

THE ROLE OF LEGAL/REGULATORY FRAMEWORK OF THE GHANA PUBLIC PROCUREMENT POLICY ON SME PARTICIPATION IN PUBLIC PROCUREMENT

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Abstract: *Access to public procurement contracts is a challenge for most Small and Medium Enterprises. While most of these challenges are either inherent in the very nature of SMEs or the business environment, there is however a major challenge inherent in government policies which is often ignored, and this is the focus of this study. The study thus seeks to identify the inadequacies in the Public Procurement Act of Ghana that inhibit SME access to public procurement contracts and how supportive legal framework could improve SME access to public procurement opportunities. The researcher used a combination of exploratory and descriptive research approaches and the sample comprised of one hundred and twenty (120) SMEs, purposively sampled for their eligibility to participate in public procurement processes and thirty (30) randomly selected public sector institutions. Primary data was collected through the administration of survey questionnaires, and the data collected was analyzed both quantitatively qualitatively. A major finding is that while the intent of the Ghana Act (Act 663) section 2(t) is to promote local businesses, the provision is administratively disproportionate as it does not take the peculiar characteristics of size, capacity, experience, and financial resources of the SMEs into consideration and so does not provide a level playing field for the different categories of local businesses. It can be concluded that limitations in the procurement and regulatory framework in terms of disproportionate application of requirements affect SME participation and success in winning public procurement contracts and that governments can influence the nature and pace of SME growth through the differential impact of government legislation on firms of different sizes*

KEYWORDS: Public Procurement, Legal and Regulatory Framework, Small and Medium Enterprises

INTRODUCTION

The World Bank (2005) defines public procurement as “procurement by a procuring entity using public funds”. Public procurement is considered a key variable in determining development outcomes and when carried out in an efficient and transparent manner can play a strategic role in delivering more effective public services (World Bank 2016).

According to Wittig (1999), the public procurement market is normally the largest in a country and offers the best opportunity for local suppliers to increase their sales through government contracts. A World Bank report (2003) indicates that the annual value of public procurement in Ghana for goods, works, and consultancy services is about US\$600 million and 14% of Ghana’s GDP and also represents about 24% of total imports and 50-70% of the national budget (Adjei 2005).

SMEs are considered a driving force for economic growth, job creation, and poverty reduction in developing countries and have played a big role in achieving rapid industrialization in most

developing countries (Harris et al, 2006, Sauser, 2005, Storey, 1994). From Capacity Development Centre Ghana report (2012), SMEs are noted to contribute not less than 70% to the GDP of Ghana and therefore have significant impact on income and employment

In view of the above, development of the Small and Medium Scale Enterprises (SMEs) in Ghana, and the provision of opportunities to grow is of crucial concern considering that bulk of citizenry of employable age in Ghana, approximately 66.7 % are employed in the private sector and the remaining 28.5 % in the public service. (Clara Osei-Boateng & Edward Ampratwum 2011)

It is thus not out of place that among the objectives of the Procurement Act of Ghana (Act 663) is the promotion of local industry. To this effect there are provisions such as preference clauses (Act 663, S60) in the Act and Regulations to the Act to ensure the achievement of this objective. These provisions are however generalized for local industry which encompasses Large, Small and Medium Enterprises alike and considered administratively disproportionate as they do not take the peculiar characteristics of size, capacity, experience, and financial resources of the SMEs among others into consideration. Such provisions according to Betty Kathure Nkonge (2013), unintentionally favors large firms in some way and discourages small firms by unfairly pitching the SMEs against these large companies.

Smallbone & Welter (2001) explain that the policy stance taken by the state has a major impact on the extent to which SMEs contribute to the process of economic transformation and that the government can influence the nature and pace of SME growth through the differential impact of government legislation on firms of different sizes. This is on the premise that the state is one of the key influences on the external environment in which businesses develop in an economy. Such policy stance according to Smallbone & Welter (2001) is not about giving preferential treatment to SMEs but about facilitating a more level playing field. Surely without a deliberate policy favoring SMEs, their chances of winning contracts in competition with the large/multinational companies is almost impossible and growth through access to the huge public procurement market is thus stifled.

It must also be admitted that whereas a government does not have full control over the procurement decisions of private companies, it has the capability of influencing the procurement decisions of its agencies, thus a deliberate attempt to encourage SME participation in public procurement through comprehensive legislation and directives directed at them is very essential in guaranteeing access to the substantial government expenditure, foster the growth of SMEs, boost local economic activities and above all achieve the objective of promoting local businesses.

Problem of the study

Schiffer & Weder (2001) and Beck *et al* (2005b) indicate that there is good evidence that SMEs face a more difficult business environment than large enterprises. A number of factors that contribute to this difficulty are rather inherent in the very nature of SMEs, such as inadequate capacity, lack of entrepreneurial skills and more importantly their size, which Vandenberg (2005) refer to as a natural disadvantage, and factors induced by the business environment like access to capital, lack of access to high quality and affordable business development services, lack of adequate technical and management support services, limited access to information on market opportunities which Vandenberg (2005) refer to as created disadvantage. There is however a third factor which is inherent in government/local government policies such as the

Public Procurement Policy among others. These according to Vandenberg (2005) have not arisen naturally but has been created through the intended or unintended actions of policymakers, lawmakers and lobby groups etc. These inherent disadvantages manifest as inadequate legal provisions which are often overlooked and inhibit SME participation in public procurement. This latter aspect of challenges SMEs encounter in participation and accessing public contracts is the focus of this study.

Objectives of the study

The main objective of the study is to assess the extent to which the procurement legislation/regulatory framework impacts on SME participation in public procurement in Ghana.

In achieving this objective, the following specific objectives will be considered;

- a) Examination of the characteristics and role of SMEs on national economies
- b) Investigation into the role of legal/regulatory framework on public procurement.
- c) Identification of the inadequacies of the legal and regulatory framework in the Public Procurement Act of Ghana.
- d) Investigation into how supportive legal framework could improve SME accessibility to public procurement opportunities.

LITERATURE REVIEW

Characteristics of SMEs

According to Storey (1994) there is no single uniformly acceptable definition of a small firm as firms differ in their levels of capitalisation, sales and employment.

The Bolton Committee Report recognizes the size of the firm in terms of relativity in that a business in a big market in a certain sector can be considered small, while another in a small market in any particular sector of the business can be medium or large (Lee-Ross and Lashley 2009).

Stokes & Wilson (2010) explains that even though the number of employees constitutes an objective and easily applicable criterion, it has important limitations, primarily because the number of people employed is dependent on the sector of the business and this makes generalized comparisons across sectors difficult. Hatten (2011) also writes that small business size standards vary by the industry within which the business operates, thus the size denoted for construction would be different for manufacturing, mining, transportation, wholesale trade, retail trade, and services.

According to Storey (1994), definitions which employ measures of size (number of employees, turnover, profitability, net worth, etc.) when applied to one sector could lead to all firms being classified as small, while the same size definition when applied to a different sector could lead to a different result.

From the various definitions and explanations above, it can be said that there is no unique definition for a small and medium scale enterprise and that the use of any single definition of SMEs for multiple countries in diverse stages of economic development leads to additional distortions (Gibson & van der Vaart, 2008)

Hatten (2011) explains that the most common criterion to distinguish between large and small businesses is the number of employees, so does Kayanula & Quartey (2000), that firms can easily be identified by their number of employees rather than their fixed assets, since the process of valuing fixed assets poses a problem by virtue of the different modes of accounting system used by different enterprises and the continuous depreciation in exchange rates which often makes such definitions obsolete.

To put the study in context an operational definition more appropriate to the particular target group as recommended by Kayanula & Quartey, (2000) is required. The employee based definition by the National Board for Small Scale Industries, Ghana (NBSSI, 1990) and the Ghana Statistical Service (GSS 2000) of SMEs in Ghana as firms with not more than nine (9) workers (Kayanula and Quartey, 2000) is considered to be appropriate for this study after consideration of the various explanations.

Economic Impact of SMEs

According to Paul Vandenberg (2005), SMEs, including those in the informal economy contribute substantially to developmental goals such as economic growth, poverty reduction and employment creation and a large portion of the poor operate or work for micro and small enterprises. SMEs have often been described as the ‘engine of the economy’ and there has long been recognition of the small business sector’s contribution to a competitive economy (Loader, 2007).

World Bank (2003) estimates suggest that SMEs in the People’s Republic of China (PRC) account for 99.9% of the total number of businesses, employ 84% of the nation’s workforce, and account for 71% of total sales.

From the European Commission Annual Report on European SMEs (2013) across the EU28 in 2013, some 21.6 million SMEs in the non-financial business sector employed 88.8 million people and generated €3,666 trillion in value added. Expressed another way, ninety-nine (99) out of every hundred (100) businesses are SMEs, as are two (2) in every three (3) employees and fifty-eight (58) cents in every euro of value added. Marco Lopriore (2009) explains that SMEs provide two thirds of total private-sector employment, represent 80% of the total job creation and produce more than half of the EU added value.

According to Vandenberg (2005) SMEs also constitute 69-72% of employment in middle and high income countries, with employment share in low income countries of 47%. The low figure for low-income countries is attributed to a higher percentage of the workforce engaged in farming (Vandenberg, 2005).

Reed *et al.* 2004; Blomqvist *et al.* 2005; Loader 2005; Karjalainen & Kemppainen, 2008; Walker & Preuss, 2008, indicate that active participation of SMEs also increases competition and guarantees that the procurer will not be dependent on a few large companies only while Memba, Gakure & Karanja (2012), also supported the competition enhancement claim but in the context of value for money for procurers and the society as a whole.

In spite of these important roles of SMEs in national economies, they tend to have high mortality rates with most of them not surviving to see beyond their third anniversaries (Ofunya Afande, 2015).

Legal/Regulatory Framework and Public Procurement Participation

The public procurement legal framework clearly covers the whole scope of public procurement, all stages of the procurement process, methods of procurement, ethics and transparency (Thai, 2009). Robert (2003), states that a good public procurement legal framework is based on the principles of openness and transparency, fair competition, impartiality, and integrity

The Government of Ghana enacted the Public Procurement Act, 2003, (Act 663) in December, 2003. The Act became effective/operational on 27th August 2004 and Public Procurement in Ghana therefore is subject to the Act and it's implementing Regulations and Administrative Instructions. The Act and Regulations provide the general rules governing Public Procurement in Ghana.

Though the primary objective of the Act as contained in section 2 is to harmonize the processes of public procurement in the public service to secure a judicious, economic and efficient use of state resources other secondary concerns such as promotion of local industry, section 2(b) with particular reference to SME participation ensue which the Act does not fully address. Such shortcomings inherent in government/local government policies according to Vandenberg (2005) may not have arisen naturally but may be created through the intended or unintended actions of policymakers, lawmakers and lobby groups etc. These inherent disadvantages manifest as inadequate legal provisions which are often overlooked and may inhibit SME participation in public procurement.

According to Paul Vandenberg (2005), weak legal and financial systems affect the growth of small firms more than large firms. This assertion is complemented by Puddephatt & Kaspar (2012) who write that a weak national regulatory framework is often the root of challenges facing SMEs in public procurement and that the abuse of public procurement systems arises largely due to weak or inconsistent enforcement of the rules.

This assertion of Puddephatt and March (2012) above is demonstrated in the inadequacies in the Ghana procurement policy in promoting SME participation in public procurement as a result of it not being clear in respect of SMEs.

Inadequacies in the procurement regulatory framework of Ghana

According to Paul Vandenberg (2005), the business environment may be biased against smaller firms due to *created disadvantages* by policymakers. While the intent of the Ghana Act (Act 663) section 2(t) is to assist the local business community to become competitive and efficient suppliers to the public sector, provisions in the Act inhibit this intention by not providing a level playing field for the different categories of local industry. The inadequacies in the Ghana Act in promoting SME participation is assessed in the context of the qualification criteria for Tenderers as contained in section 22(1) and the margin of preference provision in section 60(3).

Section 22 (1) (a) of the Ghana Act specifies the qualification criteria on basis of tenderers possessing professional and technical qualifications and competence, financial resources; equipment and other physical facilities; managerial capability, reliability, experience in the procurement object and reputation; and the personnel to perform the procurement contract;

This provision, does not make any clear distinction on how the qualification criteria should apply to the different categories of tenderers ie; SMEs and Large businesses, thus they are applied subjectively and have been a source of barrier to SMEs participation.

The margin of preference clause in section 60(3) of the Ghana Act for instance provides that a procurement entity may grant a margin of preference for the benefit of tenders for work by domestic contractors. Though this provision seeks to give preference to domestic contractors, it does not categorically mention SMEs, hence it applies to all categories of domestic contractors, meaning SMEs will unfairly be in competition with large companies. This confirms the Bolton Committee report (1971) that policies which are perceived to be neutral in intention and administration, may in actual sense be far from neutral in their effects because of the different circumstances of large and small firms.

Section 60(3)(a) of the Ghana Act lays emphasis on sources of the domestic goods and not by the nationality of the Tenderer, making it clear that the preference is given to the GOODS and not to the Tenderer. This is unlike the preferences and reservations clause in the Kenyan Act which is specific and applies to disadvantaged groups, micro, small and medium enterprises as specified in section 39(4a) of the Kenyan Act (PPDA, 2005). The Kenyan Act goes on further in section 39(8)(a)(i) to make preferences for these groups where the funding is 100% from the Kenyan government or a Kenyan Body, a condition absent in the Ghanaian Act.

These inadequacies in the Ghanaian Act is a hindrance to SME participation and confirms Puddephatt and March (2012), explanation that a strong legal framework in the form of clear and comprehensive regulations are essential in enabling fair participation in public procurement for all bidders, including SMEs. It would be more effective for participation of SMEs to be explicitly provided for in the Ghana Act for certainty.

Accessibility to public procurement through supportive legal framework

According to David Smallbone & Friederike Welter (2001) the policy stance taken by the state has a major impact on the extent to which SMEs contribute to the process of economic transformation since the state is one of the key influences on the external environment in which businesses develop in an economy.

David Smallbone & Friederike Welter (2001) further explains that government can influence the nature and pace of SME growth through the differential impact of government legislation on firms of different sizes.

The assertion of David Smallbone & Friederike Welter (2001) is for example evident with the directive of the Office of Government Procurement (OGP) in Ireland's (2014) which promote the setting of relevant and proportionate financial capacity, turnover and insurance levels for tendering to make it easier for small businesses to tender for public sector contracts.

From the Asian Development Bank (ADB) report (2012) on SME Development, more structured schemes use set asides (quotas) or price preferences in favor of SMEs. Under a set aside, essentially a quota, a certain percentage of designated government procurement contracts or total spending is reserved or 'set aside' for a targeted category of bidders that meet the preferential qualification criteria, such as SME status. The critical difference between this approach and use of bid price preferences according to the ADB report is that, under set asides, there is a segregation of competition as targeted firms, i.e. SMEs, can only compete against each other.

Procurement set asides are most often applied to historically disadvantaged individuals such as minority groups. This approach has been used to promote SMEs in public procurement, particularly in South Africa, the United States, India, Kenya and the People Republic of China (PRC). In the PRC, there is the requirement for government departments to set aside at least 30% of annual budgets for SME procurement, with not less than 60% of this amount reserved for small and micro enterprises and to apply SME price preferences of between 6%–10% in particular instances

The ADB report (2012), also indicates that the Public Procurement Bill in India set an annual goal of procuring a minimum of 20% of goods and services from micro entities and SMEs in India. In Kenya also, there is a Presidential directive that 10% of contracts should be awarded to SMEs (Betty Kathure Nkonge, 2013).

It must be said that a strong legal framework, in the form of clear and comprehensive regulation (Puddephatt and March, 2012), a well-defined legal framework (Eagan, 2005) and the differential impact of Government Legislation (Smallbone & Welter, 2001) all as necessary ingredients to enhancing SME participation in Public procurement are evident in the European Union approach (Directive 2014/24/EU) which implores buyers to encourage informal groupings of suppliers to bid where possible as consortia in compliance with relevant competition law where they are not of sufficient scale to tender in their own right. From directive 2014/24/EU, buyers are also to ensure that any capacity levels set for candidates/tenderers are relevant and proportionate to the circumstances of a particular contract and where experience is specified as a qualifying or competitive criterion, it should not be framed in such a way as to unduly narrow a field of eligible tenderers by specifying an exact work type or industry.

The various interventions have indeed paid off, as according to Audretsch & Van der Horst, and Kwaak, & Thurik (2009), between 2002 and 2007, the number of SMEs has increased by over 2 million; the number of large enterprises by only 2000.

The Ghana Act however is indifferent to these provisions as it seeks to set the same standards for every Tenderer limiting SME access to public procurement

RESEARCH APPROACH

A combination of exploratory and descriptive research approaches was adopted for the study. Exploratory research is the discovery of ideas and insights (Kothari, 2004). This design was preferred as it minimizes bias and allows maximum reliability of information from the project officials. Yieri (2006) explains descriptive survey to involve the collection of data in order to answer research questions concerning the current status of subjects under investigation. The descriptive approach was chosen as it attempts to describe characteristics of an event, situation, a group of people, community or a population. It describes a given state of affairs as fully and as carefully as possible (Fraenkel, 2000).

The research was limited to the southern part of Ghana and was focused on SMEs eligible to participate in public procurement on one hand and Procurement Entities, comprising public sector corporations/companies/Institutions and Metropolitan, Municipal and District Assemblies (MMDAs), who are contract awardees on the other hand.

In all, a total number of one hundred and twenty (120) SMEs who deal in the provision of goods and services were purposively sampled based on their eligibility to participate in public procurement and thirty (30) public sector institutions were randomly chosen for the study

Primary data was collected through the administration of survey questionnaires, while secondary information was obtained through the review of pertinent literature. The literature review helped to position the study within its theoretical context.

Data collected was analyzed both qualitatively and quantitatively. At the quantitative level, data was summarized using descriptive statistics tools, particularly tables. At qualitative levels, the researcher obtained a detailed information about the phenomenon being studied, and then tried to establish patterns, trends and relationships from the information gathered.

DATA PRESENTATION AND ANALYSIS

Of the total sample size of one hundred and twenty (120), ninety-eight (98) representing approximately 82% of the sample had participated in public procurement processes. The analysis is therefore based on the ninety-eight (98) participants.

SME participation in public procurement

Table 1 – Frequency of participation in public procurement

Response	Frequency	Percentage (%)
Under 5	21	21.43
6 – 10	38	38.78
11 – 15	25	25.51
Over 15	14	14.29
Total	98	100

Source: Field survey March 2016

Of the total number of ninety-eight (98) SMEs that had bid for public procurement contracts, 21.43% had bid for a maximum of five contracts, 38.78% had bid for between six (6) to ten (10) contracts, 25.51% had bid for between eleven (11) to fifteen (15) contracts, while the remaining 4.29% of SMEs had bid for over fifteen (15) public procurement contracts. With most of the SME's having participated in public procurement processes they are expected to be perfect candidates who can provide the required information without bias for the study.

Table 2 - Public procurement bids won

Number of bids won	Frequency	Percentage (%)
None	56	57.14
Under 5	21	21.43
6 – 10	9	9.18
11 – 15	7	7.15
Over 15	5	5.10
Total	98	100

Source: Field survey March 2016

From table 2 on the number of procurement bids won by the SMEs, 57.14% of the number had never won a public procurement contract, 21.43% have won under five (5) public procurement contracts, 9.18% had won between six (6) to ten (10) contracts, 7.15% had won between eleven (11) to fifteen (15) contracts, and the remaining 5.10% of the SMEs had won over fifteen contracts.

Of the total number of contracts won by the SMEs under study, none was under international competitive tendering. However 7.14% of contracts won was through the National Competitive method, 6.12% through the restricted tendering, while 24.49% and 69.64% of contracts won were through single sourcing and request for quotation respectively.

It can be deduced from the high numbers of contracts won through request for quotation that SMEs are more successful where there is a combination of low number of suppliers involved in the procurement process and the value of the contract is low as with request for quotation.

The forty-two (42) successful participants out of the sample of ninety-eight (98), representing 42.86% success rate is on the low side and gives credence to the assertion by Schiffer & Weder (2001) and Beck *et al* (2005b) that there is good evidence that SMEs face a more difficult business environment than large enterprises and also to Lea Kaspar & Andrew Puddephatt (2012) claim that Smaller businesses generally face substantial hurdles in winning government contracts both in developed and developing countries, and the proportion of government contracts that go to SMEs offers considerable room for improvement. The outcome gives cause for investigation into the underlying causes of this poor performance.

Table 4 - Reasons for ability to win direct contracts

Response	Agree		Uncertain		Disagree	
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
SME as sole source for the requirement	58	59.18	4	4.08	36	36.74
Fewer number of suppliers	74	75.51	0	0	24	24.49
Division of contracts into lots of low value	84	85.71	0	0	14	14.29
Margin of preference clause in the Act.	14	14.29	10	10.20	74	75.51

Source: Field survey March 2016

A number of reasons were advanced for the ability to win direct contracts as presented in table 4. 59.18%, agreed that the reason for winning public procurement contracts was because the SME was the sole source, 4.08% were uncertain, while the remaining 36.74% of SMEs disagreed.

On the ability to win direct contracts being enhanced by fewer number of suppliers 75.51% of SMEs agreed, while the remaining 24.49% of SMEs, disagreed. 85.71% of SMEs were in

agreement that division of contracts into lots of low value was the reason for winning direct contracts, while the remaining 14.29% of respondents disagreed.

Responses on the margin of preference clause being the reason for the SMEs winning public procurement contracts were skewed to the negative, in that only 14.29% of SMEs who had ever won public procurement contracts attributed their success to the margin of preference clause, 10.20% of respondents were uncertain, while the remaining 75.51% of respondents disagreed to the margin of preference clause being the reason for their success in winning the public procurement contracts.

Table 5 - Reasons for SMEs not participating in Public Procurement

Response	Agree		Uncertain		Disagree	
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
Contract value is often beyond businesses financial capability	74	75.51	6	6.12	18	18.37
Contract value is often beyond businesses capacity	82	83.67	6	6.12	20	20.41
Procedures for bidding is too cumbersome	64	65.31	8	8.16	26	26.53

Source: Field survey March 2016

From table 5, 75.51% of SMEs indicated the reasons for not participating in public procurement was due to contract value being beyond the businesses financial capability, 6.12% did not attribute any reasons, while the remaining 18.37% disagreed.

On businesses capacity, 83.7% of the SMEs agreed to contract value being beyond the businesses capacity as the main reason for not participating in public procurement, 6.12% did not attribute any reasons, while the remaining 20.41% disagreed. For the cumbersomeness of the procurement process being the reason for non-participation, 65.31% agreed, 8.16% did not attribute any reasons and the remaining 26.53% disagreed.

Table 6 - Impact of Legislative/Regulatory framework on SME participation

Response	Agree		Uncertain		Disagree	
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
Qualification criteria in terms of capacity unfair to SMEs	22	73.33	4	13.33	4	13.33
Margin of preference clause does not discriminate between SMEs and large companies	20	66.67	6	20	4	13.3

Criteria for experience does not take into account individual experience of key staff	17	56.66	4	13.33	9	30
Lack of clarity on group (consortium) participation in public procurement	21	70	9	30	0	0
Legal/regulatory framework is weak in enhancing SME participation	30	100	0	0	0	0

Source: *Field survey 2016*

The analysis in table 6 represent responses of the thirty (30) public entities on the impact of the legislative and regulatory framework on public procurement participation

73.3% of the entities agreed that the criteria for qualification in the Act in terms of capacity is unfair to SMEs, 13.3% of respondents were uncertain, while the remaining 13.3% disagreed. On the criteria for experience not taking into consideration individual experience of key staff, 56.6% of respondents agreed, 13.3% were uncertain and the remaining 30% disagreed.

On the margin of preference clause, 66.7% agreed that it does not discriminate between SMEs and large companies, 20% were uncertain, while the remaining 13.3% disagreed. The nondiscriminatory nature of the margin of preference in respect of SMEs is evident in the Act and Regulations to the Act, section 60(3), the Invitation to Tender (ITT29.1) for National Competitive Tender and section III(3) of the standard tender documents for International competitive tender. These may not be as intended and confirms Bolton Committee (1971) report that policies which are perceived to be neutral in intention and administration, may in actual sense be far from neutral in their effects because of the different circumstances of large and small firms.

The observations further reflects the weaknesses in the Act and Regulations in terms of enhancing SME participation in public procurement, a situation which according to David Smallbone & Friederike Welter (2001) government can influence and enhance the nature and pace of SME growth through the differential impact of government legislation on firms of different sizes.

FINDINGS AND DISCUSSIONS

The findings from the study in relationship to the objectives are as follows;

a) *The role of legal/regulatory framework on SMEs winning public procurement contracts*

SMEs face a more difficult business environment than large enterprises as though there is a high rate of participation by SMEs, there is very low success rate with regards to open competitive tendering, a situation mostly attributed to the administratively disproportionate provisions in the legal and regulatory framework which unfairly pitches SMEs against large businesses

b) *Inadequacies of the legal and regulatory framework in the Public Procurement Act of Ghana.*

The qualification criteria is indiscriminate because it does not take the peculiar characteristics of size, capacity, experience, and financial resources of SMEs into consideration and as a result unintentionally favours large firms. The margin of preference clause which is meant to promote local business does not discriminate between SMEs and large companies. There is also very low group bidding and inability of SMEs to win contracts through such groupings, a situation attributed to the vacuum resulting from the lack of clarity in the Act on opportunities for SMEs to leverage individual abilities and resources by pulling resources together as consortium.

RECOMMENDATIONS

A review of the law, regulations or issue of directives is recommended in respect of qualification levels and finances in relation to the size and subject matter of the contract so as to minimize or, ideally, eliminate the effect of size discrimination. Size-specific reforms such as *set-asides* applied in other jurisdictions like the United States, India, Kenya and the People Republic of China where a certain percentage of designated government procurement contracts or total spending is reserved for a targeted category of bidders that meet the preferential qualification criteria, such as SME status should be introduced. This ensures segregation of competition such that targeted firms can only compete evenly against each other. There should be clarity on the margin of preference clause to take into account the different categories of businesses and also on the consortium and joint venture provisions such that larger businesses are encouraged to form consortiums with SMEs or SMEs encouraged to pull resources together as consortium. Provisions for turnover and other capacity requirements should be appropriate for the size of the contract.

CONCLUSION

The legal and regulatory framework on public procurement in Ghana does not facilitate SME participation. Also limitations in the procurement and regulatory framework in terms of disproportionate application of requirements inhibit SME participation and success in winning public procurement.

Provisions in the Act on margin of preference and joint ventures which are perceived to be neutral in intention and administration are in actual sense far from neutral in their effects because of the different circumstances of large and small firms.

Lack of clarity in terms of size on how provisions such as the margin of preference clause, which is supposed to promote local industries apply, prevent SME participation and success in winning public contracts.

It can thus be concluded that a clear and comprehensive regulation that takes size into consideration is essential in enabling fair participation in public procurement for all bidders, including SMEs.

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