

Effect of Irregularities in Public Contract Awarding

Yenew B. Taddele¹

Abstract

Government contract placing is not left to the whim of the individual power holders at the various hierarchies of the government structure. What officials of the government do with the public expenditure should be transparent, and those wielding the power should be accountable to the general public for each and every activity that they do and have it done on behalf of the public. In order to promote efficiency and value-for-money, effectiveness, transparency and probity in the process of government contract formation and to make officials involved in public procurement processes accountable, and thereby curb wide and expansive corrupt practices in their territories, governments have been trying hard to come up with the best possible modern procurement rules. However, irregularities still face almost all public contracts awarding particularly when it is for public construction project. The finding shows that the effects of irregularities in public contract awarding are 1) keeping a public contract awarding with arithmetic error correction when such irregularities are insignificant, 2) reviewing and setting aside a public contract awarding when such irregularities are significant and can affect the outcome of the procurement, 3) avoiding a public contract awarding at all when it is unlawful, 4) disputes between procuring entity and bidders, and 5) civil, administrative and disciplinary, and criminal Liabilities against an employee of procuring entity and/or bidders.

Key Words: Public Contract Awarding, Procurement, Irregularity, effect

¹Attorney, Nile Insurance Company S.C; LLB (AAU, College of Law and Governance Studies); LLM Candidate (Bahir Dar University, School of Law); E-mail: yenew.taddele@gmail.com. Needless to say, the responsibility for the errors and wrongheaded arguments remain all mine.

1. Introduction²

The construction industry is regulated by various legislative enactments that are enacted from time to time. This is essential in light of the fact that the industry is so dynamic, that the system has to scope up with it.

Basically, the construction industry is treated in two different domains: the civil construction project, and the government construction project. The division is simply based on the employer or owner who seeks the building project is to be completed. The former refers to when a private individual or company employer enters into a contract with a contractor. The latter refers to the government department, as an employer wants to have the construction carried out on behalf of the government for the public interest. Thus, whether the construction contract involves a private or civil business-to-business engagement or a government-to-business engenders a separate set of rights and obligations in the construction contract. My focus is to deal with the formation of the government construction contracts particularly the effects of irregularities with the formation processes to award such contract.

Government contract placing is not left to the whim of the individual power holders at the various hierarchies of the government structure. What officials of the government do with the public expenditure should be transparent, and those wielding the power should be accountable to the general public for each and every activity that they do and have it done on behalf of the public. The Constitution of the Federal Democratic Republic of Ethiopia, under Article 12, titled as “the Conduct and Accountability of Government”, provides as “the conduct of affairs of government shall be transparent. Any public official or an elected representative is accountable for any failure in official duties.”³

Thus, on the one hand, to promote transparency in the process of government contract formation and, on the other hand, to make officials involved in public procurement processes be accountable, and thereby curb wide and expansive corrupt practices in their territories, governments have been trying hard to come up with the best possible modern procurement rules. Federal Government of Ethiopia has issued a modestly modern procurement laws and standard

²Sources are acknowledged in line with the “in-home” citation rules of Bahir Dar University, School of Law’s Guide to Prepare Research Paper, 2011.

³Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Federal Negarit Gazzeta, Proc. No’ 1, 1st year No’ 1, Art.12[here in after, FDRE Constitution, 1995]

documents⁴ to which all government bodies (save exceptions) should comply with in the process of their procurement needs for the supply of goods, services, and construction works. It is concerned with the establishment of procedures and institutions that will deter and detect wrongdoings.⁵

International development institutions (can be bilateral or multilateral, for example USAID and World Bank Groups respectively), and regional institution for example Common Market for Eastern and Southern Africa (COMESA) have their own public procurement rules and policies to be applied to public procurements under programs they fund and member states respectively. “Another source of rules in regulating public procurements is international free trade agreements that aim at liberation of procurement market and promote international competition.”⁶

Although the aforementioned efforts have been practiced in Ethiopia and internationally as well, irregularities still face almost all public contracts awarding particularly when it is for public construction project. It has nowadays been a well established fact that procedural irregularities in public contract awarding can affect the ultimate fate of the very purpose of the public contract dramatically not less than the substantive problems.

An important question here, which acts of a bidder or a public body or its employees or anyone under its authority, can be considered as an irregularity act? The next section tries to deal about this and its effect.

This Term paper, therefore, has three parts; the first part is the introduction, the one being discussed here and now, which tries to depict general concept of construction industry and the need to procurement laws for public construction contracts roughly, the second part is the main part of the Term Paper that elucidates about irregularities⁷ in public contract awarding and their effects. The last part is conclusion in which my stands and reflections are summed up.

⁴We can take, for instance, the Determining Procedures of Public Procurement and Establishing its Supervisory Agency Proclamation No.430/2005” latter repealed and replaced by the Ethiopian Federal Government Procurement and Property Administration Proclamation No’ 649/2009 and its Directive/2010 (as amended in 2015). And Standard Bidding Documents for Public Procurements, 2011

⁵Yemi A. George, *Legal System, Corruption, and Governance in Nigeria*, New Century Law Publishers, Lagos, 2000, P.67[here in after, Yemi A. George, Legal System, Corruption, and Governance in Nigeria]

⁶Kokebe Wolde, *International Free Trade Agreement and Public Procurement Regulation*, Lecture Delivered at Bahir Dar University, School of Law, June 13, 2019

⁷My scope to deal in this Paper, about irregularities in public contract awarding, is limited only up to the phase when such contract entered into. Because, one, irregularities in all stages (until the delivery is done or the construction project is completed) can’t be discussed within the page limitation I may be tolerated; two, irregularities after a public contract has been concluded may not be under the scope of my Paper since it has been scoped up to awarding period.

2. Irregularities in Public Contract Awarding and Their Effects

2.1 Irregularities in Public Contract Awarding

For the purposes of this term paper, irregularities in public procurement awarding can be defined and understood as infringements of public procurement rules, national and international principles and/or objectives regardless of the stage of the procedure or of their consequences for the public purse.

Although it is difficult to list down all irregularities that may happen in Public contract awarding, we can illustratively mention some, for instance, non- or incorrect transposition of directives' provisions, leading to application of non-compliant national provisions, incorrect tender procedure, additional works awarded directly in circumstances not covered by the directives or national law, use of exceptional procedures like direct award, negotiated procedure in non-exceptional circumstances, use of formulas to automatically exclude bids without possibility of recourse or appeal , mix up of selection and award criteria, inadequate publication of tender announcement, non transparent procedures for evaluating bids, discriminatory or dissuasive selection criteria, including the regional or national preference for the purpose of undue advantage of domestic bidders or excessively detailed technical specifications, imprecisely stated selection criteria and unduly formalistic application of criteria, excessively short deadlines for submission of tender or tenders modification of the essential terms of a contract after its award (physical and/or financial object), non-respect of minimal publication requirements in case of cross-border interest, unjustified by the subject matter of the contract limitation of sub-contracting, unjustified conditions that require every members of consortium to comply with the conditions for participation in the procurement procedure, use tender in lots in order to overcome the procurement provisions (the contracting authority launches the few separate procurement procedures, which are identical in terms of the content and timeframe and which could be provided by the same contractor), the contracting authority requires from contractors the documents not required by the procurement provisions, the contracting authority does not submit the changes in the specification of the essential conditions of the procurement that have an impact on the content of the bid in case of services of priority nature the public procurement is conducted in a way as for services of non priority nature and unjustified exclusion of contractor and refusal of bids.

In a comprehensive statement, irregularities in public procurement process may be committed; one, before the formal launch of a procurement procedure (in the planning phase of specific procurement, for example, during the process of estimating the value of the procurement or taking a decision about the application of a specific procedure) – decisions taken outside of the formal procurement procedure undoubtedly have an impact on the course of action taken by the contracting authority; two, in the course of a procurement procedure (for instance, during the incorrect evaluation of qualifications of the economic operator, misapplication of rules on the selection of economic operators, or erroneous evaluation of offers); three, after the procedure has been conducted and the contract awarded (for example, failure to publish a contract award notice, illegal modification of an already concluded contract, or award of additional works or services without the conditions having been fulfilled).⁸

2.1.1 Types of Irregularities in Public Contract Awarding

Various types of irregularities can be identified in the process of public procurement, depending on the criteria applied. For the purpose of this Term Paper I prefer to take a classification by Support for Improvement in Governance and Management (herein after abbreviated as SIGMA), the distinction between irregularities has been based on the criterion of the impact of such irregularities on effects of public procurement procedure. Irregularities may, thus, be classified as significant (material) irregularities or insignificant (trivial) irregularities.⁹

The distinction between significant and insignificant irregularities is not clear-cut, however, and requires a case-by-case approach and a careful assessment of the particular circumstances. Insignificant errors, even if they do not have an impact on the result of the procedure, should be detected and brought to the attention of the contracting authority concerned for educational as well as preventive reasons (at another time, in different circumstances, such an error may affect the result of the procurement procedure).¹⁰

A. Trivial Irregularities in Public Contract Awarding

Insignificant (trivial) irregularities in public Procurement awarding are all errors occurring in the application of procurement rules, which do not affect the results of the procedure, for example,

⁸Support for Improvement in Governance and Management (SIGMA), “Detecting and Correcting Common Errors in Public Procurement”, at <http://www.sigmaxweb.org>, (last accessed June 12, 2019)[here in after, Support for Improvement in Governance and Management (SIGMA), Detecting and Correcting Common Errors in Public Procurement]

⁹Ibid

¹⁰Ibid

the same offer would still have been selected as the best one had no error been made, or the economic operator who was wrongly rejected would not in any case have been the winner of the procedure. In other words, the failure to publish a contract notice (call for tender), if such a notice was required by law, and the failure to publish or the late publication of a contract award notice are both infringements of specific public procurement provisions, although they have different consequences for the procurement in question. Similarly, a contracting authority that did not ask a bidder to submit missing or incomplete documents while it did request such documents from other participants infringes formal rules stipulating that such an attempt has to be made. However, if the offer submitted by that bidder, due to a higher price proposed in his tender, did not stand a chance of winning the contract, such an infringement is inconsequential, since the results of the procedure would have remained the same even if the contracting authority had fully complied with its obligations.

B. Material Irregularities in Public Contract Awarding

Significant (material) irregularities are those that have an impact on the results of the specific public procurement procedure. In other words, the results of the procedure would have been different if an error had not been committed. For example, the ungrounded rejection, for formal reasons, of the tender that happens to be the best one submitted in the procedure clearly has an impact on the results of the procedure, as a less advantageous or simply more expensive tender is chosen.

2.2 Effects of Irregularities in Public Contract Awarding

In free trade world, the procuring entity, when irregularities happen in public procurement proceeding, can take arithmetic error correction and consider bid responsive, cancel the public procurement process, and take some administrative measures against the bidders and/or its employees.

At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarification of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.¹¹ The procuring entity shall correct purely arithmetical errors that are discovered during the

¹¹UNCITRAL Model Law on Public Procurement, 2011, United Nations Commission on International Trade Law, General Assembly Resolution 66/95, United Nations, English Publication Section, Vienna, Austria, 2014, Art.16(1)[here in after, UNCITRAL Model Law on Public Procurement,2011]

examination of submissions.¹² No substantive change to qualification information or to a submission, including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive, shall be sought, offered or permitted.¹³

The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission is accepted, under the circumstances referred to in paragraph 8 of article 22 of UNCITRAL Model Law on Public Procurement.¹⁴ If the cancellation of the procurement is a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur civil liability, solely by virtue of its invoking paragraph 1 of this article, towards suppliers or contractors that have presented submissions.¹⁵

A procuring entity shall exclude a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest.¹⁶

A procuring entity may also take any measures against its employees who are in violation of irregularities in conducting public procurement proceeding based on code of conduct enacted by a procuring entity.¹⁷

In taking its decision on an application that it has entertained, the procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the application relates.¹⁸

In taking its decision on an application that it has entertained, the independent body may declare the legal rules or principles that govern the subject matter of the application, shall address any suspension in force and shall take one or more of the following actions, as appropriate, prohibit the procuring entity from acting, taking a decision or following a procedure that is not in compliance with, overturn in whole or in part an act or a decision of the procuring entity that is not in compliance with, revise a decision by the procuring entity that is not in compliance with, overturn the award of a procurement contract or a framework agreement that has entered into force in a manner that is not in compliance with and if notice of the award of the procurement

¹²UNCITRAL Model Law on Public Procurement, 2011, supra note 10, Art.16(2)

¹³Id, Art.16(3)

¹⁴Id, Art.19(1)

¹⁵UNCITRAL Model Law on Public Procurement, 2011, supra note 12

¹⁶Id, Art.21

¹⁷Id, Art.26

¹⁸Id, Art.66(5)

contract or the framework agreement has been published, order the publication of notice of the overturning of the award, order that the procurement proceedings be terminated, and require the procuring entity that has acted or proceeded in a manner that is not in compliance with the provisions of UNCITRAL Model Law on Public Procurement to act, to take a decision or to proceed in a manner that is in compliance with the provisions of such law.¹⁹

If the World Bank determines that the borrower or recipient of investment project financing and any other entity involved in the implementation of a project financed by the Bank has not complied with the procurement requirements set out in the “Legal Agreement”²⁰, the Bank may, in addition to exercising the legal remedies set out in such “Legal Agreement”, take other appropriate actions, including declaring misprocurement.²¹ Thus, the effect of any irregularities in public procurement process financed by World Bank Groups may be any one of remedies, for instance, giving notice to take correction measurement and review the public procurement awarding or canceling to finance borrowing state or public body, which can be considered an appropriate in compliant proceeding.²²

Common Market for Eastern and Southern Africa (COMESA) Public Procurement Regulation has given mandates and responsibilities to domestic government to administer public procurement process such as Procurement planning,²³ bid document preparation,²⁴ advertising (invitation of bids),²⁵ receipts of bids,²⁶ selection of criteria,²⁷ opening of bids,²⁸ qualification of bids,²⁹ evaluation of bids,³⁰ notification of the best evaluated bid³¹ and debriefing unsuccessful

¹⁹ UNCITRAL Model Law on Public Procurement, 2011, supra note 10, Art.67/9

²⁰ It is an agreement between a borrower and the Bank providing for a loan for a project, including procurement plan and all documents incorporated by reference. If the Bank enters into a project agreement with an entity implementing the project, the term includes the project agreement.

²¹ World Bank Procurement Regulations for IPF Borrowers, 2016, Procurement in Investment Project Financing Good, Works, Non-Consulting and Consulting Service, World Bank Procurement Policy and Service Group, Washington DC, USA, 2018, Annex III[here in after, World Bank Procurement Regulations, 2016]

²² Id, Art.3.24

²³ Common Market for Eastern and Southern Africa (COMESA) Public Procurement Regulation, 2009, Council of Ministries of the Common Market Treaty, Vol.5, No’ 3, Published by the Council and Authority, 2009, Art.10[here in after, COMESA Public procurement Regulation, 2009]

²⁴ Id, Art.13

²⁵ Id, Art.14

²⁶ Id, Art.17

²⁷ Id, Art.16

²⁸ Id, Art.18

²⁹ Id, Art.19

³⁰ Id, Art.20

³¹ Id, Art.21

bid³² through, its domestic procurement regulation. Then circumstances and conditions whether any irregularities occur in public procurement awarding and effects of there off are determined through such domestic regulations.

The following effects of irregularities in public procurement awarding are elucidated in line with Ethiopian procurement regulations and Public Administrative Contract Law of such country.

2.2.1 Keeping the Public Contract Awarding with Arithmetic Correction

Provided that a bid is substantially responsive, the public body may waive any non-conformity or omissions probably with corrections in the bid that does not constitute a material deviation.³³ A substantially responsive bid is one that conforms to all the terms, conditions, and specifications of the bidding documents without material deviation, reservation, or omission.³⁴ A material deviation, reservation, or omission is, according to Federal Democratic Republic of Ethiopia Standard Bidding Document (SBD) For Procurements for National Competitive Biddings (NCB)(here in after abbreviated as PPA), one that would affect in any substantial way, the scope or quality of public procurement specified by the procuring entity or limit in any substantial way, inconsistent with the bidding documents, the public body's rights or the bidders' obligations under such procurement awarding, or would unfairly affect the competitive position of other bidders presenting substantially responsive bids³⁵.

To be assisted in the examination, evaluation, and comparison of the bids, the public body may, at its sole discretion, ask any bidder for a clarification of its bid³⁶. If the bidder does not accept a correction of an arithmetical error discovered by public body will not be awarded the contract.³⁷

In general, as far as no change in the prices or substance of the bid shall be sought, offered, or permitted, but only to confirm the correction of arithmetic errors discovered by the public body in the evaluation of the bids, the public contract awarding process is being kept though insignificant irregularities have been made.

³²COMESA Public procurement Regulation, 2009, supra note 22, Art.23

³³Standard Bidding Document (SBD) For Procurement of Textbooks and Related Services For National Competitive Biddings (NCB), Federal Public Procurement and Property Administrative Agency, Addis Ababa, Ethiopian, 2011, Clause33(1)[here in after, PPA, 2011]. See also Public Procurement and Property Administration Proclamation, 2009, Federal Negarit Gazzeta, Proc. No' 649, 15th year, No' 60, Art.43 (2 and 4) [here in after, Proc. No' 649/2009]

³⁴PPA, 2011, Clause 32(2)

³⁵Id, Clause32(2)

³⁶Id , Clause 31(1)

³⁷Proc. No' 649/2009, Art.43(5/b)

So, the public procurement process is considered as responsive and the next stage may continue until the desired objective is achieved.

2.2.2 Reviewing and Setting Aside of the Public Contract Awarding

The public body shall not consider any bid that arrives after the deadline for submission of bids, in accordance with PPA Clause 26. Any bid received by the public body after the deadline for submission of bids shall be declared late, rejected, and returned unopened to the bidder.³⁸

If a bidder does not provide clarifications of its bid by the date and time set in the public body's request for clarification, its bid may be rejected³⁹.

If a bid is not substantially responsive to the salient requirements of the bidding document it shall be rejected by the public body and may not subsequently be made responsive by the bidder by correction of the material deviation, reservation, or omission.⁴⁰

After confirming the bids comprise all mandatory documentary evidence establishing the bidder's qualification, the public body will rule on the legal, technical, professional, and financial admissibility of each bid to classifying it as compliant or non-compliant with qualification requirements set forth in the bidding document⁴¹.

It may then determine bid as not responsive and reject when it lacks legal admissibility⁴², professional admissibility⁴³ and technical admissibility⁴⁴, and/or when bidder has failed to submit financial statements certified by an independent auditor as required in PPA.⁴⁵

³⁸PPA, 2011, supra note 32, Clause 27(1)

³⁹Id, Clause 31(2). See also Proc. No' 649/2009, supra note 32, Art.43(5/b)

⁴⁰Id, Clause 32(3). See also Proc. No' 649/2009, Art.30(1/a and f)

⁴¹Id, Clause 37(1)

⁴²PPA, 2011, Clause 37(2). A bid lacks legal admissibility, as stipulated under PPA, when a bidder does not have nationality in accordance with PPA Sub-Clause 4.2, (b) bidder is found to have a conflict of interest as described in PPA Sub-Clause 4.3, (c) bidder has failed to submit valid business license indicating the stream of business in which the bidder is engaged, in accordance with PPA Clause 4.6(b) (i), (d) bidder has failed to register itself in the Public Procurement and Property Administration Agency's suppliers list (mandatory for domestic bidders only), in accordance with PPA Clause 4.7, (e) domestic bidder has failed to submit VAT registration certificate issued by the tax authority (in case of contract value specified in BDS Clause 4.6(b)(ii), in accordance with PPA Clause 4.6(b)(ii), (f) domestic bidder has failed to submit a valid tax clearance certificate issued by the tax authority, in accordance with PPA Clause 4.6(b)(iii), (g) foreign bidder has failed to submit business organization registration certificate or valid trade license issued by the country of establishment, in accordance with PPA Clause 4.6(c), (h) bidder has been debarred by a decision of the Public Procurement and Property Administration Agency from participating in public procurements for breach of its obligation under previous contracts, in accordance with PPA Clause 4.4, (i) in the case of a bid submitted by a joint venture (JV), the Bidder has failed to submit the form data on joint ventures, the agreement governing the formation of joint venture, or letter of intent to form joint venture, including a draft agreement, in accordance with PPA Clause 4.1

⁴³PPA, 2011, Clause 37.3. A bid lacks a professional admissibility, as stipulated under PPA, when a bidder has failed to submit relevant professional practice certificates, if required in BDS Clause 4.6(b) (iv), and (b) bidder has failed to provide in the bidder certification of compliance form information related to its professional qualification

So, the public body may issue invitation to bid for a second time once the first bid is rejected due to significant irregularities occurred in public contract awarding where the invitation to bid has been unsuccessful, namely where no qualitatively or financially worthwhile bids have been received and where it is concluded that non compliance with the rules and procedures governing bids prescribed by the Proclamation⁴⁶ and Procurement Directive⁴⁷ has been made.

2.2.3 Avoiding the Public Contract Awarding

Public body can't invite bidders to supply or construct any project and a bidder can't offer to perform such invitation by violating any law of the country.⁴⁸ For example, if one of a public entity at Bahir Dar City wants to build a complex and multipurpose building at a place that is accustomed and designed to be part of Bahir Dar International Stadium and invites bidding contractors, it is unlawful. Because the law that governs the City's master plan can't allow such public body to construct such building unless any change or amendment towards such master plan is made. If "a contract shall be null on the ground of unlawful cause where it is made by the administrative authorities with an unlawful object in view"⁴⁹, it will, for strong reason, have same effect at procurement awarding stage.

and capability for the period specified in the BDS Clause 14.1.

⁴⁴PPA, 2011, Clause 37.4. A bid lacks a technical admissibility, as stipulated under PPA, when a bidder has failed to provide in the bid submission sheet form the statement attesting the origin of the textbooks and related services offered, (b) bidder has failed to provide in the bidder certification of compliance form information about major relevant contracts successfully completed in the number and period specified in the BDS, (c) bidder has failed to submit certificates of satisfactory execution of contracts provided by contracting parties to the contracts successfully completed in the period and budget as specified in the BDS Clause 16.3, (d) bidder has failed to complete its technical specification, technical offer and compliance sheet form in accordance with technical specification presented as per template of statement of requirements and to submit the following mandatory attachments: (i) bidder has failed to submit descriptive technical literature in accordance with PPA Clause 17, (ii) bidder has failed to submit description of the organization of the bid guaranty, (iii) bidder has failed to submit copyright authorization letter in accordance with PPA Clause 5.6, and (e) bidder has failed to submit signed and dated delivery and completion schedule presented as per template as required.

⁴⁵A bid lacks financial statement requirements when a) a bidder fails to submit financial statement certified by independent auditors, Clause 15.2, for the period specified in it, b) bidder has failed to submit other documents proofing its financial standing, as required in the PPA Clause 15.2(b), (c) the average annual turnover for the period specified in it does not exceed the amount of the financial proposal of the bid in value specified in the BDS, (d) bidder has failed to calculate bid Prices for the textbooks and related services offered as prescribed in PPA Clause 12 and (e) bidder has failed to quote prices in currency specified in the BDS in accordance with PPA Clause 13.

⁴⁶Public Procurement and Property Administration Proclamation, 2009, Federal Negarit Gazzeta, Proc. No' 649, 15th year, No' 60.

⁴⁷Federal Public Procurement Directives, Ministry of Finance and Economic Development, June, 2010[here in after, Federal Public Procurement Directive, 2010]

⁴⁸Civil Code of The Empire of Ethiopia, 1960, Proc. No. 165, Negarit Gazzeta, Year 19th, No.2, Art. 1716(1) [here in after, Civil Code, 1960].

⁴⁹Id, 3171(1)

Any public procurement awarding may also be avoided when “it is ascertained that the procurement has no use in enabling the public body to obtain a better technical or economic advantage as a result of a change of work plan or another alternative representing a better option to meet the requirement of the public body”⁵⁰. An argument may be raised here that avoiding any public procurement awarding process due to not enabling the public body to obtain a better technical or economic advantage as a result of a change of work plan or another alternative representing a better option to meet the requirement of the public body can’t be considered as an irregularity act and effect of there off, but, as change of mind not to continue such procurement process. However, it results, at least, the stopping of such procurement awarding at all.

Although it is unlikely to happen when public procurement is awarding, public body can’t invite bidders to supply any product or service, or construct any construction project and a bidder can’t offer to supply or perform such invitation which is humanly impossible to supply or to construct.⁵¹ Likewise, no bidder can offer to bind himself to supply certain product or service, or to construct any construction project by violating laws of the country.

If there is such kind of irregularity in public contract awarding, however, the effect is avoiding such unlawful and impossible public contract awarding. “Upon deliberation on a complaint submitted to it”, the board⁵² may give its decisions to terminate⁵³ or annul in whole or in part⁵⁴ if an unlawful act occurred or unlawful decision is made by the public body in public procurement awarding proceedings.

2.2.4 Disputes between Procuring Entity and Bidders

Bid participants in one hand and procuring entity on the other hand, have their own particular aims and objectives and it has been rare to find public contract structures that encourage harmony among these aims.⁵⁵ Even in developed states, in the past, bid participants have expected to enter into confrontations with the procuring entity. Sadly this is often still the case.⁵⁶

Conflict of interest in a public procurement process is said to have occurred if the best interest of one of the bidders is impeded or might be perceived to have been impeded by procuring

⁵⁰Proc. No’ 649/2009, Supra note 32, Article 30(1)/b

⁵¹Civil Code, 1960, Supra note 47, Art.1715

⁵²A board that may be established under Public procurement and property Administration Proc. No’ 649/2009

⁵³Proc. No’ 649/2009, Supra note 32, Art.72(3)/A

⁵⁴Id, 75(2)/C

⁵⁵Will Hughes, Construction contracts Law and Management, 5th ed., Routledge Taylor and Francis Group, London and New York, 2015, P.4[Here in after, Will Hughes, Construction contracts Law and Management], PP.16-17

⁵⁶Ibid

entity, the vice versa is true, for instance a bidder may want to reduce his cost and maximize his profit while a procuring entity may want to receive quality work from the winner bidder that may cause the later to cost much.

The characteristic nature of public procurement transaction very often results irregularities that in turn results conflict of interest and latter results to disputes between bidders and procuring entity.

Thus, due to these irregularities in such transaction, the procuring entity and bidders are prone to conflicts and latter may be changed in to disputes. “Empirical evidence from previous studies shows that conflicts of interest” resulted in disputes and “affect public procurement project outcomes”, said O. A. Ejohwomu (et al), “if not properly managed.”⁵⁷

2.2.5 Liability

Apart from effects of irregularities of public procurement awarding discussed above, anyone who involves and commits any irregularity in public procurement bid process may be subject to any one or all of the following liabilities.

A. Administrative and Disciplinary Measures

Public Procurement and Property Administration Proclamation No’649/2009 and Federal Procurement Directive, 2010 empower the concerning public body to take measures against public officer or anyone under its authority⁵⁸ to ensure that objectives provided and the basic principles set out in such proclamation are realized.

A Public Procurement and Property Administration Agency may suspend a bidder for a definite or indefinite period from participation in any public procurement or give a written warning when it is satisfied that a bidder is committed an unlawful act or an act prejudicial to procuring entity’s legitimate interest⁵⁹.

So, in line with the above stipulation, such provisions of Proclamation No’ 649/2009 and Public Procurement Directive No’2010 reiterate that the concerning public body or the Agency may take administrative measures against any person under its authority and, against any bidder respectively, who, in violation of public procurement statutes, commit irregularities in public procurement awarding.

B. Civil Liability

⁵⁷O. A. Ejohwomu (et al), ‘Causes of Conflicts in Construction Projects in Nigeria: Consultant’s, Contractor’s and owner’s Perspective’, *Nigerian Journal of Technology*, 2016, Vol.35, No’2, PP.270-277 at P.1

⁵⁸Proc. No’ 649/2009, Supra note 32, Art.32 (1).See also Public Procurement Directive, Supra note 46, Art. 34.2.3(C)

⁵⁹Id, Art. 76/5(A and B)

Any irregularity for instance, the commission or omission of the following acts by any bidder may result in the forfeiture of bid security to the public body; a) withdrawing from a bid after the dead line for submission of bids stated in the bidding document or before the expiration of the price validity period indicated in the bid document and b) refusing to sign the contract or to furnish the performance security after award.⁶⁰ In addition to or apart from applying for either of administrative measures or criminal punishments where the procuring entity suffers a compensable injury due to irregularities or wrongs (offences) by a bidder, it may also claim damages in the form of pecuniary compensation or in the form of other appropriate compensatory remedies.⁶¹

Bidders can also claim damages, where they suffer a compensable injury due to irregularities or professional fault by procuring entity's employees, in the form of pecuniary compensation or in the form of other appropriate compensatory remedies.⁶²

Thus, there is a possibility for suing the public body, its administrative units, and servants for damage based on extra contractual wrongs. And a public body may also sue a bidder based on extra contractual liability to make good any compensable injury by a bidder. The basic function of an award of damages is to compensate for the full losses suffered to the bidder or public body as well as the expenses that have been incurred due to such irregularities in public contract awarding process. The exact type of award depends upon the nature of the harm, the characteristics of public procurement in question, and the technical capacity to repair the damage though damages or indemnity requires giving an economic value to the loss suffered and any expense there off.

C. Criminal Liability

The most important function of the state is acting as the guardian of the law and order, preventing and punishing all injuries to itself and all disobedience to the rules, which it has laid down for the common welfare. In regard to Ethiopian public procurement laws criminal liability is encompassed in the Criminal Code⁶³, and other enabling procuring statutes.

⁶⁰Federal Public Procurement Directive, 2010, supra note 46, Art.16.16.8. See also Proc. No' 649/2009, Supra note 32, Art.40

⁶¹Civil Code, 1960, Supra note 47, Art.2028

⁶²Id, Art.2126(2)

⁶³The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Proc. No. 414, Negarit Gazzeta, 9th year, extra-ordinary issue [here in after, Criminal Code, 2004].

As it is the case with all law enforcement, the objective in punishing violators of public procurement awarding process is not so much punishment for punishment's sake. Rather, it is to express community rejection of the conduct and send a message of "deterrence" that discourages similar misconduct in the future.

An officer or anyone employed by a public body contravenes or intentionally permits any irregularities in carrying out his duties in public contract awarding process is liable on conviction to fine and imprisonment.⁶⁴ Likewise, Any person or candidate who promises, offers or gives any bribe to any person appointed to or employed in any public procurement and property administration or intentionally presents falsified documentary evidence or conceals any evidence which he should have disclosed or connives at an act of fake is liable on conviction to fine and imprisonment.⁶⁵

3. Conclusion

Government contract placing is not left to the whim of the individual power holders at the various hierarchies of the government structure. What officials of the government do with the public expenditure should be transparent, and those wielding the power should be accountable to the general public for each and every activity that they do and have it done on behalf of the public.

In order to promote efficiency and value for money, effectiveness, transparency and probity in the process of government contract formation and to make officials involved in public procurement processes accountable, and thereby curb wide and expansive corrupt practices in their territories, governments have been trying hard to come up with the best possible modern public procurement rules. However, irregularities still face almost all public contracts awarding particularly when it is for public construction projects.

In conclusion, therefore, the effects of irregularities in public contract awarding can be summarized as; keeping a public contract awarding with arithmetic error correction when such irregularities are insignificant; reviewing and setting aside a public contract awarding when such irregularities are significant and can affect the outcome of the procurement; avoiding a public contract awarding when it is unlawful; and disputes between procuring entity and bidders. Apart from or in addition to the aforementioned effects, civil, administrative and disciplinary, and

⁶⁴Proc. No' 649/2009, Supra note 32, Art. 77(1-3)

⁶⁵Id, Art., 77(4 and 5)

criminal Liabilities against an employee of procuring entity and/or bidders are other effects of such irregularities.

Although, it is difficult to eliminate a bad inherit intention of a bidder or an employee of procuring entity, hiring a well educated personnel, and using a well established and modern public procurement procedures (including electronic procurement), in addition to legislating modern public procurement laws, may at least reduce any irregularities happen at public procurement process.