectively.

The 1994 edition of the Model Law provides the basis on which much national legislation in Africa was modelled. However, the Model Law is silent on the kind and nature of institutional structures that enacting states can adopt, since it envisages that enacting states will have the necessary institutional structures already in place to enable implementation of provisions under the Model Law.²² On the contrary, states enacting the Model Law, particularly in Africa, do not have the appropriate institutional structures in place before adopting the Model Law and, although institutional reforms are usually part of the legislative reform agenda, little attention is often given to the effective implementation of the required institutional structures. Although the Model Law provides extensive guidance on how it could be adapted to suit domestic contexts, developing countries such as those in Africa could benefit from additional support in addressing some specific issues, including institutional mechanisms that are peculiar to the continent. Indeed, procurement reform is not a one-off event but rather a process that takes time and resources. One could argue that regulatory reforms are a necessary first step in the reform process. Perhaps a second phase of reforms may be required, which could focus on institutional changes.

Secondly, many procurement systems in Africa are increasingly giving attention to issues of corruption. This could be explained by the greater awareness of the problems of corruption in procurement, driven mainly by development partners, particularly the World Bank.²³ Implementation of procurement reforms in Africa includes anti-corruption mechanisms that usually require clear rule-based regulation that is enforceable by several remedies, including fines, debarment of corrupt bidders, dismissal of government officials for procurement misconduct and criminal prosecution for corrupt misconduct.²⁴ These remedies may not necessarily confer benefits on aggrieved parties, but they constitute an important means of reinforcing the rule of law. On the one hand, development partners implement usually fragmented policies on preventing corruption in aid-funded procurement, as explained below.

21 Borson "EU procurement policy", above at note 10; id "The nature of multiple procurement rules and the policy issues arising from multiplicity of rules: A case study of Ghana" (unpublished MPhil thesis, 2016, University of Nottingham).

22 UNCITRAL "Guide to enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services" (1994) part I, section K.

23 World Bank "Strengthening governance: Tackling corruption, The World Bank Group's updated strategy and implementation plan" (March 2012).

24 S Williams-Elegbe "A perspective on corruption and public procurement in Africa" in Arrowsmith and Quinot (eds) *Public Procurement Regulation*, above at note 7, 348.

On the other hand, development partners also implement other policies aimed at supporting domestic efforts to combat corruption within both national and regional territories of partner countries. One example is the technical and financial support to the Ghana Anti-Corruption Coalition (GACC), as explained further below.

Nonetheless, corruption in public procurement remains a systemic problem in many African countries. Although it may not be practically possible to eradicate corruption completely, it is possible to reduce corruption to a level that causes minimal damage to the economy. The risk of corruption is still high in many African systems, despite the anti-corruption mechanisms already in place and concerted efforts to combat corruption. Institutional weaknesses, skewed incentive structures, poor ethical standards and inadequate law enforcement are among the likely causes of corruption in many African countries. It has been generally recognized that the nature of corruption in procurement manifests itself in different forms and a single anti-corruption approach is unlikely to resolve the problem.²⁵

Thirdly, many African countries lack the necessary capacity to implement the required development projects.²⁶ The decentralized system of administration in many African systems has resulted in the diffusion of the procurement function. Skilled procurement personnel are often scarce and the institutional capacity needed to manage the procurement function is often lacking. However, many procurement reforming African countries are adopting capacity development policies as part of the reform process.²⁷ These policies include the adoption of a national capacity building strategy and the establishment of a capacity development function where a dedicated body has responsibility for coordinating activities related to developing capacity in the system. Development partners often provide capacity building in the form of technical assistance and training, which usually forms part of their funded projects. However, capacity building initiatives by development partners, particularly those involving technical assistance, are often unsustainable and appear to undermine domestic institutional capacity. They also reduce the motivation of local authorities to take control of their own development. Moreover, development partners' capacity building policies are often fragmented and lack coherence with national capacity development strategies.²⁸

25 Ibid.

26 P Trepte "Procurement regulation and emerging economies: The examples of Laos and Bhutan" in S Arrowsmith and A Davies (eds) *Public Procurement: Global Revolution* (1998, Kluwer Law International) chap 6 at 111; World Bank "An independent review of World Bank support to capacity building in Africa: The case of Ghana" (2005); WA Wittig and H Jeng *Challenges in Public Procurement: Comparative Views of Public Procurement Reform in Gambia* (2005, PrAcademics Press) at 24.

27 Ibid. P Trepte "Building sustainable capacity in public procurement" in S Arrowsmith and R Anderson (eds) *The WTO Regime on Government Procurement: Challenge and Reform* (2011, Cambridge University Press) 377.

28 OECD-DAC "The Mali donor's public procurement procedures: Towards harmonisation

Indeed, sustainable capacity development in African countries may require that capacity building policies be aligned and driven by national strategies.

DEVELOPMENT PARTNERS AND PROCUREMENT

As indicated above, development partners usually finance major development projects and public procurement is used in acquiring the goods and services needed for development projects. Development aid to Africa comes from multilateral development banks such as the World Bank and the African Development Bank, as well as bilateral development partners such as the USA and EU member states including Germany, the UK, the Netherlands and Denmark. Over the past ten years for example, African states, particularly those to the south of the Sahara, were the most significant recipients of EU development aid, estimated at about 10.7 billion US dollars in 2015.²⁹ EU development aid comes from two sources: that granted by the EU institution through contributions from member states; and that granted directly by member states through bilateral relations. The latter is often subject to different sets of rules and procedures, set by the member state concerned. In addition to aid financing activities, there are other external regimes, such as trade regimes including UNCITRAL, that do not provide aid funds but provide other assistance to promote development in national economies, as discussed below.

Donors finance development projects in different ways, utilising different modalities to transfer aid funds to the domestic economy. The diversity in aid modalities allows donors to implement specific policies to address strategic or commercial concerns, as discussed below. Donors usually provide aid in one of two main ways. First, there is the budget support approach, where aid is channelled directly through the domestic government's budget.³⁰ This approach usually relies on domestic resource allocation and accounting systems, including domestic public procurement rules for the acquisition of the required goods and services. Donors usually attach conditions to the grant of aid through budget support, including requirements for reform of domestic policies such as poverty reduction, good governance and fiscal adjustments.³¹ Nevertheless, the budget support approach ensures alignment with national plans and systems. It is country led and also supports the

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with the national law" (2000, OECD Publishing), report summary at 2; S Knack and A Rahman "Donor fragmentation" in W Easterly (ed) *Reinventing Foreign Aid* (2008, The MIT Press) 334; A Doig et al *Measuring "Success" in Five African Anti-Corruption Commissions: The Cases of Ghana, Malawi, Tanzania, Uganda & Zambia* (2005, U4 Reports) at 60.

29 See "EU aid explorer 2015", available at: <<https://euaidexplorer.ec.europa.eu/AidOverview.do>> (last accessed 15 July 2017).

30 S Koeberle, Z Stavreski and J Walliser (ed) *Budget Support as More Effective Aid? Recent Experiences and Emerging Lessons* (2006, World Bank Publications).

31 Ibid.

national development strategy.³² As a result, it does not necessarily create duplication of procedures in the system, as discussed below. Despite these benefits, budget support usually accounts for a small proportion of total aid disbursements in many African countries.³³ For example, the proportion of budget support is estimated at 30 per cent of the annual disbursement in Ghana.³⁴

Secondly, there is the project aid approach, which finances specific development projects with limited budget, timeframe and objectives.³⁵ This process is usually supervised by donors and the approach is based on specific areas of intervention identified by donors with defined project results.³⁶ Similar to the budget support approach, project aid comes with a number of conditions, including the requirement to apply procurement rules imposed by donors, as discussed below. This approach raises many policy issues regarding the effectiveness of development aid. Indeed, many donors, such as the World Bank, EU external aid and the US aid regime, usually adopt this financing approach with requirements to apply procurement procedures set by the donor.³⁷ This means that a significant proportion of aid to Africa is financed through the project aid approach, estimated at 46 per cent in Ghana in 2010.³⁸ This implies that any small improvement in the project aid approach could have a significant impact on the effectiveness of development aid.

The implementation of aid delivery is guided by policies and procedures aimed at ensuring the achievement of development goals. Indeed, development partners and aid recipient countries usually have a shared goal of promoting development in the domestic economy. However, the nature of interaction between the policies of development partners and those of domestic countries could have significant implications for development in the domestic system. Development partners' procurement policies can be classified into two major types. First, there are policies directed specifically at loan funded procurement. Secondly, there are other general policies targeted at reforming procurement systems in developing countries. This article now discusses these two types of policy procedures.

32 Ibid.

33 Ibid. S Jain "Project assistance versus budget support: An incentive-theoretic analysis of aid conditionality" (2007) 143/4 *Review of World Economics* 694.

34 "Ghana, national anti-corruption action plan 2012–2021" (2011) at 49.

35 Jain "Project assistance", above at note 33.

36 Ibid.

37 F Borson "Implications of multiple procurement regimes: A case study of Ghana and the specific issue of correction of errors in tenders" (6th public procurement research students conference, University of Nottingham, 29 April 2014) at 28, available at: <<http://www.nottingham.ac.uk/pprg/documentsarchive/phdconference2014/borson.pdf>> (last accessed 10 July 2017).

38 This information was extracted from the OECD interactive statistics page, available at: <<http://stats.oecd.org>> (last accessed 10 July 2017).

Loan funded procurement

As indicated earlier, development partners provide funds that are usually in the form of loans and grants for the procurement of major development projects. Donors have a fiduciary duty to ensure their funds are used for the intended purposes. This fiduciary duty has often led donors to engage in the regulation of the procurement process.

Donors usually require the application of specific procurement procedures in order to guarantee the proper use of their funds. Loan funded procurement refers to the application of procurement rules and systems set by donors in the acquisition of goods, works and services needed for the implementation of development projects.

For the purposes of procurement funded by donors, several rules other than domestic procurement rules are usually applicable, as specified by donors. When donors provide funds for development, they usually specify certain conditions to be fulfilled by the domestic regime. In most cases, donors require the use of procurement rules and systems that are developed and set by the donor for the implementation of its financed projects. Recipient countries are required to apply these rules whenever the donor provides funds for development projects. One example is the World Bank guidelines and standard bidding documents, developed and used extensively for projects funded by the bank.³⁹

Other donors, including EU External Actions⁴⁰ and the different US aid agencies such as USAID,⁴¹ have also developed individual sets of procurement rules that are usually applicable when they provide funds for procurement. Some donors simply adopt the procurement rules of other donors and introduce certain modifications in order to reflect their own objectives. For example, the African Development Bank and Millennium Challenge Corporation adopted the World Bank procurement guidelines with some modifications.⁴²

39 Further information on the World Bank's procurement guidelines is available at: <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,contentMDK:50002392~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>> (last accessed 10 July 2017).

40 Further information on the EU External Actions procurement guidelines is available on-line. See European Commission International Cooperation and Development "Procedures and practical guide" at: <https://ec.europa.eu/europeaid/funding/about-funding-and-procedures/procedures-and-practical-guide-prag_en> (last accessed 10 July 2017).

41 Further information is available on-line. See USAID "Operational policy" at: <<http://www.usaid.gov/who-we-are/agency-policy>> (last accessed 10 July 2017).

42 Millennium Challenge Corporation "MCC program procurement guidelines", available at: <<https://www.mcc.gov/resources/doc/program-procurement-guidelines>> (last accessed 10 July 2017); African Development Bank's procurement policies and procedures are available at: <<http://www.afdb.org/en/projects-and-operations/procurement/resources-for-borrowers/policies-procedures/>> (last accessed 10 July 2017).

Application of the separate sets of procurement rules developed by donors is by definition external to the procurement legislation usually applicable in the domestic system. The application of national procurement legislation in addition to the external procurement rules as set by the many donors (each donor having its own set of procurement rules and procedures) has led to the proliferation of procurement rules in aid recipient countries. This means that several different procurement rules may be applicable to similar or different projects. In some cases, the same donor has different procurement rules for the different types of project it implements. Also, procurement rules applicable to external EU aid vary depending on several factors, including the source of funds, the year in which financing is provided or the programming cycle, and whether project implementation is carried out through a centralized or partially decentralized financial management approach.⁴³ This implies that, where several donors finance different projects at the same time, this results in the parallel application of several procurement rules under the responsibility of a single or several procurement officials.

The requirement to apply procurement rules set by donors is mandatory and is usually incorporated into the funding agreement as the contract between the donor and the aid recipient. This imposes an obligation on the recipient country to apply procurement rules set by the donor. This means that officials conducting procurement must set aside domestic procurement rules and instead apply those rules set by the donor whenever the donor provides funds for procurement. This requirement is enforced by the authority of donors to cancel procurement funds if the domestic regime does not comply with the donor's rules. In such cases the aid recipient country will simply lose the aid funds if it does not accept and follow the rules set by the donor.

The obligation to apply procurement rules set by donors is reinforced by the introduction of specific exemption clauses into the procurement legislation of many aid recipient countries. In Ghana for example, the domestic procurement legislation provides that "this Act applies to procurement with funds or loans taken or guaranteed by the State and foreign aid funds except where the applicable loan agreement, guarantee contract or foreign agreement provides the procedure for the use of the funds".⁴⁴ The legislation further states that "notwithstanding the extent of the application of this Act to procurement, procurement with international obligations arising from any grant or concessionary loan to the government shall be in accordance with the terms of the grant or loan".⁴⁵ These provisions are stated with similar wording in the procurement legislation of many other African countries, including The Gambia, Tanzania and Uganda.⁴⁶ The provisions effectively exclude the application of domestic procurement legislation to donor funded

43 European Commission "Procedures and practical guide", above at note 40.

44 Ghana, Public Procurement (Amendment) Act (2016), art 14(1)(d).

45 *Id.*, art 96.

46 The Gambia, Public Procurement Authority Act (2014), sec 20(4); Tanzania, Public

procurement and allow donors to determine the rules to be applied to their funded procurement. As indicated earlier, donors usually require the application of procurement rules developed and set by them, which are usually incorporated into the loan agreement. In other words, the obligation to apply procurement rules set by donors is not unilaterally imposed by donors. National procurement legislation has specific provisions that allow the application of donors' procurement rules for their funded projects.

The use of specific exemption clauses in national procurement legislation allowing the application of procurement rules set by donors is also the case in many other African countries, particularly those undergoing procurement reforms, usually with assistance and perhaps some influence from development partners.⁴⁷ For example, the procurement rules of Liberia and Tanzania also have specific exemption clauses that exclude application of the national procurement legislation to donor-funded procurement and allow donors to determine the applicable rules in such cases.⁴⁸ The 1994 edition of the Model Law on which much of this national legislation is modelled, as well as the subsequent updated 2011 edition, suggest the use of exemption clauses to exclude the application of domestic procurement legislation to international agreements such as those entered into between a state and an international financial institution.⁴⁹ As a result, procurement rules set by donors may take precedence over national procurement rules in donor funded projects and the requirement to apply donor rules is reinforced by the provisions of domestic legislation. These exemption clauses provide legitimacy for the parallel application of multiple rules set by donors in addition to existing procurement rules under the domestic system.

In some cases, the aid recipient country has responsibility for conducting and administering the process of procurement funded by donors. This arrangement is often agreed upon and included in the loan agreement signed by both parties. This implies that domestic civil servants are responsible for the procurement duties under the different procurement rules, including the publication of contract opportunities, evaluation of bids and award of contracts. As for donors, their duty is mainly supervisory and their liability is often limited to responsibilities provided in the loan agreement, which does not extend to the contract agreement with the selected bidder. This means that donors generally may not be held liable for breaches arising from the procurement process, even though domestic officials may have acted on the

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Procurement (Amendment) Act (2016), sec 4; Uganda, Public Procurement and Disposal of Public Assets (Amendment) Act (2014), sec 3.

47 A La Chimia "Donors' influence on developing countries' procurement systems, rules and markets: A critical analysis" in Arrowsmith and Quinot (eds) *Public Procurement Regulation*, above at note 7, 219 at 250.

48 Liberia, Public Procurement and Concessions Act (2005), sec 3(a); Tanzania, The Public Procurement Act (2016), sec 4.

49 2011 Model Law, art 3.

advice of donors. For example, suppliers cannot generally bring complaints against donors regarding breaches of the donor's procurement rules, since there is no contractual relationship between suppliers and donors.

There are several reasons for the application of different donors' procurement rules in addition to existing rules under the domestic regime. First, they are primarily intended to ensure that donor funds are used exclusively for the purposes for which the funds were provided. In other words, they ensure that funds are not diverted for personal gain or for other projects not intended by the donor.

Secondly, one could also argue that there is the need to minimize the usually high risk of using national systems for funded development projects that are usually complex in nature. National systems, such as public finance management and institutional capabilities, are usually unreliable and operate under less than optimal conditions. National systems may not guarantee adequate monitoring and accountability regarding the use of funds, as required by donors in order to provide the required level of accountability to their lenders and tax payers.

Thirdly, the application of donors' procurement rules also allows donors to achieve specific policy objectives, such as promoting international trade through open markets and transparency. A major policy driver, particularly under the World Bank, is the need to eliminate corruption in procurement. Many developing African countries such as Ghana and Nigeria often experience high levels of corruption, which presents unprecedented risks to donor funding activities. Domestic rules may not have adequate mechanisms (at least, not to the satisfaction of donors) to detect and prevent corrupt practices.

Furthermore, the application of rules set by donors may encourage procurement reform policies in recipient countries. Requirements to apply donors' rules, including requirements on open competitive bidding, could mean that, over time, national systems may become familiar with those rules and consider some of the procedures useful for adoption into national legislation. For example, Ghana has a separate set of rules and procedures for selecting consultants, which is largely based on World Bank procedures for engaging consultants. This is the case in many other African countries where there is a separate set of rules for the procurement of consultant services, which closely model the position under the World Bank rules.⁵⁰ The application of a separate set of rules for engaging consultants under World Bank funded procurement could be justified by historical reasons regarding the importance of consultants in World Bank funded projects. However, there is no clear justification for the approach under national systems, apart from their close interaction with the World Bank rules.

50 S Arrowsmith and E Carborn "Procurement methods in the public procurement systems of Africa" in Arrowsmith and Quinot (eds) *Public Procurement Regulation*, above at note 7, 292.

Other general policies aimed at procurement reform

Apart from policies directed specifically at loan funded procurement as discussed above, development partners also implement other general policies aimed at steering procurement reform in developing countries. In many African countries, such as Ghana, such reform programmes are usually drawn up as part of an overall public sector reform initiative.⁵¹ Development partners will often identify weaknesses in national procurement systems and adopt specific policies to encourage reform. For instance, the lack of procurement capacity and skilled personnel in Ghana and Liberia has led the World Bank and Millennium Challenge Corporation regimes to adopt specific policies on professionalizing the procurement function, including providing assistance for the development of procurement course content and modules to be taught across schools in those countries.⁵²

Policies aimed at promoting procurement reform may include information sharing or the transfer of technical skills to assist domestic procurement authorities in implementing reforms. This form of assistance is essentially non-financial and does not necessarily involve the development partner giving monetary funds. However, some financial commitments are usually made by development partners towards the implementation of reform policies. For example, development partners may pay for consultants to undertake law reforms. This is the case in Ghana, where the World Bank paid consultants who assisted in drafting Ghana's procurement legislation. Development partners may also pay for training sessions organized for local procurement officers to ensure that officers are well equipped to implement the law reforms.

Policies of development partners who are not necessarily donors, such as trade regimes, could also encourage reforms in domestic systems. For example, policies of good procurement regimes, such as UNCITRAL and the Government Procurement Agreement regimes, that have gained international recognition could also generate reforms in the procurement systems of developing countries. Regimes such as UNCITRAL are not funding organizations and do not provide financial assistance to encourage reforms in national systems. However, they may have gained international recognition as offering a generally good and well formulated procurement model that is widely accepted and can provide an exceptional example for countries to follow.

PROBLEMS ARISING FROM DEVELOPMENT PARTNERS' POLICIES

As indicated above, development partners' policies are usually aimed at promoting the general development of aid recipient countries. However, the

51 World Bank *Ghana: 2007 External Review of Public Financial Management* (2008, Public Procurement Assessment Report).

52 See Millennium Challenge Corporation "MCC, World Bank, MiDA sign memorandum to strengthen procurement practices" (30 May 2013), available at: <<https://www.mcc.gov/news-and-events/release/pressrelease-0530-13mcc-world-bank-mida>> (last accessed 10 July 2017).

manner of application of these policies could result in significant and often unintended implications for domestic systems.

A system of multiple rules

Development partners' policies often result in a system with multiple rules: those usually applicable under the domestic system, as well as the several sets of rules set by donors.⁵³ As indicated above, the requirement to apply procurement rules and procedures that are not usually applicable under national systems has resulted in the proliferation of procurement rules. Multiple sets of rules and procedures are applicable to different stages of the procurement process. Even within the same project, different rules may be applied to different contracts, particularly under co-financing arrangements. These multiple rules may be similar in content but use different terminology to refer to the same things.⁵⁴

For example, the funding activities of the EU institution as a donor in its own right are independent from those of its several member states and their funding procedures are largely uncoordinated.⁵⁵ The policies of the EU institution as a donor as well as those of its member states clearly duplicate the applicable procurement procedures in many African countries and add to the system of multiple rules. Indeed, considering the role of the EU institution as an additional donor in its own right, rather than a body that coordinates the funding activities of its member states in Africa, can be controversial. One could argue that the current approach may benefit national systems, as the EU brings an additional source of funding and may represent other EU member states that do not have bilateral relations with some African countries. However, the potential adverse effects of a multiple rules system may outweigh these benefits.⁵⁶ Perhaps the situation reflects the realities of the nature of the EU institution and its member states as different actors and the practical challenges the EU may face in addressing the issue of multiplicity.

Multiplicity of procedures is a major issue in many aid recipient countries. In Uganda for example, there were 58 donors by 2008⁵⁷ and in Ghana there are no fewer than 32 active donors, each with its own set of procurement rules

53 La Chimia "Donor's influence", above at note 47. Also, many other themes discussed in Arrowsmith and Quinot's book *Public Procurement Regulation*, above at note 7, including the introductory chapter and study on specific countries, highlight the existence of multiple regimes in Africa. OECD-DAC "The Mali donor's public procurement", above at note 28.

54 Borson "Implications of multiple procurement regimes", above at note 37.

55 Ibid. A La Chimia *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law* (2013, Hart Publishing) at 182.

56 Ibid.

57 B Ellmers *Tapping the Potential? Procurement, Tied Aid and the Use of Country Systems in Uganda* (2010, Eurodad) at 5.

that apply when they provide funds for development.⁵⁸ This situation is comparable to the case in many other African countries, where the same donors usually also provide funds for development. The multiple rules system forces some interaction between the different sets of rules, which could have potential policy implications. Multiplicity could create gaps and overlaps in the system that could be exploited. As discussed above, several reasons (including unreliable national systems and the need for specific policy results) may lie behind the application of donors' rules in addition to those usually applicable under the domestic system.

However, the argument for using donors' rules becomes controversial, especially in some procurement reforming African countries such as Ghana, Nigeria and Kenya. The domestic procurement systems of these countries are undergoing major reform with assistance from donors. These reforms are usually based on recognized international standards and best practices, such as those provided under the Model Law and as recommended by donors. Despite major domestic reforms, individual donors still require their own rules to be applied. As a result, donors' procurement rules operate as additional rules to the reformed domestic rules on procurement and create a multiplicity of procedures.

Capacity building in a complex system

The implementation of development policies in multiple systems creates perhaps unnecessary complexities, which could have implications for domestic capacity building efforts. As indicated above, inadequate procurement capacity is a major problem in many African systems and, in recognition of this, efforts to develop local capacity are usually part of reform programmes. However, the multiplicity of procedures may impose administrative burdens on local authorities that are required to understand and apply different procedures to similar contracts and prepare similar reports, perhaps in different formats for different donors.⁵⁹ This task could drain the already low resource and administrative capacity in national systems and also render the procurement profession unattractive as a career. As a result, domestic capacity building efforts may yield minimal benefit.

Moreover, development partners' policies also have the potential to increase the demands on a country's capacity to manage aid, including the coordination of multi-donor support programmes. The number of donors operating in a specific country is increasing, leading to ever increasing fragmentation in development aid policies generally. For example, many donors, including the EU and the World Bank, usually implement policies aimed at supporting national efforts on combating corruption. However, policies are often

58 This information was extracted from the interactive infographics page of "EU aid explorer", available at: <<https://euaidexplorer.ec.europa.eu/DevelopmentAtlas.do>> (last accessed 10 July 2017).

59 Knack and Rahman "Donor fragmentation", above at note 28.

implemented separately by the individual donor rather than through a coordinated anti-corruption policy. For example, GACC is a coalition of both public and private sector anti-corruption institutions that receives technical and financial support from different donors at different stages of its existence.⁶⁰ However, there is no single anti-corruption strategy or single focal point for the delivery of an anti-corruption strategy.⁶¹ Rather, there are fragmented anti-corruption strategies, developed with assistance from individual donors. The mere existence of several donors, each implementing separate development policies, could create unnecessary complexities in the system, which makes coordinating donor support difficult for both the domestic system and any lead donor. The level of consultation necessary for a meaningful dialogue between the several donors involved could make coherent policy reform a significant challenge.

Allocation of responsibility for procurement

There are no standard practices or consistency in arrangements between development partners and aid recipient countries on the allocation of responsibility for the procurement function. The determination of who conducts the procurement process or who monitors the process often varies from one donor to another and, even within the same donor, the choice could vary from one project to another. The level of engagement with domestic authorities in the procurement decision making process and the nature of responsibilities assigned to domestic authorities in the conduct of procurement could have implications not only for the skills development and capacity building policies in domestic systems but also for the nature and level of development outcomes.

In some cases, responsibility for the conduct of procurement may be allocated to domestic authorities, as is the case with the World Bank and African Development Bank. In other cases, parties other than domestic authorities may be responsible for the conduct of procurement. For example, donors may choose to conduct the procurement themselves on behalf of recipient countries, as is the case under the EU regime.⁶² Donors may also choose to transfer responsibility to other third parties, such as private procurement agencies and non-governmental organizations, as is the case under the US regime.⁶³ In some cases, a system of partial devolution is also used, where only specific duties at specific stages of the procurement process are carried

60 Doig et al *Measuring "Success"*, above at note 28 at 60.

61 Ibid.

62 EU External Actions "Practical guide", above at note 40, sec 2.2.

63 C Dunning "Is local spending better? The controversy over USAID procurement reform" (November 2013, Center for American Progress), available at: <<http://www.americanprogress.org/wp-content/uploads/2013/11/ProcurementReform.pdf>> (last accessed 10 July 2017). Information obtained by the author from a procurement officer in Ghana who wishes to remain anonymous confirms this position.

out by domestic authorities. These arrangements allow donors to retain significant responsibility regarding the conduct of procurement, as is the case under the EU regime. Some other donors do not involve domestic authorities in the conduct of procurement. For example, procurement funded by China is usually conducted in the donor country and does not involve domestic authorities. Recipients of Chinese aid may often be presented with the service outcomes without taking part in the procurement process. There is often limited information on the rules and procedures regarding procurement funded by China in Ghana.

Even where domestic authorities have responsibility for the conduct of procurement, there are no standard arrangements for whether the same or different procurement officials are responsible for conducting both donor-funded procurement and that funded from domestic resources. In most cases, the same procurement official may be responsible for conducting procurement funded from domestic resources in addition to that funded by donors. In such cases, the issue of inadequate capacity development becomes more pronounced. Donors usually provide operational assistance where domestic procurement officials can seek advice from donors when undertaking the procurement exercise. These situations could create significant complexities in the system, which could work against any domestic policies on simplifying procedures.

Donors often act as supervisors of the procurement process, which offers them significant monitoring control over the process. Although donors generally rely on their internal mechanisms to monitor the procurement process, the situation varies from one donor to another and from project to project. There are no standard rules on the allocation of the monitoring function. There seems to be little formal means for the community to participate in procurement funded by donors and, in some cases, suppliers may not have a formal monitoring role in the form of a supplier review process, as is the case with the World Bank. Donors' use of their internal monitoring system may be an effective monitoring tool. However, the supplier's interest, in particular regarding the proper conduct of the procurement process, means that a formal supplier review process could serve as an additional monitoring mechanism, which can reinforce the monitoring function for donors in securing the proper use of funds.⁶⁴

CONCLUSION

This article has examined the procurement policies of development partners applicable to aid procurement in developing countries in Africa. It has noted that, on the one hand, development partners implement specific policies

64 X Zhang "Supplier review as a mechanism for securing compliance with government public procurement rules: A critical perspective" (2007) 16/5 *Public Procurement Law Review* 333.

relating to their funded procurement where they often require recipient countries to implement procurement rules set by the donor. On the other hand, donors also implement other general policies aimed at encouraging reform within the domestic system.

The implementation of these donor policies is often justified by the unreliable systems within the national systems. These policies are generally aimed at eliminating poverty and facilitating development within recipient countries. However, the manner in which these policies is implemented results in significant unintended implications for the general development of the domestic economy.

The article has argued that the manner of implementation of the policies of some development partners raises significant problems for national development. Development partners' policies create problems of multiplicity and complexity in the system, which could impact on national capacity development efforts. This could work against not only the effectiveness of domestic policies, but also limit the effectiveness of development assistance provided by development partners.