



THE GOVERNANCE OF PUBLIC PROCUREMENT IN MYANMAR'S STATES AND REGIONS

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James Owen
Nilar Myaing
Nay Yan Oo



The Asia Foundation

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AUTHORS

James Owen
Nilar Myaing
Nay Yan Oo

REVIEWERS

U Htay Win
Naung Win
Dan Jollans
Ye Khaung Oo
Adu-Gyamfi Abunyewa

GRAPHIC DESIGNER

Ye Htut Oo

EDITOR

Sandy Barron



Building 186, Room 602, 6th Floor, Nawarat Center
Corner of Mahabandoola Road and 52nd Street
Pazundaung Township
Yangon, Myanmar



No. 11, Ko Min Ko Chin Yeik Thar Street
West Ngar Htet Kyi Ward
Bahan Township
Yangon, Myanmar

PREFACE

Public procurement is a critical pillar of effective and responsive government. Governments spend huge sums of money procuring goods, services and infrastructure. How this money is spent matters. Improving public procurement helps to improve public services, the integrity of government, and the public's trust in government. Public procurement reform has become a tool for the government to demonstrate to the Myanmar people that it is working to rid itself of the harmful legacies of socialism, authoritarianism, and cronyism.

Myanmar is in the early stages of public procurement reform. The first pieces of the legal and regulatory framework were only put in place in 2011, as part of the President Thein Sein government's steps to introduce more market-oriented reforms and to upgrade Myanmar's Public Financial Management (PFM) system. This system continued to evolve and by 2020 Myanmar's first Public Procurement Bill had been drafted. This legislation, and the policy and guidance that will follow it, could profoundly alter the governance of procurement policy in Myanmar by placing procurement policy under the responsibility of the union Ministry of Planning, Finance and Industry (MoPFI).

To contribute to the policy discussions around how to operationalize the new law, this joint policy brief with The Sandhi Governance Institute explores the under-investigated role of state and region governments. Our analysis of Kayin State and Ayeyarwady Region suggests that there is much to learn from those who have been on the frontline of reform, driving implementation and adapting policy to their context. A critical question for the MoPFI is how, in its new policymaking role, it can operationalize the law in a way that makes the most of this local knowledge and the determination of local actors that are already working to improve Myanmar's public procurement system. This will include a mix of old and newly elected state and regions MPs and Ministers. Our hope is to support these transitions by contributing towards a greater shared understanding of the system that currently exists, and the changes that are coming.

Mark McDowell
Country Representative
The Asia Foundation

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GLOSSARY

- Bidder:** the participant in a tendering process
- Contractor:** also known as supplier, is a person or business that undertakes a contract to provide goods or services to agreed terms.
- Capital Expenditure:** government investments in assets that will last for more than a year, such as vehicles, land, machinery, buildings, and roads.
- Direct Contracting:** also known as single source procurement, involves contracting without competition of a particular manufacturer, supplier, or contractor.
- Economy:** minimizing the cost of resources for an activity ('doing things at a low price').
- Effectiveness:** the extent to which objectives are met ('doing the right things').
- Efficiency:** performing tasks with reasonable effort ('doing things the right way').
- eProcurement:** also known as electronic procurement or supplier exchange, is the purchase and sale of supplies, equipment, works and services through a web interface or other networked system.
- Infrastructure:** the basic physical structures and facilities (e.g. buildings, roads, power supplies) needed for the operation of a society or organization.
- Open Tendering:** a bidding system that is not private. It is opened for all qualified bidders. Bids are then chosen openly, based on price, quality or other predetermined criteria. It is a means to encourage competition between suppliers.
- Public Financial Management (PFM):** the system by which financial resources are planned, directed, and controlled to enable and influence the efficient and effective delivery of public service goals.
- Public-Private Partnership:** a contract (institutional relationship) between public and private actors for the co-operative provision of a public good or service. The essential element is some degree of private participation in the delivery of traditionally public-domain goods or services.
- Public Procurement:** the purchase of goods and services by governments and state-owned enterprises. It encompasses a sequence of related activities, starting with the assessment of needs through award to contract management and final payment.
- Request For Proposals:** a document that announces and provides details about a project, as well as solicits bids from contractors who will help complete the project.
- Request For Quotations:** a process in which an entity solicits select suppliers and contractors to submit price quotes and bids for the chance to fulfill certain tasks or projects. Typically used for small value procurements of readily available off-the-shelf goods, small value construction works, or small value services procurements.
- Restricted Tendering:** a procurement method that limits the request for tenders to a select number of suppliers, contractors or service providers. This method of procurement is also called limited bidding and selective tendering.
- Secondary Legislation:** the collection of rules, regulations and guidance that are subordinate to a law (primary legislation). In Myanmar this would include by-laws, rules, regulations and procedures that are subordinate to an originating law.
- Tender:** the process of bidding for contracts let by contracting authorities.
- Tenderer:** the bidder/participant in a tendering process.
- Two-Stage Tendering:** a procurement method where the procuring entity awards an initial contractor initial work on a limited agreement. This allows for the gathering of more information on the specifications for a second, typically more specialized, tender.
- Value For Money:** is about meeting needs, however these are defined, at the most reasonable cost. It is typically explained using the 'four Es' of economy, efficiency, effectiveness and equity.

CHAPTER 1

INTRODUCTION

1.1 WHAT IS PUBLIC PROCUREMENT AND WHY DOES IT MATTER?

Public procurement is the *process* by which a government buys goods, services and infrastructure, typically from the private sector. In the case of schools, public procurements can range from the books bought, or consultants brought in to help update the curriculum, to school construction and repairs. Thus, procurement is the process through which government engages with the private sector to find, manage, and pay suppliers. Public procurement represents a decision to focus the role of the state *away* from the direct provision of the good or service and *towards* managing the private sector. This can be because the private sector may be able to deliver the good or service at better value for money due to differences in capacity, capability, and efficiency.

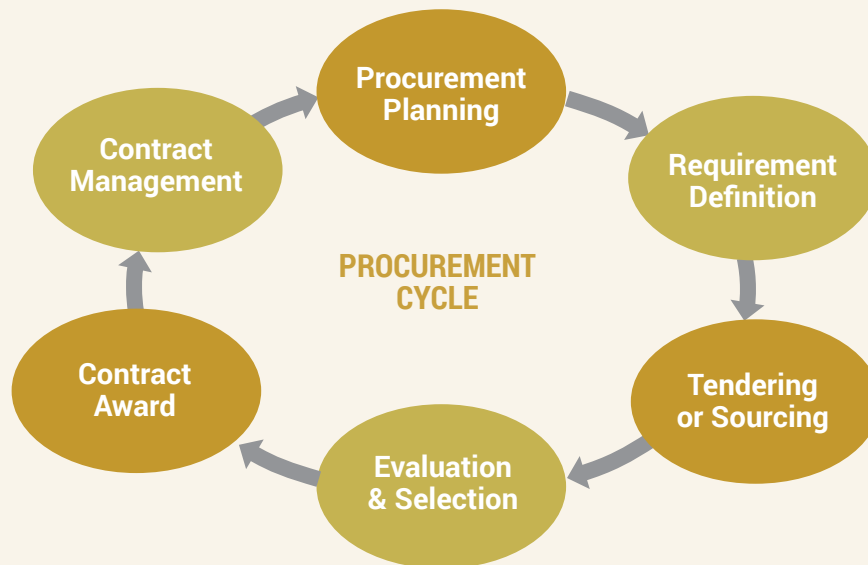
If public funds are spent more effectively, a nation's people benefit more. For example, a better-governed procurement system could mean that more schools or hospitals are built, helping improve access to education and health. All levels of government in Myanmar have prioritized improving physical infrastructure, as reflected in recent years by the large increases in government capital expenditure – investment in assets with a lifespan of more than one year, such as machinery and roads.¹ Capital expenditure has nearly doubled since 2011/12 to reach MMK 5,061 billion—approximately USD 3.8 billion and 6 percent of Myanmar's Gross Domestic Product (GDP)—and is forecast to grow to close to MMK 11,000 billion by 2021/22.² With such large expenditures the difference between procuring these assets well and doing so poorly are immense.

In addition to improving infrastructure and service delivery, governments typically use procurement to pursue wider economic, social or environmental goals. These include supporting the development of domestic industries and improving environmental standards.³ Therefore, procurement must support the delivery of a public organization's strategic objectives while meeting the expectations of taxpayers.⁴

Of particular importance in Myanmar, given its recent history, is the connection between public procurement, transparency, and corruption. How public funds are spent affects peoples' attitudes toward the state, and towards their elected officials.⁵ When the *integrity* of the public procurement system is compromised, through corrupt or unfair practices, people may begin to question the legitimacy of the state.⁶ This, in turn, can impact peoples' willingness to pay their taxes, which is a cornerstone of stable democracies.⁷ The sums of money at stake and the complexity of the processes involved in procurement provide ample opportunities and incentives for corruption. Thus, safeguarding and procurement oversight, from inside and outside the government, are crucial to avoid contracts going to the "*best briber*" instead of to suppliers offering the best combination of price and quality.⁸

When the extent of corruption involved in public procurement gets out of hand, it can topple governments. For example, when it was discovered that the Brazilian construction company, Odebrecht, was paying bribes to procure government contracts, 30 government investigations were launched that discovered USD 3.5 billion in bribes. The charges resulting from these bribes led to more than 200 convictions, including that of the former president, Luiz Inacio Lula da Silva, in a scandal that led to his resignation and prosecution, as well as the prosecution of two other former Brazilian presidents, and former presidents of Peru and Panama.⁹ In addition to the major political consequences, the continued unwillingness to address corrupt practices resulted in decades of poorer public investment decisions that robbed the public of opportunities for economic development.

BOX 1 The typical public procurement process¹⁰



PRE-TENDER

1. Preparation of annual budget and budget allocation to government agencies
2. **Procurement planning** to identify procurement needs and procurement approach
3. **Defining procurement requirements** and preparing tender documents

TENDER

4. **Tendering** or sourcing to invite potential suppliers to submit tender proposals
5. **Evaluation** of tender proposals and selection of winning tender
6. **Contract award**

POST-TENDER

7. **Contract management** to ensure supplier delivers goods or service to required quality and is paid as per the terms of the contract

1.2 RESEARCH SCOPE AND METHODOLOGY

This policy brief focuses on the *governance* of public procurement. It seeks to understand the different rules, regulations, capabilities, knowledge, incentives, and actors that influence public procurement *practice* in Myanmar. It focuses on the role that Myanmar's states and region governments play in the management and oversight of the public procurement system. Myanmar's fourteen state and region governments were only formed in 2011 and yet play an important role in public finance policy, implementation, and oversight. This paper seeks to more clearly understand the current legal and policy framework and what influence this has on procurement management and oversight by state and region governments. It looks to identify

common practice and perspectives, and to explore what policy adaptations have taken place since 2011. It focuses on public procurement related to infrastructure spending, given that this has been a policy priority of successive governments at both the union and state and region level.

Outside of the scope of this paper are procurements that take place through Public Private Partnerships (PPPs). PPPs are excluded from the main legal and regulatory framework governing public procurement tendered in states and regions. Such projects are typically too large (approximately above USD 5 million) and too complex to be managed directly by states and regions.¹¹ While these are not *within* the

scope of this research, it should be noted that PPPs constitute major infrastructure spending that takes place within states and regions and so in reality are subject to some state and region government oversight.

A wider objective of the paper is to try to gain insights into practice on the ground, with the intention that this may inform future policymaking around the Public Procurement Bill and further secondary legislation and policy. The paper is not an audit of procurement practice. It is not a systematic assessment of public procurement systems in the style of the globally recognized Methodology for Assessing Procurement Systems (MAPS), nor is it a systematic audit of procuring entities' adherence to Myanmar's regulatory framework. The findings of the paper, drawn from only one state and one region, suggest practice is sufficiently varied across different departments and locations as to deserve more careful study.

BOX 2 **Myanmar's state and region governments**

The 2008 Constitution introduced 14 state and region governments across the country, led by centrally-appointed chief ministers and a cabinet of ministers. Ministers are mandated to “manage, guide, supervise and inspect” departments covering areas for which they have responsibility, as set out in Schedule 2.¹²

Most departments in a state or region have two separate budget allocations: a union budget and their state or region budget. State and region budgets account for 11.8 percent of total government spending¹³ and 24 percent of capital expenditure (2018/19 Budget Estimate).¹⁴

State and region Hluttaws, and Hluttaw committees such as the Public Accounts Committee, support the drafting of legislation and in many places play an active role in monitoring government activities and supporting their constituents to interact with government processes.¹⁵ While much policymaking is driven by the union government, state and region governments play an important role in implementation.¹⁶

This paper is based on desk-based research, interviews with development actors working on procurement, and two rounds of field research that took place between the end of 2018 and early 2020. The desk-based research included a review of the legal and regulatory framework for public procurement in Myanmar. There is limited published research available on public procurement in Myanmar, due to the twin facts that Myanmar only recently opened up to the world, and that the procurement legal and regulatory framework is very recent.

From January to February in 2020 the Sandhi Governance Institute and The Asia Foundation traveled to Ayeyarwady Region and Kayin State to conduct Key Informant Interviews and Focus Group Discussions with government actors, and state and region Hluttaw MPs. This included interviews with ministers and officials representing departments responsible for planning, budgeting, rural roads, electricity, social affairs (education and health), and Development Affairs (municipal). It also included members of Township Planning and Implementation Committees, Construction Work Inspection Committees, state and region MPs, and a chair of a State/Region Public Accounts Committee. Key Informant Interviews were also conducted with businesses, including suppliers and those performing roles as third-party quality control companies. One state and one region were selected to enable a contrast of experiences. Ayeyarwady Region was selected on the grounds that earlier research found that additional guidance was being prepared by the regional government to support procurement processes.

This brief builds off earlier research conducted by the Sandhi Governance Institute, with the support of The Asia Foundation, on the procurement practices of subnational government actors in six townships in Bago Region, Ayeyarwady Region and Mon State in late 2018 and early 2019. Interviews and focus groups were complemented by a series of workshops in July and August 2020 that presented initial findings to government officials, ministers, MPs and businesses, for whose feedback we are grateful.

BOX 3**What role do state and region governments play in infrastructure public procurements?**

Responsibility for infrastructure procurement varies according to the location of the infrastructure project, the size and complexity of the project, and the budget from which it is drawn. Infrastructure projects are typically tendered within the state or region in which the project is physically located. In some instances, however, such as a highway project covering more than one state or region, this is not the case. State and region governments are responsible for managing public procurement from both the union capital budget and state or region capital budgets, though the extent of their role varies:

- For tenders called in states and regions but drawn from the **union budget**, state and region ministers help manage all competitive tenders through their positions as chairs on tender committees. Respective state and region departments also manage the procurement process when they are the procuring department.
- For tenders called in states and regions and drawn from the **state or region budget**, management is almost entirely a state or region government affair. As with the union budget, state and region ministers act as chairs of the Tender Committee and state and region departments directly manage procurement as the procuring department. In addition, other “relevant” state and region department officials (typically engineers) support the management process.

MPs of states and regions play an active oversight role assessing project needs and specifications, inspecting projects upon completion, and acting as a further check and balance on procuring entities and committees. Local residents typically feel more confident approaching their MPs with information and complaints, and use them as a communication channel to procuring entities and tender committees. Public Accounts Committees (PACs) play a role in tracking poor performance by contractors. Chapter 5 provides a more detailed assessment of the roles that different state and region actors play in infrastructure procurement.

1.3 PAPER OUTLINE

While the effectiveness and integrity of public procurement systems are widely recognized as important, the path towards these ends is a difficult one. **Chapter 2** identifies some of the typical challenges developing countries have faced, introduces principles used to guide reform efforts, and summarizes Myanmar’s reform experience to date. **Chapter 3** provides an overview of the legal and regulatory framework that guides procurement policy and practice in Myanmar. It takes a deeper dive into Directive 1/2017 and presents a simplified process map of the tender procedures. **Chapter 4** presents observations from the field research, identifying and categorizing the main actors within

states and regions that influence state and region government infrastructure procurement practice. It catalogs some of the ways in which state and region actors have interpreted and adapted procurement policy to their specific context and to learning from implementation. **Chapter 5** identifies 11 findings drawn from an analysis of the legal and regulatory framework and observations of procurement in practice. **Chapter 6** presents a series of recommendations for the MoPFI and state and region governments as they move forward into operationalizing the upcoming Public Procurement Bill.

CHAPTER 2

PUBLIC PROCUREMENT REFORMS: CHALLENGES, PRINCIPLES AND MYANMAR'S EARLY EXPERIENCE

While it may be important, procurement reform is notoriously difficult. This chapter summarizes some of the typical challenges faced by developing countries in the South East Asia region, as providing the most relevant point of reference for Myanmar policymakers. It then introduces a set of principles that can act as a guide for those working to support procurement reform, whether in the union or state and region governments. The chapter ends with a brief overview of Myanmar's reform journey, which is very nascent compared to many regional neighbors. While there is much ground to travel, Myanmar's policymakers have a unique opportunity to help shape a system of public procurement that is based on the lessons that have been learned from regional experiences. The initial signs are good, and Chapter 6 provides further recommendations on how this success can be taken further.

2.1 TYPICAL CHALLENGES TO PUBLIC PROCUREMENT IN DEVELOPING COUNTRIES

While many countries in South East Asia have undertaken impressive economic transformations, their procurement systems have often struggled to keep up. Where reforms have been tried, these have typically not had their desired impacts – with particular difficulties in translating reforms to the legal and regulatory frameworks into changes in actual practice.¹⁷ Implementation has typically fallen short of intentions. This has undermined poverty reduction efforts, strained the integrity of public procurement systems, and stymied reform momentum.¹⁸ These challenges fall under the following categories.¹⁹

The legal and regulatory framework: Procurement laws and implementing regulations and procedures have typically been fragmented and inconsistent. Procedures have been unclear and roles and

responsibilities of the different actors in the procurement system have been vaguely defined or are in conflict. This has led to confusion and weaknesses in accountability. A stark example was the Philippines, where up until 2003 there were more than 60 laws, presidential decrees and administrative orders that governed the procurement process. In addition, in South East Asia there has been *“an absence of central procurement authorities to oversee procurement policy and practices, to review procurement rules, draft bidding documents, advertise intended procurements, and monitor compliance to the rules.”*²⁰

Institutional and human resource capacity: A major impediment to effective procurement implementation has been inadequate attention and resourcing to the capacities and motivation

of procurement officials and those who monitor the procurement system. The technicalities of procurement require systematic training of staff and other efforts to promote continued upgrading of skills and capabilities. This can start with promoting a general awareness of the rationale behind public procurement and the existing system and procedures.

Competition and access: Major barriers exist to the creation of level playing fields for local businesses. When bidder eligibility conditions are too stringent this can undermine competition, to the benefit of larger, more established businesses, and to the detriment of Small and Medium Enterprises (SMEs) and new start-ups. In areas such as eGovernment, this can result in less innovative service solutions. Opinions differ on the extent to which developing countries' procurement systems should treat foreign businesses on the same terms as local ones. While favoring local businesses may in some cases result in procurements of higher cost or lower quality, this can also form part of an industrial strategy to support the improvement in the cost-efficiency and capacity of local businesses over time, through a gradual learning-by-doing process.

Corruption: Widespread abuses of power to make illicit personal gains have been enabled by poor enforcement. Fear of the influence and power of those involved, and the secretive nature of many of the deals, and weak legal systems, have made it hard to sanction those responsible. This has been most notable in those countries where attitudes towards corruption among government and business are relaxed. Corruption usually takes the following forms: misappropriation of funds from stealing part of the goods or service, bribery (money, gifts or favors) for award of a contract, nepotism and cronyism resulting in preferential treatment to a bidder, and supplier and contractor fraud (disclosing false information). A much harder to observe, and

eliminate, form of corruption is collusion among potential bidders to reduce competition by working together to strategically bid (e.g. suppliers engage in rotation bidding where they take turns to be the sole bidder on a contract).

Transparency: New procurement laws and implementing rules have typically introduced measures to promote transparency. However, there has been considerable variation in the scope and details of conflict of interest disclosure requirements and the degree to which transparency requirements are put into practice.

Decentralization: Decentralization brings the promise of *"substantial efficiency gains because decisions will be taken at a level of government that has better information and is more accountable to the local public"*.²¹ Yet if procurement reforms are not undertaken alongside this effort there is the risk that decentralization encourages local corruption and mismanagement. Lower levels of government also need investments in the procurement capacities of their staff and efforts should be made to protect against corruption of the procurement process by local officials and businesses.

Over-emphasis on compliance to rules: Many public procurement reforms are focused on the legal and regulatory framework, with inadequate attention to the broader concept of Value for Money. Systems are designed to reduce discretion and encourage enforcement of rules, but this rigidity comes with trade-offs. Rules can't account for all eventualities and they act to reduce autonomy, which can be demotivating.^{22, 23} A focus on rule enforcement, without wider efforts to build the capacities and motivations of procurement officials, can give the illusion of an effective system. Many countries have struggled to get the balance right between transparency and compliance on one side, and agency and managerial effectiveness on the other.²⁴

2.2 PRINCIPLES FOR PUBLIC PROCUREMENT REFORM – VALUE FOR MONEY

While procurement policy can have multiple objectives, a principal goal is to achieve value for money in how public funds are spent.²⁵ Value for Money is about getting the most value for every kyat invested. This is sometimes mistakenly understood as procuring goods or services at the lowest costs or according to the rules – but Value for Money is a much richer concept (see Box 4).

Governments attempt to achieve Value for Money throughout the procurement cycle. Central to this is understanding what the *end-user* of a product, service or infrastructure really needs, and finding and managing the right people to meet those needs, at a suitable cost.

Weaknesses at any one stage in the procurement process can result in worse procurement outcomes and undermine the overall Value for Money of the procurement, even if all the rules and procedures are being followed. For instance, if an unrealistic budget is assigned for a construction project, it should come as no surprise that few businesses put forward bids, or that those businesses that win then lower quality and cut costs to make the project financially viable for them.

A competitive tendering process can be undermined if procuring entities don't have the right skills or

incentives to manage the eventual contract, or must do so in the context where contract violations are rarely taken to court. This has been a challenge for some municipal Development Affairs Organizations (DAOs) which have struggled to manage the private companies they have contracted to provide solid waste management, with poorer and harder-to-reach households left underserved.²⁷

The timeliness of public procurement also matters, for both the needs of end users and for budget management. Myanmar's government annual capital expenditure is consistently lower than what was planned, and close to half of capital expenditure takes place in the last quarter. In the first half of 2019/20 capital expenditure was 46 percent of what was planned, representing "unrealistic targets as agencies are preparing for procurement".²⁸

Ultimately, the concept of Value for Money helps prompt us to think beyond the immediate procurement process and the annual budget cycle when making procurement decisions. Costs should be considered over the *whole life* of the product, service or infrastructure, and not just those incurred in the first year of procurement. Cheaply built roads are not a great deal if they wash away each rainy season and require regular expensive maintenance.

BOX 4 Value For Money – the 'three Es'

Value for Money is about meeting needs, however these are defined, at the most reasonable cost. It is typically explained using the 'three Es'.²⁶

- **Economy:** minimizing the cost of resources for an activity ('doing things at a low price')
- **Efficiency:** performing tasks with reasonable effort ('doing things the right way')
- **Effectiveness:** the extent to which objectives are met ('doing the right things')

Competition is one way to improve the economy of procurement as potential suppliers attempt to outdo each other in terms of the cost and quality of goods or services. Efficiency relates to the costs (in time and resources) involved in managing procurement processes. Effectiveness reinforces that what is being procured also matters. Even success in two out of three E's isn't a guarantee of Value for Money. For instance, a bridge built at low cost and quickly, but in a location that serves few people, is not an effective use of scarce public resources.

2.3 PRINCIPLES FOR PUBLIC PROCUREMENT REFORM – INTEGRITY

Many countries recognize that the integrity of public officials matters a great deal. Corruption, collusion or favoritism can undermine trust in government and across society. The Organization for Economic Cooperation and Development (OECD), a global think tank, has developed a set of principles that reflect a global view of the policies and practices that have helped improve integrity in procurement. As these are principles, and not rules or regulations, they are broad guides that give space

to policymakers and practitioners in each country to consider how to apply them to their own context.

The Principles are anchored in four pillars: transparency, good management, prevention of misconduct, accountability and control. The overall aim is to enhance integrity efforts so that they are fully part of an efficient and effective management of public resources.

BOX 5 OECD Principles for Integrity in Public Procurement

Transparency

Principle 1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

Principle 2. Maximize transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

Good management

Principle 3. Ensure that public funds are used in public procurement according to the purposes intended.

Principle 4. Ensure that procurement officials meet high professional standards of knowledge, skills, and integrity.

Prevention of misconduct, compliance and monitoring

Principle 5. Put mechanisms in place to prevent risks to integrity in public procurement.

Principle 6. Encourage close cooperation between government and the private sector to maintain high standards of integrity, particularly in contract management .

Principle 7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct, and apply sanctions accordingly.

Accountability and control

Principle 8. Establish a clear chain of responsibility together with effective control mechanisms.

Principle 9. Handle complaints from potential suppliers in a fair and timely manner.

Principle 10. Empower civil society organizations (CSOs), media, and the wider public to scrutinize public procurement.

2.4 A SHORT HISTORY OF PUBLIC PROCUREMENT REFORM IN MYANMAR

Myanmar is in the very early stages of a transition to a modern public procurement system, with considerable scope to improve Value for Money and integrity. The transition from a socialist command and control economy has been a decades-long process, and it was not until 2011 that Myanmar introduced a procurement system that involved participation of the private sector through open competition.

In the preceding years, public procurement either occurred through Myanmar's State Economic Enterprises or well-connected businesses. The processes undertaken, and the terms within contracts, were opaque and kept beyond external scrutiny. A system of patronage fed a business elite and facilitated the development of a culture within government that blurred the boundaries between public and private interests.²⁹ The government had limited exposure to international practices of procurement or wider PFM. A legal and regulatory framework such as a PFM law, a procurement law, and contemporary financial and administrative regulations, simply did not exist.³⁰

In 2011 President Thein Sein broke from tradition and introduced the first regulatory frameworks for public procurement. In a move to introduce greater competition into procurement processes, as part of wider reforms to Myanmar's PFM system, the then president introduced two instructions in 2011 that marked a step-change in the governance of public procurement. The directives requested government departments to change from closed to open tenders for public procurement, to increase transparency, and to decentralize procurement implementation to individual line ministries. The two directives established open tender as a new norm and a tool to promote competition and, transparency and to reduce corruption.³¹ These instructions were followed by a series of directives and guidelines that constitute the foundational elements of a legal and regulatory framework for public procurement. Collectively, the instructions and directives have provided some uniformity in the guidance to Myanmar's union and state and region governments, though substantial gaps remain.

One legacy of decades of military rule has been the practice of *"governing by directives and commands, rather than by public administrative law and institutional practices."*³² This has resulted in inadequately detailed guidance, a lack of clarity on responsibilities, and an under-investment in policy-

making capabilities that has left many officials reluctant to develop the necessary guidance to fill these voids. In the case of procurement governance these issues have been exacerbated by the absence of a single entity assigned responsibility for developing procurement policy and providing overall oversight.

However, since 2016 the National League for Democracy (NLD)-led government has overseen a concerted effort to create a single unifying legal and regulatory framework governing public procurement and to put overall responsibility for procurement monitoring, evaluation and policy under one organization. During 2020 a national 'Public Procurement and Asset Disposal Bill' (hereby referred to as 'The Procurement Bill') was submitted to the Amyotha Hluttaw following consultation across union government departments, business associations and development partners including the World Bank, the Asian Development Bank, the Department of Foreign Affairs and Trade (UK), and the United States Agency for International Development.

The Procurement Bill marks a second step-change in the governance of public procurement with a deliberate effort to institute a more centralized and coordinated procurement governance framework. This development of the bill has been overseen by the Ministry of Planning of Finance and Industry (MoPFI) which will take on overall responsibility for procurement oversight and policy. MoPFI is already in the process of drafting the secondary legislation and policies that will be needed to operationalize the legal framework. These efforts are being supported by Development Partners, such as the World Bank, with measures being taken to establish the systems and capabilities to operationalize the law.

The reforms to public procurement currently underway demonstrate an appreciation of the challenges that other countries have faced and are aimed at both improving value for money and the integrity of public procurement. However, considerable challenges remain – principal among these will be operationalizing the law and supporting government agencies across the country through implementation. Historically the MoPFI has played a limited policy or oversight role, is relatively unfamiliar with existing practice in states and regions, and may find it challenging to develop guidance and policies relevant to all participants

in public procurement. Fortunately, this research has identified a range of actors, inside and outside government, that have a desire to see the public procurement system improve and are looking for support to do so. A critical question for the MoPFI is whether it acts to channel the energies and distinct capabilities of other actors towards their shared goal of improved public procurement, or to displace them through its own more direct actions.



A CRITICAL QUESTION FOR THE MOPFI IS WHETHER IT ACTS TO CHANNEL THE ENERGIES AND DISTINCT CAPABILITIES OF OTHER ACTORS TOWARDS THEIR SHARED GOAL OF IMPROVED PUBLIC PROCUREMENT, OR TO DISPLACE THEM THROUGH ITS OWN MORE DIRECT ACTIONS.



CHAPTER 3

LEGAL AND REGULATORY FRAMEWORK: FROM OPEN TENDERING TOWARDS UNIFICATION AND CENTRALIZATION

Reform of the public procurement system forms part of the Myanmar government's ambitious PFM reform agenda, where it is seen as a tool to promote competition and transparency, and protect the integrity of public funds. Since the first foundational elements of a legal and regulatory framework were introduced in 2011, the governance of public procurement in Myanmar has evolved at a rapid pace. This chapter introduces the main components of the legal and regulatory framework and focuses on the three core elements of importance to infrastructure procurement in states and regions.

Following on from two instructions in 2011 the Thein Sein Government issued the Presidential Directive 1/2013 – Tender Guidelines for Investments and Business – which provided general guidance for public procurement of construction projects and goods. While the Directive was a major step forward, officials still lacked guidance on procurement planning, thresholds for tendering, the tender procedure for consultancy services, and a complaint handling system. The 2013 Directive was then followed by the Ministry of Construction (MoC) Guideline for procurement in construction projects, issued first in 2014 and updated in 2016. These were soon followed by the 2017 Regulations on Financial Management of Myanmar, the presidential Directive 1/2017, and the 2018 Myanmar Project Bank Notification which included guidance on procurements related to PPPs. By late 2020, the first public procurement law, the Public Procurement and Asset Disposal Bill, had been submitted to the Amyotha Hluttaw.

The major legal and regulatory framework governing procurement of Myanmar's states and region governments is Presidential Directive 1/2017. All government officials interviewed as part of this research referenced 'Presidential Directive 1/2017 for Tender Procedures' (hereby referred to as 'Directive 1/2017') as the central guidance to follow. It provides detailed information on the process and procedures of public procurement. All works related to construction, purchase, and procurement of services have to be conducted in compliance with Directive 1/2017. For construction projects, the MoC's 2016 Guideline for Execution of Works by Contractor (hereby referred to as the 'MoC 2016 Guideline') is another critical form of guidance. The 2017 Regulations on Financial Management mandate that all government departments and organizations have to use the Directive 1/2017 to procure construction works, goods, and services. The major exception to these are PPPs which are covered under The Myanmar Project Bank.³³

While the 2013 and 2017 President Office Directives put in place the first elements of a regulatory framework to guide public procurement, they did not specify which government entity should play an overall oversight or enforcement role. Monitoring adherence to the regulatory requirements was left to the discretion of line ministries and elected officials. No central body was assigned responsibility for building the capacity of staff within procuring agencies to carry out their procurement roles.³⁴

To address these gaps the cross-government Public Procurement Rules & Regulations Supervision Committee (PPRRSC) was developed to establish a unified procurement legislative framework. The PPRSC was formed in April 2015 with the then Ministry of Planning and Finance Deputy Minister acting as chair, and with the bulk of members being Director Generals from different departments across three ministries. The Committee developed a draft Procurement Law, which by late 2020 had been submitted to the Union Parliament, and draft secondary legislation to support operationalization of the law.

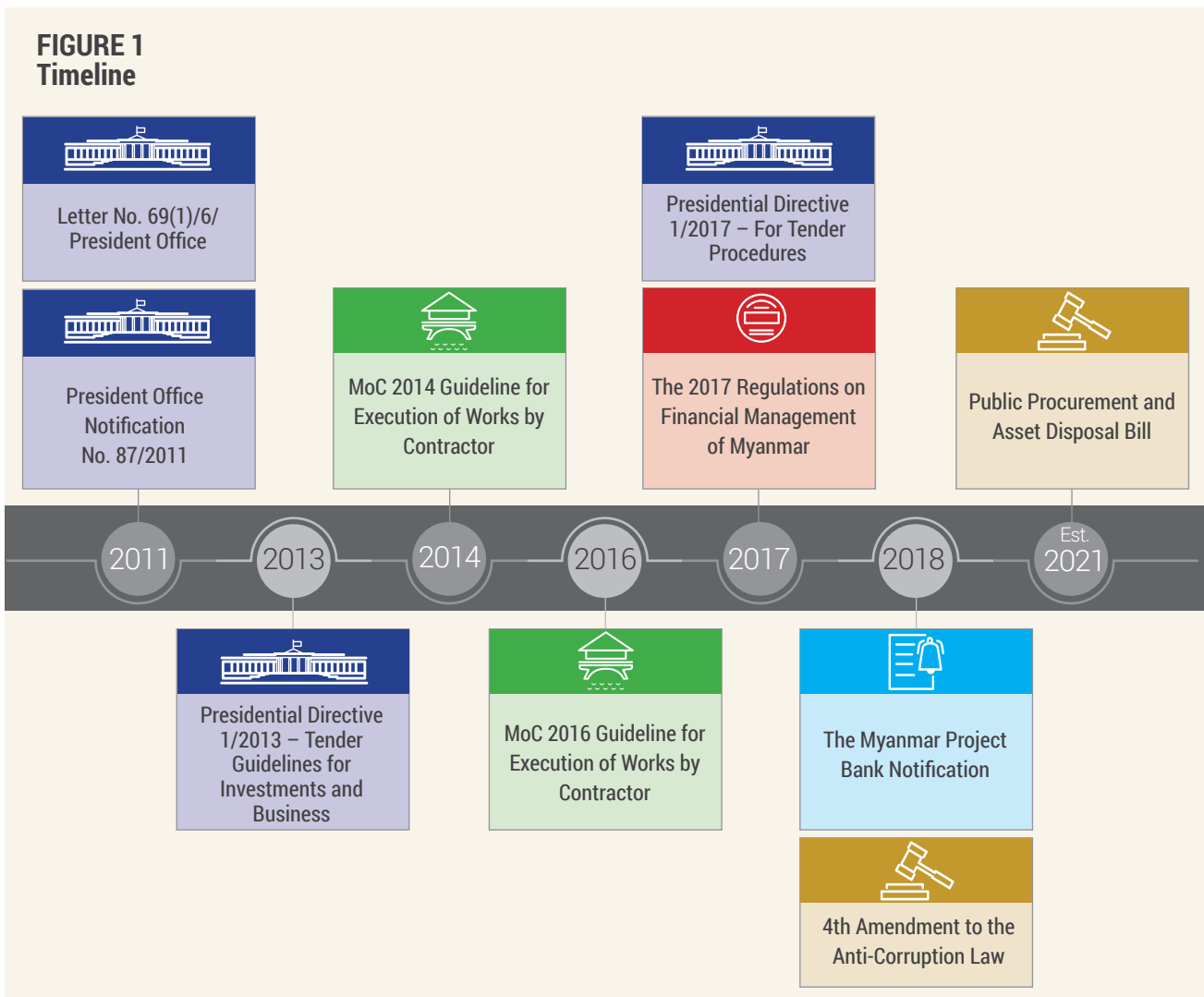
The upcoming Public Procurement and Asset Disposal Bill therefore marks another step-change in Myanmar’s legal and regulatory framework for public procurement. It would specify the MoPFI as responsible for oversight, enforcement, and further policy development. This includes the drafting of secondary legislation and additional guidance and templates, such as standard bidding documents. It will be tasked with providing procurement capacity building training for implementing agencies and will assume overall responsibility for adherence to the laws and regulations.



THE UPCOMING PUBLIC PROCUREMENT AND ASSET DISPOSAL BILL THEREFORE MARKS ANOTHER STEP CHANGE IN MYANMAR’S LEGAL AND REGULATORY FRAMEWORK FOR PUBLIC PROCUREMENT.



**FIGURE 1
Timeline**



3.1 THE 2016 GUIDELINE FOR EXECUTION OF WORKS BY CONTRACTOR

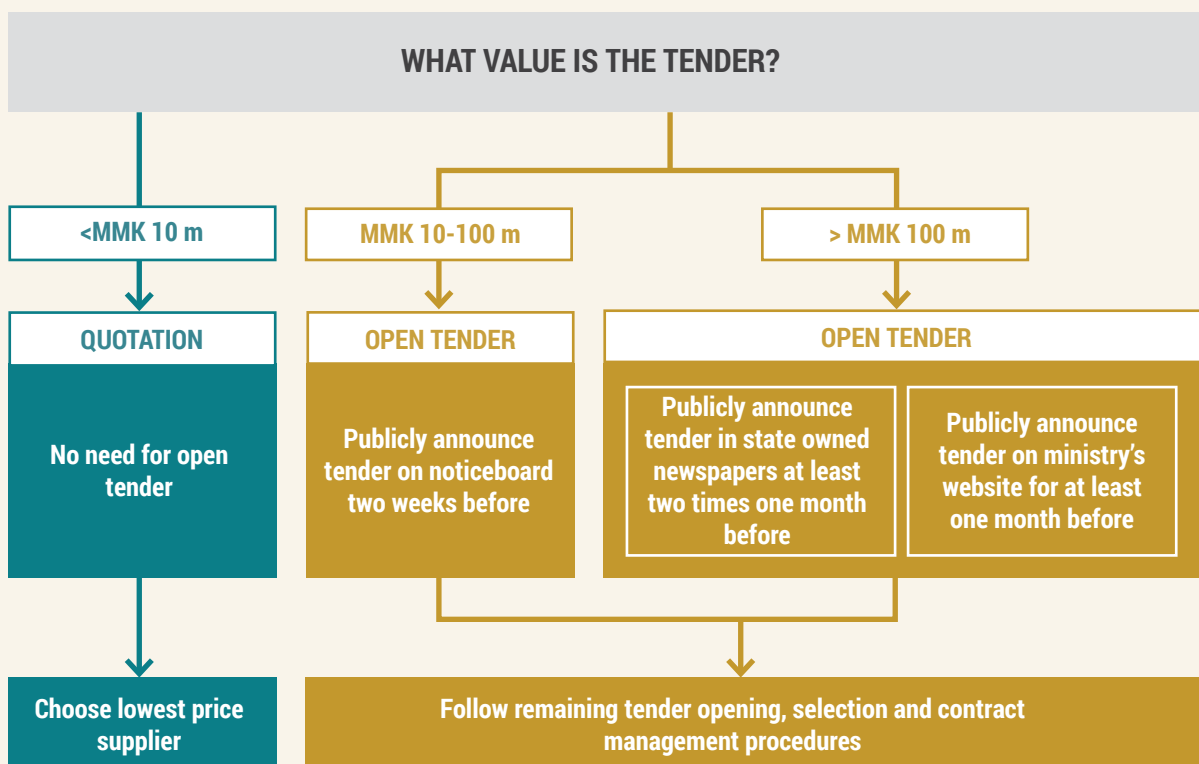
The MoC's Guideline, first introduced in 2014 and updated in 2016, applies to all union government and state and region government departments' construction projects. It was developed following consultations with representatives from different union ministries and updated in September 2016 to include suggestions from the World Bank and other stakeholders. The stated objectives are to enable accurate expenses, ensure good quality construction, prevent corruption, implement a systemic tendering process, promote transparency, improve inspection and supervision, and ban those suppliers and companies that provide poor quality goods and services.

Under the guideline the MoC is responsible for the execution and supervision of construction and maintenance projects. The MoC 2016 Guideline instructs that contractors should be used for most MoC construction and maintenance work, and only projects that require specialized skills should be carried out by the MoC. Joint MoC–contractor projects are also possible. The Guideline instructs

the MoC and contractors to align themselves with three existing codes, and to use the ministry's own estimates of the costs of supplies when developing proposals.

For construction projects with a value of less than MMK 10 million, no tender is required. Such projects require the establishment of an internal department board which must award the project to a "company it can trust". To promote open competition and transparency the Guideline contains similar measures to Directive 1/2017. When tenders are opened, they have to be announced publicly. For a value of from MMK 10 million to MMK 100 million the tender announcement has to be published two weeks before the tender opening date on the notice board of the relevant departments and the district and township administration office. For projects over MMK 100 million the tender has to be announced in newspapers one month before the tender opening date, on relevant department's notice boards and, if possible, on the ministry's website.

FIGURE 2
Open Tender Cost Thresholds



In order to evaluate the tenders, a board has to be formed which should be composed of at least three people from relevant departments, district administration office, township administration office and outside organizations. The MoC 2016

Guideline also provides detailed information on tender procedures, payment methods, contract management, penalties for not meeting deadlines, and supervision.

3.2 THE 2017 REGULATIONS ON FINANCIAL MANAGEMENT OF MYANMAR

In April 2017 the Ministry of Planning and Finance³⁵ issued the Regulations on Financial Management for union-level organizations, ministries and departments, state-owned economic enterprises, the Nay Pyi Taw Council, and state and region departments and organizations. These set out the overarching regulatory framework for PFM, with public procurement identified within this. These regulations set out to improve expenditure management, promote transparency and accountability, and provide specific procedures for budget preparation, implementation, reporting and supervision, and management of public funds. Public procurement guidelines are described in Chapter 2.

According to the regulations all government departments and organizations shall prepare

procurement plans for the relevant fiscal year, and these must be approved by the controlling officer. A procurement plan must include detailed information on what goods and services will be procured and over what timeline for each procurement activity. It states that government departments and organizations shall not act to discourage competition, disqualify an entity from the competition, discriminate, or favor one supplier over another. The guideline explicitly mentions that procuring entities shall ensure transparency in the procurement process, and proposes several measures to this end, including advertising tenders in newspapers and news media. Government officials are instructed to act in compliance with Directive 1/2017 and are instructed that construction projects shall be carried as per the MoC 2016 Guideline.

3.3 PRESIDENTIAL DIRECTIVE NO. 1/2017 FOR TENDER PROCEDURES

Presidential Directive No. 1/2013 – Tender Guidelines for Investments and Business, was replaced by the NLD government with Presidential Directive No. 1/2017, known as “Tender Procedure for Procurement of Civil Works, Goods, Services, Rental and Sale of Public Properties for the Government Departments and Organizations”. Directive 1/2017 guides tender processes for the procurement of construction, goods and services undertaken by union, state and region government departments and organizations. It references The MoC 2016 Guideline and acts as the principal regulatory framework governing public procurement in Myanmar.

The major exceptions to the Directive include PPPs and procurement related to state defense, state security, and electronic security matters, where

procurement can be conducted according to parent ministries’ procurement procedures. In addition, if state-owned enterprises provide goods and services that match required criteria then ministries can procure them directly, through a negotiated contract. For procuring goods or services (including consultancy services) as part of a loan or grant, it is possible to use the international or partner organization’s own rules and regulations.

Directive 1/2017 has the stated goals of preventing the waste of public funds, reducing opportunities for corruption, creating fair competition, improving transparency, and increasing accountability so as to ensure greater value for money in public procurement. It provides detailed information on tender procedures and sets out the roles and functions of different actors. It also includes

measures that cover the rental and sale of state-owned property (such as government buildings), which are not the focus of this report.

The Directive sets out the conditions under which open tendering should take place and specifies the nine main steps for such tender processes. It describes the composition and roles of key committees and the responsibilities of procuring departments, tender bidders, and tender winner.

Within Directive 1/2017 public procurement is classified into two categories: (a) construction, purchase, and procurement of services and (b) leasing or selling of state property. This report looks at procurement exclusively (i.e. construction and procurement of goods and services), as the leasing or selling of state property is not technically procurement. Public tenders are required for

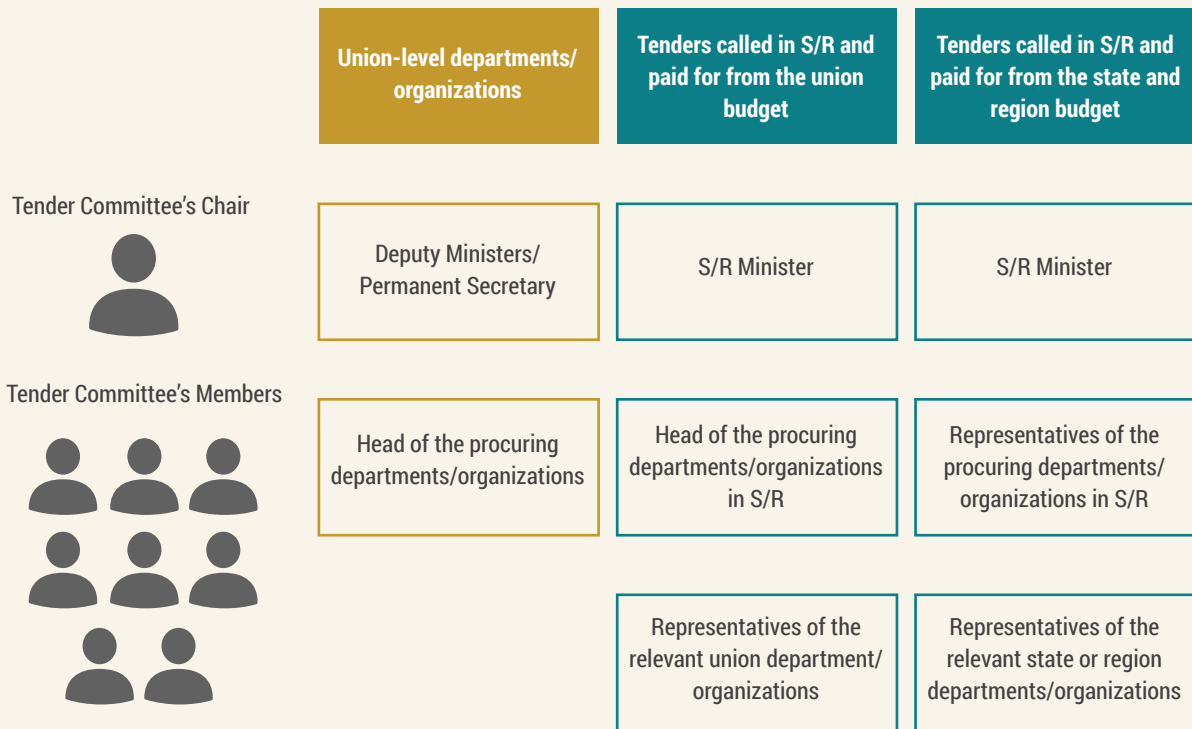
purchases of over MMK 10 m, following the same requirements as The MoC 2016 Guideline (see Figure 2).

The Directive mandates that the procuring entity must form a cross-organization Tender Committee and subcommittees to manage any tender process. These cover tenders for union-level departments/ organizations, tenders called in states and regions and paid for from the union budget, and tenders called in states and regions and paid for by the state and region budget. The Directive is unclear as to whether a Tender Committee must be called for a single procurement (e.g. the construction of one rural road project), or for all procurements related to a specific type of procurement (e.g. the construction of all rural road projects in a township or state or region). The Directive does not specify any role for the President's Office, the (then) Ministry of Planning and Finance, or state and region MPs.

TABLE 1
Tender Committees and their responsibilities, according to Directive 1/2017

COMMITTEE RESPONSIBILITIES	COMMITTEE MEMBERS
<p>Tender Committee</p> <p>Overall management of the tender process, ensuring tender procedures are followed, as set out in the Directive. This involves the creation of sub-committees, the preparation of documents, decision-making and announcing the tender winner.</p>	<p>Varies according to whether the tender is called for union level departments / organizations or is called in a state or region. When called in a state or region the membership varies according to whether the procurement is from the union or state and region budget. See Figure 4.</p>
<p>Committee for Calculating the Floor Price</p> <p>Calculate the floor price of the lease and sale of the state-owned property and report it to the tender committee. <i>To note: this is not technically for procurement.</i></p>	<p>At least three and not more than five representatives from relevant departments who are <i>“well-versed in the market of the lease and sale of the state-owned property.”</i></p>
<p>Tender Acceptance and Evaluation Committee</p> <p>Accept and open tender proposals, evaluate proposals, and prepare an evaluation report for the Tender Committee.</p>	<p>Three to five representatives from relevant ministries who are well-versed in the construction, purchase, and procurement of services, in addition to representatives from the procuring department or organization.</p>
<p>Quality Inspection and Acceptance Committee</p> <p>Assess the quality of goods or services as to whether their quality and standards meet the descriptions specified in the contract. Accept or reject the goods or services on behalf of the procuring department.³⁶</p>	<p>At least three representatives from procuring department or organization.</p>

FIGURE 3
Tender Committee membership, according to Directive 1/2017



The cornerstone of Directive 1/2017 are nine procedures over three stages. These are summarized in the following process map (Figure 4). Each procedure contains multiple steps, split between the procuring department, tender committees, and suppliers.

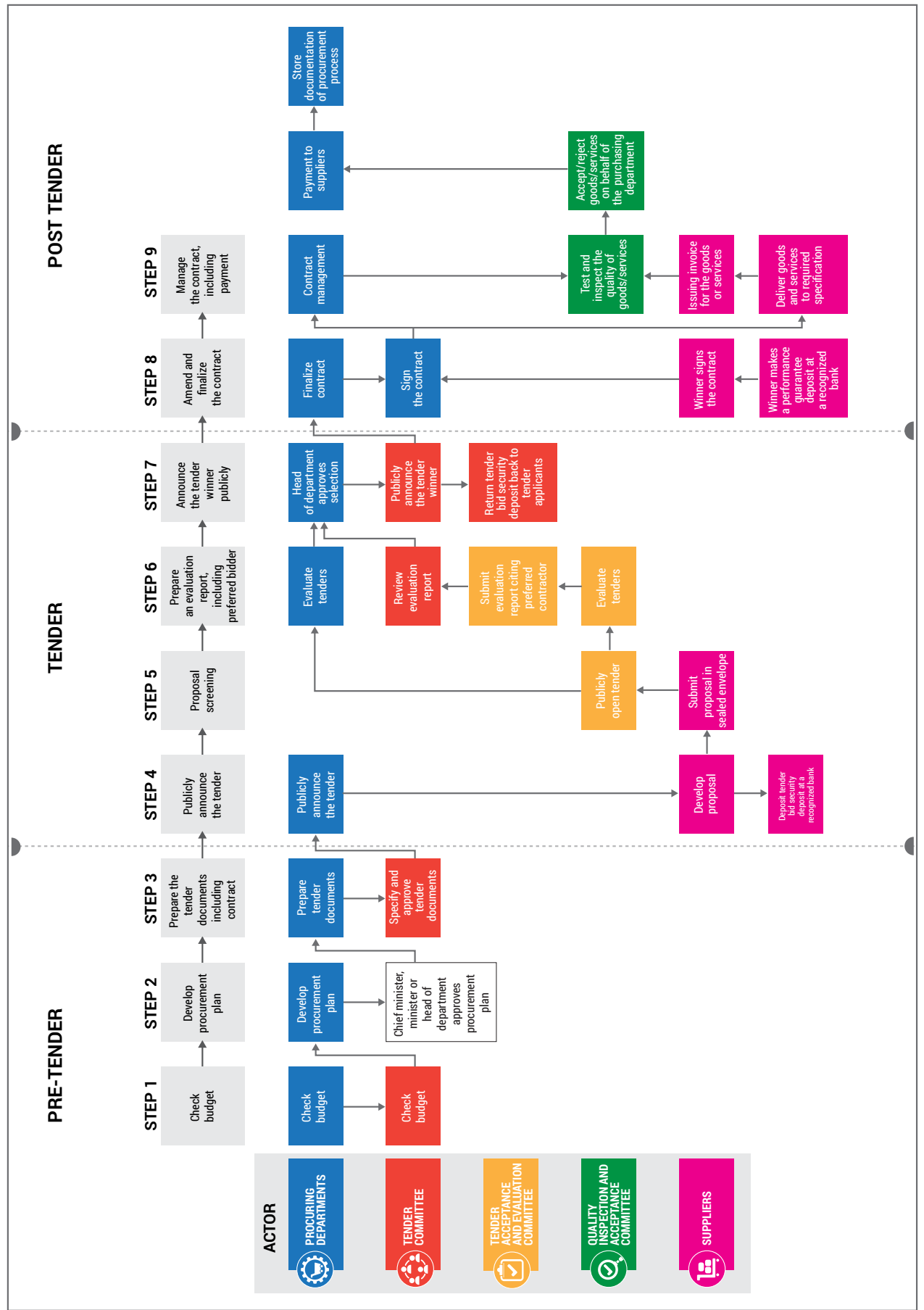
The tender procedures include a number of provisions designed to promote transparency, provide a complaint mechanism, and reduce conflicts of interest and opportunities for bribery and corruption. The measures introduced are summarized below:

- **Transparency:** Upcoming tenders must be publicly announced on government notice boards and websites with the method and timeframe varying according to the size of the tender. On the tender opening day, the tender has to be opened in front of the tender bidders in compliance with the procedure, place, and time stated in the tender documents. When opening the tender, names of the tender bidders, bidding price, tender period, and the amount and time period of the tender guarantee have to be publicly announced. The tender winner is

then publicly announced in front of other tender bidders.

- **Complaint mechanism:** The Tender Committee has to investigate if a bidder complains about a grievance stemming from the tender selection process and is able to present “concrete” evidence to support the complaint. If he/she is not satisfied with the decision of the Tender Committee, it can escalate the complaint to the MoPFI. The ministry then has to establish a complaint resolution team comprising at least three representatives from ministries. The complaint resolution team is expected to record and screen the complaint, hold a discussion with the bidders who complained, and make a judgement on the validity of the complaint. The decision of the complaint resolution team is final and binding. Disputes arising from contract implementation shall be decided through the legal system.
- **Conflicts of interest:** The directive mandates that government departments and organizations must notify the union government if a bid-winning company has a family, social, business

FIGURE 4
Procurement process, according to Directive 1/2017



or project-related relationship with respective union ministers, chief ministers, and members of the government.

- **Bribery or corruption:** The directive sets out actions that can be taken if there are instances or suspicions of bribery or corruption. These can include the cancellation of the contract and

the tender, disciplinary or administrative actions against the employees from the procuring departments and organizations per the existing rules and regulations, and banning the bidders, suppliers, or purchasers from other tenders. The process by which bribery or corruption is investigated and decided upon is unclear.³⁷

BOX 6

Incoming Procurement Legislation – The Public Procurement and Asset Disposal Bill³⁸

The Myanmar Government is in the midst of updating its regulatory framework for procurement through the Public Procurement Bill. The PPRRSC has submitted a Public Procurement Bill for parliamentary approval that, when enacted, will replace the current Presidential Directive No. 1/2017 and the MoC 2016 Guideline.

At the time of writing this report, it was expected that the Bill would be approved by the new Parliament after the 2020 election. The ministry has revised the Bill 18 times as part of an extensive internal union government consultation process. This includes inputs from the now abolished Pyidaungsu Hluttaw Commission for the Assessment of Legal Affairs and Special Issues, the Public Procurement Rules and Regulations Supervision Committee, the Union Auditor General Office, the Union Attorney General Office, the National Economic Coordination Committee, and many others.

The Bill could substantially alter the governance of procurement in Myanmar through the creation of a single unifying legal framework that will set the overall objectives of future legislation and policy, assign roles to specific actors, and centralize procurement policymaking and oversight. Below, we summarize the main expected changes when compared to Directive 1/2017. The Bill:

- calls for the **promotion of local industry** by encouraging procuring entities to favor local suppliers and to conduct restricted tendering to promote local small and medium-sized enterprises;
- has been designed to be complemented by subsequent **secondary legislation** (by-laws, rules, regulations and procedures) that will provide more detailed instructions. These articles have been separated from the law to allow for more regular updating in response to changes in the context and learning from policy implementation;
- assigns the MoPFI a central **policymaking role**. The MoPFI will be responsible for developing secondary legislation and guidance related to public procurement. This includes standardized and unified procurement and asset disposal rules, instructions, and tender documents. But it will also take responsibility for mid- to long-term policies;
- assigns the MoPFI overall responsibility for **monitoring and oversight** of public procurement. This will involve the collection of data from departments and the preparation of annual reports for the union government. This can include working with other actors, such as state and region governments and CSOs, to support a more comprehensive system of oversight;
- assigns MoPFI responsibility for **developing procurement knowledge and skills**, capabilities and training, offering public procurement training courses to promote and develop public officials in gaining knowledge and expertise, and providing advice and technical assistance to procuring entities;
- assigns MoPFI responsibilities for **procurement transparency** and **dispute resolution**, including the creation of a web portal for public procurement information, and a Trust Panel (a tribunal) to judge on disputes in the tender process;
- **simplifies procurement management** arrangements by removing the necessity for the Tender Committee to create three subcommittees. This is now optional;
- adjusts the **membership of Tender Committees** so that membership is apparently no longer based on whether the procurement is from the union or state or region budget. The head of the procuring department will now chair the Tender Committee which will be composed of at least three (unspecified) members. It is unclear what role this assigns for state and region ministers.
- enables procuring entities to choose from **seven tender invitation methods**: open tendering, request for quotations, restricted tendering, two-stage tendering, direct contracting, request for proposals, and e-procurement. Open tendering remains the preferred method for most public procurements.

CHAPTER 4

PROCUREMENT IN PRACTICE: OBSERVATIONS FROM AYEYARWADY REGION AND KAYIN STATE

Legal and regulatory frameworks help shape what is possible within a governance system. They are part of the “rules of the game” that influence how different actors behave. While they can act as a guide, they rarely provide the complete picture, in part because laws, directives and rules must be interpreted by people other than those who designed them. And they must also be adapted to fit the particular context in which actors operate.

This chapter explores how Myanmar’s state and region governments have interpreted and adapted the union-developed legal and regulatory framework set out in the preceding chapter.³⁹ It does this by categorizing the multitude of actors that influence public procurement practice into two discrete categories: those who manage procurement, and those who oversee it. The authors believe that this simplification is necessary to help the reader make sense of the network of interconnected and overlapping groups involved in public procurement.

This chapter uses observations from interviews, focus groups, and workshops to try to show how the management and oversight of procurement takes place in practice. While there are many similarities in practice across Ayeyarwady Region and Kayin State, there are also considerable differences between how state and region government actors interpret and adapt to the legal and regulatory public procurement framework described in Chapter 3. This diversity of practice means that the reader should not interpret these observations as a definitive assessment of practice across Myanmar. This research highlights some important examples of policy adaptations to fit policies to their local context and to respond to learning. The emphasis of the research is on public procurement for infrastructure projects by state and region governments.



LEGAL AND REGULATORY FRAMEWORKS HELP SHAPE WHAT IS POSSIBLE WITHIN A GOVERNANCE SYSTEM. THEY ARE PART OF THE “RULES OF THE GAME” THAT INFLUENCE HOW DIFFERENT ACTORS BEHAVE.



BOX 7 **Policy interpretation and adaptation**

Interviews and workshops have revealed that procurement policy by state and region governments is far more dynamic than it may first seem. While there are few instances of Kayin State or Ayeyarwady Region launching specific policy documents or guidance to assist procurement management or oversight, there are instances of very dynamic processes of small-scale policy experimentation, learning, and adaptation. The research reveals that state and region governments have developed a mix of process modifications and formal and informal instructions, and created or re-constituted organizations, based on their understanding of how to address the specific needs and challenges of their state and region, and to respond to learning from earlier rounds of modifications.

Such a reflective and adaptive policymaking approach is particularly valuable for procurement reform because there is little existing evidence of what works in Myanmar, and because procurement reform is best thought of as a “dynamic game”. Interviews with ministers and MPs revealed a deep appreciation of this dynamism – with an acknowledgement that those that benefit from weaknesses in the procurement system will continue to adapt their own strategies for extracting personal gains in response to policies that try to make this harder. The expanded role of MPs in oversight can be seen as part of this dynamic process, with MPs directed to address perceived weaknesses from the earlier rounds of procurement reform.

The research did identify one concrete example of the creation of more specific (and formally documented) guidance. The Ayeyarwady Region government developed a Standard Operating Procedures (SOPs) for all construction projects in the region. This was adapted from Directive 1/2017 and the MoC 2016 Guideline. It provides officials with a systematic step-by-step set of instructions on how to conduct tender procedures for construction projects. Officials and MPs spoke positively about the SOPs, even in the face of initial implementation challenges. Important lessons were learned through the design and implementation process which have relevance for the union government and other states and regions. Implementation has been paused as the MoC is in consultations with states and regions as part of developing nation-wide SOPs. There is a great opportunity to learn from the experience of the Ayeyarwady region government, and a potential pilot state and region to test what SOPs they do develop.

4.1 WHO IS RESPONSIBLE FOR PUBLIC PROCUREMENT MANAGEMENT AND OVERSIGHT?

A range of actors are responsible for public procurement by state and region governments (Figure 5). Their specific roles can be difficult to untangle given that actors can be involved in multiple stages of the procurement process, and belong to multiple groups (e.g. MPs can act independently and sit on multiple committees that oversee procurement). In an attempt to simplify the situation, the authors believe that it is possible to broadly split actors’ responsibilities into two different functions: management and oversight. Management: As public procurement in Myanmar is decentralized to individual departments, state and region departments and organizations play a critical role in the procurement process as the main







procuring entities. They lead the pre-tender process to specify procurement needs, develop procurement plans, assemble the necessary documentation, conduct tenders, select and manage the winner, and respond to complaints. They do this as direct implementers, and as members of Tender Committees and their subcommittees. Much of the more direct engagement with tender winners takes place at the township level, given that the township has the closest office to a project. State and region ministers are typically responsible for several departments, and act as chairs of their respective Tender Committees. The interviews for this study highlighted the often informal, but important, role that ministers play in coordinating the functions of







different actors. The MoC plays an important role in supporting the management of procurement by providing technical expertise at different stages of the procurement cycle. For instance, engineers from the MoC support the screening of technical proposals, provide guidance to committee members, and participate in the inspections of construction projects.

Oversight: State and region MPs oversee inspections of projects, monitor adherence to

procurement procedures, and scrutinize and report to ministers and party colleagues on the use of public funds. They do this independently, and through their membership on specific committees, such as the Construction Work Inspection Committees (*Ti-Kaw*) and state and region PACs – Budget Oversight Committees. Since 2016, private businesses have served as independent project quality inspectors.

FIGURE 5
Actors responsible for the management and oversight of public procurement by state and region governments

ACTOR	ROLE IN PUBLIC PROCUREMENT
Ministers of state and region governments	 <p>According to Directive 1/2017 state and region ministers manage tenders called in states and regions through their position as chairs of the Tender Committees. This applies for procurements drawn from both the union budget and state and region budgets. They ensure the tender procedure is followed and support the Tender Committee to respond to implementation challenges. They also support coordination between different actors throughout the procurement process.</p>
State and region departments and organizations	 <p>According to Directive 1/2017 state and region departments initiate and manage tender processes as the procuring entity. Departmental representatives are members of Tender Committees in their capacity as the lead procuring entity or as a “relevant” department with some interest or expertise in the procurement. Representatives of the department are typically directors, deputy directors, assistant directors or technical specialists such as chief engineers.</p>
Representatives of union departments and organizations	 <p>According to Directive 1/2017 tenders called in states and regions using the union budget must have a representative of the union department as a member of the Tender Committee.</p>
State and region departments under the Ministry of Construction	  <p>According to the MoC 2016 Guideline, MoC state and region engineers are assigned as technical experts and provide recommendations in the selection of quality control companies. They play a major role in supporting pre-engineering work. Engineers are invited to join committees in project design, assessment and evaluation, tender and inspection of projects.</p>
State and region chief ministers	 <p>While chief ministers are not members of Tender Committees, they oversee the spending of public funds within their state or region. They approve some procurement plans and for more complex or sensitive procurements they may take on a more active role in setting the direction and coordinating actors. They help shape the development of procurement policy by supporting state and region ministers and departments to interpret union policy and by shaping state- and region-specific procurement system objectives.</p>

ACTOR	ROLE IN PUBLIC PROCUREMENT
State and region MPs	 Directive 1/2017 does not specify a role for MPs. However, through their wider mandates to address the needs of their constituents, MPs play an important role in monitoring the completion and quality of projects. MPs can be included as members of the committees related to public procurement (see below). In Ayeyarwady a notification was issued stating that MPs can fill in for ministers' responsibilities in the procurement process, at ministers' discretion.
Public Accounts Committee (known as the Joint Public Accounts Committee in Kayin State)	 Article 167 of the 2008 Constitution enabled the creation of state and region Public Accounts Committees (PACs) made up of state and region MPs. PACs are responsible for ensuring the effective use of public spending and through this broad remit they have played roles in monitoring the completion and quality of infrastructure projects. They also support the tracking of poor-performing contractors.
State and region Auditor General's Office	 State and region Auditor General's Offices approve the completion of infrastructure projects. ⁴⁰
Construction Work Inspection Committees (<i>Ti-Kaw</i>)	 President Office's Order 9/2016 established a union-level Construction Work Inspection Committee to approve, suspend, cancel or revise national construction-related projects. State- and region-, district- and township-level versions were later formed to assist quality control. These committees include representatives from respective procuring government departments, the MoC and regional MP for township level or responsible minister at state/region level. For construction projects the construction work inspection committee inspects the quality of the projects.
Third party / quality control agency	 In 2017 the MoC issued an order to state and region Construction Departments to hire independent businesses to assess the quality of procured construction projects. Their findings are submitted to the procurement Quality Inspection and Acceptance Committee. In Ayeyarwady the role is divided in two with a 'quality control' agency to check the quality of the procured construction project and a 'third party' agency to assess projects where the quality control agency's verdict is disputed.
State and region budget departments and Finance Ministers	 State and region budget departments play a limited role in the public procurement process. Once budgets have been approved the budget department's role is limited to tracking budget progress of projects. The departments are not typically members of the Tender Committee. State and region finance ministers are similarly not members of the Tender Committee (unless the minister is also responsible for another department). They do not play an active public procurement policy role.

4.2 WHAT GOVERNS MANAGEMENT AND OVERSIGHT OF PUBLIC PROCUREMENT?

Management

Directive 1/2017 was almost universally referenced in interviews with government officials as the main regulatory framework governing public procurement by state and region governments. In particular, almost all government actors interviewed demonstrated familiarity with the tender procedure set out in Directive 1/2017. Familiarity with the MoC 2016 Guideline was lower across officials, in part reflecting its narrower scope. Officials at all levels also made reference to the 2018 4th Amendment to the Anti-Corruption Law's stipulations that if they don't follow Directive 1/2017 they are breaking the law. Interviews suggested that this appears to be down to a concerted effort by the Anti-Corruption Commission to communicate this, and other key aspects of the Anti-Corruption Law, to departments.

Businesses that have worked as government contractors or third-party quality control agencies also demonstrated an awareness of the major guidelines. However, interviews with businesses involved in public procurement revealed that their understanding of the nine-step tender procedure within Directive 1/2017 was limited.

Interviewed government officials in each state and region insisted that the nine major steps of the tender procedure are now followed. This includes the establishment of the relevant committees, preparation of tender documents, public announcements of upcoming tenders, tender evaluation and selection processes, tender inspection, and operation of a functioning complaint mechanism. The gaps in how procurement is

managed relative to the goals of the legal and regulatory framework can be found within the specific details of how those nine major steps are managed, covered later in the chapter.

Oversight

The research reveals that the oversight of state and region public procurement stems from a more complex and diffuse set of rules, regulations and responsibilities. Committees and MPs are governed by legislation and policy that sits outside of Directive 1/2017. This makes their roles no less important or impactful; however, it is harder to identify the specific policy frameworks that shape actors' behavior.

It is noteworthy that Directive 1/2017 and the MoC 2016 Guideline have little to say on how procurement should be overseen. The upcoming Procurement Bill is expected to change this situation, however, with the MoPFI assigned a specific role in monitoring adherence to the bill and future policies. What impact this will have on state and region government procurement remains to be seen, though this research suggests that care should be taken to consider how new oversight responsibilities will map onto the existing web of actors fulfilling that role. Given that the MoPFI is relatively new to policymaking, and will be assuming responsibility for procurement policy for the first time, the research suggests much can be learned from the current experience of state and region actors and the policy adaptations they have developed.

4.3 MANAGEMENT IN PRACTICE

This section provides highlights from field research on how tender committees and procuring departments and organizations (simplified to "procuring departments" from this point on) manage the procurement process. It structures this according to the three main stages of the procurement cycle. It provides some case studies and shines a spotlight on challenges that were identified as important across both locations. It concludes with some highlights of perspectives from businesses.

Pre-tender: Procurement planning

There appears to be considerable variation in how different departments and states and regions approach procurement planning and pre-engineering work, warranting further investigation than was possible in this research. Directive 1/2017 contains limited guidance on what form procurement plans must take and who must approve them. It states that every procurement must have a procurement plan and that this must be approved by the relevant union ministry, heads of departments or organizations, or the state or

BOX 8

Tender Committees in practice

Directive 1/2017 identifies Tender Committees as serving a critical management function in public procurement in state and regions. They are established as the main entity that must ensure the requirements within the Directive are followed, which includes creating the three sub-committees and managing their operations.

The Directive lacks details on how Tender Committees should function, i.e. how decisions should be made, instructions issued, or disagreements resolved. Interviews with officials in Ayeyarwady Region and Kayin State found considerable diversity in how Tender Committees function in practice; unsurprisingly given the lack of guidance. Common across interviews was that Tender Committees tend to act as coordinating bodies delegating tasks to committee members and other officials; they also problem-solve implementation challenges, and provide some degree of overall accountability for tender procedures being followed. The sub-committees they establish are typically comprised of members of the Tender Committee.

The research revealed that how Tender Committees function in practice depends on the personalities involved, the relative authority and expertise of different members, and the sector of the procurements. In some Tender Committees departmental engineers (especially MoC engineers) play a very active role in discussions due to the authority granted to them by their technical expertise. Below we provide a short case study to help illustrate how a Tender Committee works in practice, though we advise against generalizing from this single example.

Ayeyarwady Region Tender Committee for Public Procurements in the education sector

For procurements by the Ayeyarwady Region Department of Basic Education, using the union budget, the Social Affairs Minister typically assumes the role of chair of the Tender Committee. On some occasions the Divisional Officer of the Education Department assumed the role of chair. Other members include representatives from the Department of Highways (normally the Deputy Director who acts as a joint secretary of the Division Construction Work Inspection Committee) and other departments which have engineers.

For education construction procurements in Ayeyarwady Region the tender plans are typically prepared by district due to the large number of projects, though this can vary according to the size of projects. After the pre-tender process is complete and the tender is announced, the Tender Committee forms a Tender Acceptance and Evaluation Committee, in line with Directive 1/2017.

Within the annual budget cycle the procurement process takes between one and three months to transition from pre-tender to contract signing. This process can be delayed if a complaint is made. As there are many projects the procuring departments are the key players and the Social Affairs Minister reported not being able to join all tender openings due to other priorities. To address this the Ayeyarwady Region government circulated a letter that officially sanctioned regional MPs to join and observe all tender openings on behalf of ministers.

region chief minister. It is ambivalent about who must provide approval as to whether each individual project must have its own separate plan or whether project plans can be packaged together and then submitted for approval.

Interviews revealed that practice varies across states and regions and departments. Public procurements are typically bundled together according to the specific sector of the procurement and the type of procurement. Plans can also be approved that cover procurements across a

township, a district, or the entire state or region. More complex projects can require individual approval. As an illustration, in Ayeyarwady Region it was reported that for construction related to schools, education department officials first check the approved budget is ready and then compare this against the projects in each township. These individual plans are then aggregated together to cover a district and this is submitted for approval by the Ayeyarwady Region Social Affairs Minister. However, there is no standard approach.

In both Kayin State and Ayeyarwady Region procurement planning can be undermined by upstream decisions made around planning and budgeting (such as how much budget to assign for a bridge). Officials in both locations pointed to project budgets being too low for the task at hand. This is especially problematic when there is considerable variation across states and regions in the costs to construct a building; for example, there may be higher costs in parts of the country that are harder to access and supply. Where departments have costed similarly designed buildings the same, no matter where they are built, this has led to tender processes where no bids are received, or the bids are of low quality. To offset this some departments have adjusted the costs and others have adopted a cross-subsidization system that pairs high-cost projects with low-cost ones, allowing businesses to offset losses in one location with profits from the other.

Tender: Tender documents, announcements and openings

To meaningfully participate in a tender process potential suppliers need to know that a tender is due to take place, have sufficient time to prepare for the tender, and have sufficient information to develop a feasible, compelling and profitable tender proposal. What information gets revealed to companies is therefore critical for the overall transparency and fairness of the procurement system. A lack of information in the tender document usually results in suppliers increasing their margins, to account for the greater risks, which increases costs or decreases quality.

Interviews revealed that Ayeyarwady Region and Kayin State governments have taken transparency in tender announcements and openings seriously, with compelling evidence that the prescriptions in Directive 1/2017 are typically followed, with some examples of government departments and ministers trying new approaches to further promote transparency. However, interviews with ministers, MPs and businesses raised serious concerns that transparency, fairness and the integrity of the system are undermined through the inconsistent disclosure of project specifications (e.g. construction drawings) to give specific businesses an edge during tender evaluations.

An additional concern is that low project budgets can restrict the quality of information gathered for tender documents. Interviews in Kayin State suggested that most tender documents were incomplete, requiring companies to prepare their own designs, and that pre-engineering work to assess site suitability was not conducted. Even when some budget has been made available for pre-engineering work there can be challenges.

For instance, in 2018/19 the Ayeyarwady Region government took steps to try to improve the quality of information in construction project tender specifications. This included conducting feasibility studies, soil tests and other pre-engineering work that would help develop more appropriate Bill of Quantities (BQ). It contracted out the pre-engineering work to a private company, and unfortunately this company under-performed relative to expectations. The engineers hired were relatively inexperienced, resulting in cases of inaccurate information being used to develop BQ and budget estimates. However, it is not unusual to have private sector limitations, especially if this work is being commissioned for the first time. The initiative is commendable and the regional government is applying the learning from this practical experience to adapt the process next year.

Interviews suggested that government departments at the state and region level do systematically and consistently publicly advertise tender information on their notice boards at least two weeks before tender invitation or in public newspapers one month in advance when projects are over MMK 10 million, in line with Directive 1/2017 and the MoC 2016 Guideline.

In Ayeyarwady Region, the Social Affairs Minister described some of the efforts taken to be “as transparent as possible”. Tender proposals are publicly opened in front of all tenderers and displayed on a projector. This includes disclosure of the criteria used to assess the tenders and the points scored by each project for each of the criteria. In another example of policy innovation the Social Affairs Minister for Ayeyarwady Region has turned to livestreaming the tender openings on her Facebook page. Such a practice is especially valuable as government departments look to enforce social distancing measures in response to COVID-19.

ကရင်ပြည်နယ်၊ အစိုးရအဖွဲ့
ကရင်ပြည်နယ်၊ ဘားအံမြို့
အိတ်ဖွင့်တင်ဒါ(Open Tender) ခေါ်ယူခြင်း

၁။ ကရင်ပြည်နယ်အတွင်းရှိ အခြေခံပညာ(အထက်တန်း၊ အလယ်တန်း)ဆင့်သင် ကျောင်းသား/သူများ အားလုံးအတွက် ဗလားစာအုပ်များနှင့် အခြေခံပညာ(အထက်တန်း၊ အလယ်တန်း၊ မူလတန်း)ဆင့်သင် ကျောင်းသား/သူများ အားလုံးအတွက်(ခဲတ်၊ ဘောပင်) များ အခမဲ့ထောက်ပံ့ပေးရန် လိုအပ်သော ဗလားစာအုပ် များနှင့် (ခဲတ်၊ ဘောပင်)များအား တင်ဒါ(အိတ်ဖွင့်)စနစ်ဖြင့် ဝယ်ယူပါသောကြောင့် မြန်မာနိုင်ငံသား လုပ်ငန်းရှင်များအား တင်ဒါတင်သွင်းနိုင်ရန် ဖိတ်ခေါ်အပ်ပါသည်။

၂။ ကရင်ပြည်နယ်အတွင်း ဗလားစာအုပ်ဖြန့်ဝေမည့် ဒါဇင်အရေအတွက်မှာ (၁၄၄၅၈၁)ဒါဇင် ဖြစ်ပါသည်။

၃။ ကရင်ပြည်နယ်အတွင်း ဖြန့်ဝေမည့် ခဲတ် ဒါဇင်အရေအတွက်မှာ (၈၃၉၄၇) ဒါဇင် ဖြစ်ပါသည်။

၄။ ကရင်ပြည်နယ်အတွင်း ဖြန့်ဝေမည့် ဘောပင်ဒါဇင် အရေအတွက်မှာ (၂၄၀၉၇) ဒါဇင်ဖြစ်ပါသည်။

၅။ တင်ဒါများကို အောက်ပါအတိုင်း ရောင်းချပေးမည်ဖြစ်ပြီး အသေးစိတ်သိရှိလိုပါက ဖုန်း- ၀၅၈-၂၃၃၇၃၊ ၀၉-၄၂၅၀၃၈၁၉၊ ၀၉-၇၇၆၃၇၉၃၃၇၊ ၀၉-၇၉၉၂၅၆၁၈ တို့သို့ ရုံးချိန်အတွင်း စုံစမ်းနိုင်ပါသည်-

(က) တင်ဒါစတင်ရောင်းချမည့်ရက်	-	၂၈-၇-၂၀၂၀ ရက်
(ခ) တင်ဒါပိတ်မည့်ရက်	-	၅-၈-၂၀၂၀ရက်၊ ၁၆:၀၀ နာရီ
(ဂ) တင်ဒါရောင်းချမည့်နေရာ	-	ပြည်နယ်ပညာရေးမှူးရုံး၊ ဘားအံမြို့

အိတ်ဖွင့်တင်ဒါ စီစစ်ရေးအဖွဲ့

BOX 9 Fair competition?

An explicit objective of Directive 1/2017 is to promote competition as a means to improve the value for money of public procurement projects. The theory goes that with more competition comes better quality tenders, better tenders selected, and so better projects finished. Yet ministers across states and regions raised serious concerns that this potential was being undermined.

A critical component of developing a winning tender is understanding the requirements of the tender. This influences the design of the technical proposal and estimates of the cost of delivering to those requirements. Yet the research revealed that there are many cases where firms do not have enough information on which to develop accurate proposals. Tender documents lacked construction drawings, BQs were missing or inaccurate, or information from feasibility studies was absent.

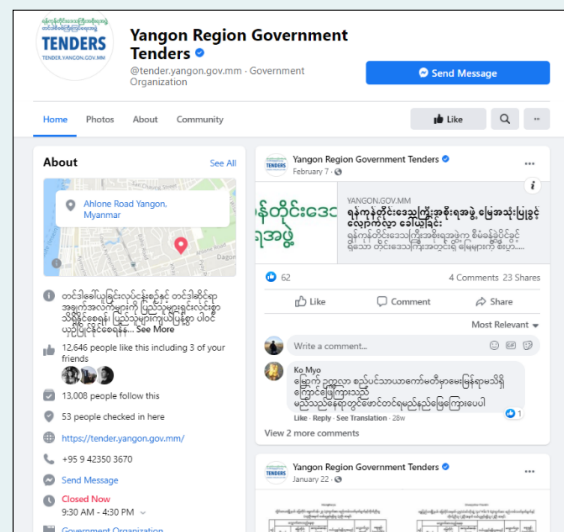
In the worst instances the absent information is deliberate. By revealing important information to a favored business, and not others, an official is able to increase the chances this business wins the tender. The absent information is valuable, enabling more unscrupulous officials with access to the information to exchange it for money, gifts or favors.

There are clues as to such practice taking place. Business groups refer to the “lucky number” whereby tenders appear to almost magically exactly match the lowest price the Tender Committee would be willing to accept for the tender (tenders below a certain price are often not accepted as they suggest that the tender is based on an unrealistic understanding of the project specifications). Such actions would represent a violation of the integrity of the procurement system, undermine transparency, reduce competition, and undermine the value for money of procured goods and services. MPs reported an increasing appreciation of the signs to look out for, the steps they have taken to respond, and the need for constant vigilance to spot new and old ‘tricks’.

Not all poor information disclosure is malicious. Sometimes information is absent because of simple neglect, an under-appreciation of the value of the information, or limited resourcing. Officials and ministers spoke of the challenges of finding sufficient budget to conduct sufficient pre-engineering work to provide suppliers with the information they need. However, when this information is not provided it shifts the costs of preparing these on to suppliers (who must each individually develop the information at potentially greater expense to society overall). In Kayin State businesses claimed that because construction drawings for tendered projects were not provided in many cases, they had to prepare their own drawings. This increases the costs to businesses in submitting bids, which can deter competition, and favor more established businesses that have already worked with the government on similar projects.

BOX 10 Moving online

As part of Myanmar’s eGovernment reforms, many government departments have created websites and Facebook pages as depositories of information and, more recently, platforms for two-way conversation. One standout approach to improving transparency in public procurement is the approach taken by the Yangon Region Government Tender Screening and Evaluation Committee. All important tender information, such as all tender invitations, list of registered qualified professionals and quality controllers, and tender processes, can be viewed online. As most people (and many smaller businesses) in Myanmar do not visit websites, the Committee established a Facebook page in 2017 that is open to all Facebook users. Its 13,000 followers can track the latest tender announcements and awards. It is not perfect though, as by late 2020 it had not been since February 2020.



The Ayeyarwady Region government website includes a section for information on tenders, though the page was blank at the time of writing.⁴¹ The Kayin State government website does not have a section for information on tenders, though this can be found on some specific departments' websites and Facebook pages. The research finds that practice varies considerably and that with the exception of some standout cases, such as the Ayeyarwady Department of Urban and Housing Development and Yangon Regional Government, there is limited attention paid to tailoring communications to the most appropriate channels for the intended recipients.

Tender: Tender evaluation

Tender evaluation is an area where we observe considerable policy adaptations and variation in practice. Directive 1/2017 is ambiguous about how projects should be evaluated, enabling state and region governments to interpret the guidance and develop their own policy positions. Interviews revealed that the initial starting point for many state and region departments was the points scoring system put forward in Directive 1/2017 for large and complex projects (with no definition of these provided). Even though it referred to large and complex projects it has somewhat unintentionally served as a sort of template that departments can use and modify.

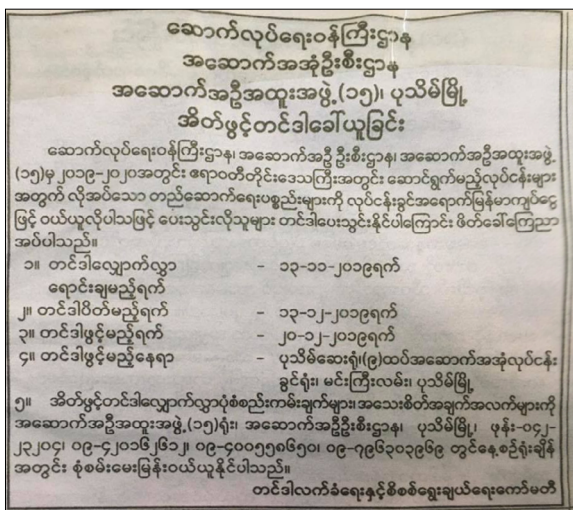
Large and complex projects – bid criteria ⁴²	Points
Experience and capacity of the tender bidder	0 – 10
Methodology	0 – 10
Compliance with important standards	0 – 20
Employees	0 – 10
Offered price	50 – 70

The large and complex projects bid criteria within Directive 1/2017 prioritizes the offered price (with over 50 points available). In the absence of additional guidance this may account for why some departments similarly consider the offered price as the most important variable when evaluating tender proposals. This emphasis on offered price is reinforced by the MoC 2016 Guideline which calls for a two-stage system whereby technical proposals are evaluated first, and only those that pass the first stage make it to the second stage. In the second stage the lowest price is then selected.

State and region government departments from both Kayin State and Ayeyarwady Region have interpreted what limited guidance is available and developed their own scoring system to fit their context and policy preferences. These scoring systems have continued to evolve in response to lessons state and region governments have learned through their management of the system. This has led to an interesting divergence in practice, each of which has its own logic.

In Kayin State, a maximum of 70 points (out of 100) are available for the technical proposal (which contains information on the price, quality and methodology) and 30 points for the tender proposal (which according to those interviewed contains general information on the company, including its past experience). This is compared to existing lists that have been developed that assign companies a classification based on their past performance. In Ayeyarwady Region, for health and education projects the profile and background history of suppliers is worth 22 points (out of 100) and the offered price is worth 20 – 30 points.

Ayeyarwady – bid criteria ⁴³	Points
Experience and capacity of the tender bidder	0 – 22
Methodology	0 – 15
Compliance with important standards	0 – 16
Employees	0 – 17
Offered price	20 – 30



Both of these approaches represent a seemingly clever response to other challenges in the public procurement system. Past efforts to try and blacklist companies triggered a counter-response from poor-performing suppliers, which re-registered under a new name. Increasing the weighting placed on past experience makes this option less attractive to suppliers, though it can also make it harder for genuine new entrants to the market to win tenders.

Actors are having to constantly navigate these difficult trade-offs and to adjust policy as they learn more about what works in their context.

Another marked difference in evaluation approaches reflects a difference in the objectives of state and region governments. In Ayeyarwady Region the state government wishes to promote local businesses by favoring them through the procurement process. Local businesses are awarded an additional 20 points, similar to the practice in Mon State. However, business owners interviewed in Kayin State reported that the Kayin State government has reduced this over time to only two points for local companies. One government minister interviewed in Kayin State described how many local companies active in Kayin State were regarded as local cronies affiliated with former military officials, and that they lacked the proper technical knowledge. The Ayeyarwady Region government also incorporates the recommendations of MPs into the evaluation process, though it is unclear just how this influences the evaluation process in practice.

Tender: Complaint mechanism

An important component of a fair public procurement system is the operation of a complaint mechanism that allows tender bidders to report any allegations of improper process or discriminatory treatment. Interviews with state and region government officials suggest that the complaint mechanism is seen as more of a problem than a tool for protecting the integrity of the system. Ministers worry, perhaps reasonably, that the complaint mechanism is used by disgruntled bidders to punish the government by delaying the process.

The Ayeyarwady Region government has interpreted Directive 1/2017 as allowing it to restrict the timeframe within which businesses can file a complaint. Businesses are allowed to file a complaint with the Tender Committee up until the end of the tender award meetings, when all bidders are brought together, and not afterwards.

Interviews with businesses did not identify any particular concerns with the complaint process.

BOX 11 Some perspectives of suppliers in Kayin State

Government adherence to tender procedures has improved

“Although there are some areas to be improved in tender procedure, compared to previous governments, at least 70 percent to 80 percent of government departments have improved, compared to before and they are less corrupt”. – Member of the Kayin State Young Entrepreneur Association

Government pays more but expects more

“While the [payments per area constructed] have increased, the structure and designs have also been adjusted and the procuring departments’ demands of us have increased.” – Member of the Contractor Association, Kayin State

Government should move procurement online

“I am working with international NGOs for construction projects in ceasefire areas. They use an online system effectively. I get all necessary information related to the tender from them online. I just need to upload the tender proposals. We use an email and online system. We don’t need to meet anyone. It’s very efficient and effective. I don’t understand why the government is not using an online system for procurement.” – Member of the Kayin State Engineering Association

Businesses want to be able to deposit their 10 percent performance guarantee in banks of their choosing

“The Kayin State Attorney General instructs us to use Myanmar Economic Bank, but with them we have to pay 1 percent of the deposit each year for retention. Over two years that costs us 2 percent of our deposit. We also don’t have that much cash and so may have to borrow money to make the deposit, costing us even more.” – Member of the Kayin State Engineering Association

Government doesn’t understand our cash flow challenges

“When 25 percent of the project work is done we are supposed to get paid, but it takes many months to receive that installment. However, we cannot just stop construction work and wait for the money and so typically we only receive the installment after 35 to 40 percent of the project work is completed. They don’t care whether we are able to make a profit and don’t understand how important our cash flow situation is to us, our subcontractors and workers.” – Member of the Contractors Association, Kayin State

However, they did identify parallel complaint mechanisms being adopted with companies and communities looking to complain directly to their MPs (who they are more familiar with), government ministers and state, region or union Anti-Corruption Commissions. The research uncovered anecdotes of officials being presented with copies of letters submitted to these institutions, including copies of letters sent to the President's Office and the State Counsellor's office.

Post-tender: contract management, penalties and blacklisting

One of the main differences between Kayin State and Ayeyarwady Region is how tendered projects are managed according to the contract. Interviews suggested that in Kayin State the Chief Minister has been very active in encouraging officials to finish all tender-awarded projects within the year, and in exploring ways to support the contractors to finish the projects on time. However, in Ayeyarwady Region, which is a larger entity with considerably more procurement projects, the cabinet takes a less direct role in engaging with suppliers, and all tender awarded projects which did not finish in a financial year are paid back as underspent budget.

In both Ayeyarwady Region and Kayin State, efforts are taken to penalize contractors that fail to meet project expectations or that bribe officials. The Ayeyarwady Region government places companies that are reported to have attempted to give bribes

onto a blacklist. In Kayin State efforts are made to keep track of construction companies' past performance, with companies placed into four different categories (A, B, C and D). Those that have delivered to an appropriate quality are assigned as a category A or B. If the government has projects that need to be finished urgently or in which the initial tender process resulted in no bidder, then companies from these categories are given preferential treatment.

Interviewees reported that the effectiveness of these systems is undermined by the relative ease with which blacklisted or low-rated companies can change their names or move to another state or region. One downside of the ease with which the Directorate of Investment and Company Administration (DICA) allows companies to be registered is that it makes it harder to track the owners over time. There is no centrally controlled system to trace the performance of poor-performing companies and interviews suggested that coordination among government departments does not work well.

The Ayeyarwady Region tender evaluation scoring system illustrates one approach to overcoming these shortfalls. The high weighting placed on the profile and background of bidders may make it harder for new entrants to compete, but it also acts to discourage companies from re-registering.

4.4 OVERSIGHT IN PRACTICE

Both Ayeyarwady Region and Kayin State have taken on additional responsibilities with the aim of improving the quality of public procurements. Both areas hire businesses to conduct third party quality control assessments. In addition, state and region MPs take an active role in project inspection through their membership of township and state and region committees. Interviews suggest that they are also playing a role in 'overseeing the overseers' by monitoring how actors responsible for procurement oversight fulfil those duties (or don't).

The quality control – third party system

Both Ayeyarwady Region and Kayin State hire companies to act as third party quality control companies and to arbitrate on disputes related to the quality of construction projects. The quality control – third party system only began in 2017, following a proposal from union MPs. The Deputy Minister of Construction then established a system

at the union and state and region level. State and region governments have since adapted the instructions and employ different approaches according to their specific context (e.g. the size of the state or region and number of projects to be covered). In Kayin State a single "third party quality control" company was hired to independently oversee the quality of tender projects throughout the State.

In Ayeyarwady Region the role is split into two with "quality control" companies hired to independently assess the quality of construction projects. These companies are paid 2 percent of the project's value for the service. In Fiscal Year 2019/20 nine companies were commissioned by Ayeyarwady Region for "quality control", with each responsible for specific townships. "Third party" companies are hired to provide a technical assessment of the project in the event that there is a dispute between

BOX 12**Ayeyarwady Region school construction inspection and approval process**

Once the contracted construction company has finished the construction of a school building, or a specific contractual milestone, it informs the school principal. The principal then informs the township *Ti-Kaw* that the project is ready for inspection. If a quality control company has been hired then it is assigned to conduct an assessment of the completion status and quality of the project. It submits a report to the *Ti-Kaw* which must then sign off that the milestone or project has been completed to the required quality. Once the *Ti-Kaw* has signed off on the milestone or final project the procuring department is able to process the payment to the construction company. According to MPs interviewed in Ayeyarwady Region, a project can require inspection on at least four different occasions, in line with the milestones and payment schedule in the contract. The region *Ti-Kaw* typically keeps records of project status and inspection reports by quality control businesses. The Ayeyarwady Region Auditor General's Office staff usually makes a site visit at the end of the project.

Ayeyarwady Region is experimenting with different configurations of actors responsible for inspection and approvals. In 2018/19 the Social Affairs Minister replaced the role of the *Ti-Kaw* with a new committee called the Health and Education Work Supervision Committee that included a more active role for MPs. Interviews suggested that having more actors in an oversight role doesn't necessarily equate to improved outcomes. Interviews with businesses and officials revealed that a greater number of actors having to sign off on project completion can result in either greater delays or an increase in requests for bribes to speed approval. Delays are bad for business and for government departments, which need to finish projects within the fiscal year the budget was allocated to them.

In addition, a number of MPs raised concerns that some quality control companies and some actors within committees did not even visit project sites and that some members sought bribes in exchange for timely payment. It can be difficult to determine whether delays are due to limited resources, poor coordination, or gaming by actors in the system. Understanding these issues requires a detailed understanding of the local context, which helps explain why MPs have been encouraged to play a more active role in overseeing the overseers.

the contractor and the government or the contractor and local community. The government runs separate tenders for quality control companies and those that win a contract can be assigned to act as a "third party" on projects in other townships.

State and Region MPs and oversight committees

Interviews in Ayeyarwady Region and Kayin State suggest that state and region MPs have played an active and increasing role in the oversight of public procurement processes. They have done this in their capacity as members of committees such as the *Ti-Kaw*, township-level work supervision committees and Public Accounts Committees. Directive 1/2017 and the MoC 2016 Guideline do not specify a role for MPs. Their role is an evolving one that appears to respond to gaps identified by state and region governments in the current legal and regulatory environment.

During 2020 the Ayeyarwady Region government experimented with replacing the role played by quality control companies/*Ti-Kaw* for education and health procurements with township-level work supervision committees. MPs are members of these committees and they are chaired by township education or health officers, with township

engineers from the Department of Highways acting as secretaries. This responds to concerns that the *Ti-Kaw* were not fulfilling their responsibilities in a way that maintained the integrity of the procurement system.

MPs also appear to play a role monitoring other oversight actors, notably quality control – third party businesses and the public officials sitting on different committees. Members of the Public Accounts Committees have a responsibility to oversee how public funds are spent, though they often take a surprisingly "hands on" role in the sense that MPs make themselves physically present in committee meetings and personally inspect project sites. MPs are also able to tap into their networks in the townships to understand how implementation and oversight is taking place. Interviews suggested that this had helped discover instances of quality control companies violating their own contracts by relying on photographs sent by construction companies instead of physically investigating the site.

CHAPTER 5

CONCLUSION

5.1 FINDINGS

FINDING 1 – State and region governments play a central role in the management and oversight of public procurement in Myanmar. State and region departments and organizations and ministers are responsible for managing the majority of public procurements tendered in states and regions, drawn from both the union and state and region budgets.

FINDING 2 – State and region government public procurement practice is guided by an expanding set of union government legal and regulatory frameworks. Presidential Directive 1/2017 is currently the primary legal and regulatory framework governing public procurement processes in Myanmar's states and regions. For infrastructure projects the MoC 2016 Guideline is also critical. Businesses report improved adherence to these frameworks and reduced instances of corruption. But these directives and guidelines are very high-level and do not by themselves equip officials with the information needed to more effectively manage and oversee public procurement.

FINDING 3 – While there are many commonalities, practice can vary considerably between states and regions and across departments. To implement the existing legal and regulatory frameworks, in the absence of more relevant guidance, state and region governments have had to undertake a difficult process of policy interpretation and adaptation. The downside of this has been an unnecessary duplication of effort across states and regions – such as in the creation of bidding documents. The upside is that this process has resulted in some notable examples of policy innovation, such as the creation of SOPs and the tailoring of tender scoring systems to local policy priorities and lessons from earlier reforms.

FINDING 4 – There is an opportunity for the MoPFI and the MoC to learn from the experience of state and region governments. The research did

not uncover any examples of union government ministries actively looking to learn from the implementation experience of state and region governments. In part this is because there is currently no central authority responsible for public procurement policy. But it may also reflect a more general policymaking norm within the union government of developing policies and then instructing lower levels of government to execute them faithfully, with little consideration for feedback. It is notable that while the upcoming Public Procurement and Asset Disposal Bill was developed with extensive consultation with union government organizations and business associations, we found no evidence that state and region governments were included in the consultation process.

FINDING 5 – The management of public procurement is principally the responsibility of Tender Committees and procuring state and region departments. Procuring departments lead implementation and state and region ministers work to ensure processes are followed and play a coordinating role as chairs of Tender Committees. For infrastructure projects, engineers from the MoC and other state and region departments play an important role in tender committees as technical experts.

FINDING 6 – Oversight of public procurement is currently a decentralized function with a range of different actors playing a role. Oversight of state and region public procurement stems from a complex and diffuse set of rules, regulations and responsibilities. A Quality Control - Third Party system has been developed that employs independent companies to oversee construction projects. MPs play an active role, individually and through their membership of committees, though they are governed by legislation and policy that sits outside of Directive 1/2017.

FINDING 7 – State and region MPs play an important role in overseeing public procurement by state and region governments. State and region MPs provide oversight by supporting the inspection of specific projects, monitoring adherence to procurement procedures and reporting to ministers and party colleagues, and by generally scrutinizing the use of public funds. They do this independently and through their membership of specific committees, such as the *Ti-Kaw* and state and region Public Accounts Committees.

FINDING 8 – Government has not considered the role that civil society (e.g. the media and CSOs) can play in supporting the goals of public procurement policy. Few examples were identified of CSOs playing a role in oversight of public procurement. The media can play an important role in identifying or highlighting instances where the integrity of the procurement system has been compromised, which can act as a deterrent and help improve the functioning of the overall system. It is unclear whether these roles have been considered and discounted, or simply not considered. A role for businesses has been recognized, however, with them being used to support oversight.

FINDING 9 – Procurement technical capacity is almost universally low. This is not surprising given how early Myanmar is in its procurement reform journey. There is currently no ‘procurement cadre’ of officials specialized in public procurement. There is a wide recognition that low capacity is an impediment to a better performing procurement system and there is strong demand for more training, guidance and ongoing learning support. This includes demand for non-training-based capacity building, such as learning from the experiences of others working on public procurement.

FINDING 10 – Management and oversight is undermined by a lack of access to data. Even basic data on procurement, such as spending categorized according to the procuring department, location, type, budget source (union or state and region), or average procurement time, is not available in accessible formats. Most of this information is recorded using paper records, though it is not typically aggregated and centrally stored. What aggregation of data does take place is in summary formats, which majorly reduce the scope of what sort of data analysis is possible. Increased access to data would help the MoPFI, procuring ministries and state and region governments conduct foundational data analysis to support the prioritization of reform efforts.

FINDING 11 – A major shift in the governance of public procurement is about to take place which should impact the role played by state and region governments. The upcoming Public Procurement and Asset Disposal Bill is expected to centralize policymaking by placing the MoPFI in a policymaking and oversight role. The MoPFI has had success driving PFM reforms though is still relatively new to policymaking. Beyond supporting drafting of the Procurement Bill and its secondary legislation, it has not had responsibility for procurement policy. It remains to be seen what role the MoPFI sees for state for region governments and what steps the MoPFI will be taking to increase the chances that procurement policy is implemented as designed and in accordance with the diverse capabilities and needs of fourteen state and region governments.

5.2 RECOMMENDATIONS

RECOMMENDATION 1 – The MoPFI should consult with state and region governments as part of operationalization of the Procurement Bill. Build off the good practice of consulting across union government departments and expand consultation for the planned secondary public procurement legislation to include state and region ministers, MPs and department officials. There is much that can be learned from existing implementation experience and policy adaptations. Consultation could help build support among state and region governments for the new provisions and provide

an early detection system for provisions that will struggle to be implemented as intended.

RECOMMENDATION 2 – The MoPFI should establish mechanisms for receiving ongoing feedback from state and region governments and businesses on the operationalization of the Procurement Bill. This should go beyond the aggregation of reporting data and include space for discussion on the inevitable implementation challenges experienced and the scope to improve policies further. Regular feedback will provide the

MoPFI with information that can be used to improve procurement policy over time. Commitment to an annual review/feedback process would be a strong starting point.

RECOMMENDATION 3 – The MoPFI and the MoC should consider using state and region governments as places to test policy ideas before attempting to roll them out across the country.

Operationalization of the new Procurement Bill will require both organizations to develop considerable guidance on public procurement (including standardized procurement documents and SOPs and new approaches to building the capacity of those working on procurement. The MoPFI and the MoC should look to pilot policies in willing states and regions, capture the learning from these pilots, and feed this into improvements in the policies. E-procurement reforms are a prime candidate for testing given the high failure rate of most eGovernment reforms.⁴⁴

RECOMMENDATION 4 – The MoPFI should pilot the use of an electronic recording system in at least one state or region.

An electronic recording system can allow for easier aggregation of data and enable MoPFI to conduct data analysis that can be of value to the MoPFI, procuring ministries and state and region governments. To improve the management and oversight of the overall system, the MoPFI should also consider state and region governments as users of this data and test what formats support them to conduct the analysis that can improve their management and oversight of the system.⁴⁵ By demonstrating the value of data to those responsible for recording it, the MoPFI can also encourage more accurate and timely data entry.

RECOMMENDATION 5 – The MoPFI and state and region governments should consider what role civil society can play in supporting their procurement objectives. Principle 10 of the OECD’s High Level Principles for Integrity in Public Procurement recommends states “empower civil society organizations, media and the wider public to scrutinize public procurement”. Yet we found limited evidence that government officials have a policy position on the role that civil society can play in helping government reach its objectives. As a practical illustration this could involve supporting CSOs to conduct Public Expenditure Tracking Surveys or a commitment to conduct community consultations for large or sensitive infrastructure projects.

RECOMMENDATION 6 – The MoPFI should develop a strategy for building the capacity of actors engaging with the procurement system. This could include awareness of the new Procurement Bill and planned secondary legislation. Progress

on this is already being made as the government is considering how to improve management capacity and the new PFM Academy has a module on procurement for its training of all mid-level civil servants with relevant PFM responsibilities. However, capacity building should not just be for officially designated procurement staff in procuring departments, given the range of actors that play important management and oversight roles. Other members of Tender Committees are prime candidates for management capacity support. In addition, the 2020 election will bring with it a new set of ministers and MPs, many of whom would be eager for, and would benefit from, capacity building support.

RECOMMENDATION 7 – State and region governments should encourage officials, ministers and MPs involved in procurement to develop formal or informal networks of practice with their peers in other states and regions.

Networks of practice are a group of people that engage on similar issues. When members of such networks are able to exchange information with each other (through workshops or an online group), it can be a powerful tool for sharing good practice and building capacity. Early pilots by the Sandhi Governance Institute suggest there is demand for such networking and knowledge exchange opportunities.

RECOMMENDATION 8 – The MoPFI and state and region governments should work together to ensure that a shift to centralized monitoring of public procurement complements, rather than displaces, the oversight provided by local actors.

There is a strong rationale for greater standardization and aggregation of public procurement performance data across Myanmar’s states and regions. However, this should be considered as part of a wider strategy to improve oversight, which includes a specific role for states and region governments. This research identifies ministers, MPs and CSOs with valuable local knowledge and a strong commitment to oversee public procurement. The MoPFI and state and region governments have a unique opportunity to co-develop an oversight strategy that specifies a division of responsibilities that plays to the relative strength of each and maximizes overall oversight of the public procurement system.

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