

JIMMA UNIVERSITY



COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

GRADUATE PROGRAM IN COMMERCIAL AND INVESTMENT LAW

The Law and Practice of Price Adjustment in Public Procurements: The Case of Some Federal Institutions

A thesis submitted in partial fulfillment of the requirement of LLM Degree in Commercial and Investment Law

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October 2019, Jimma, Ethiopia

DECLARATION

I Jawhar Nuru declare that, “The law and practice of price adjustment in public procurements: the case of some federal institutions” is my work. To this end, no work identical to this has been submitted for any degree or examination in any other University. All sources of material used in the thesis have been duly acknowledged.

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ACKNOWLEDGEMENT

I'm grateful to Allah and my families who supported me throughout my educational life. I am also thankful for all who have assisted me and give me ideas from the initial point of this study. My special appreciation also goes to my advisors Mr. Yosef Alemu (Assistant professor of Law) and Mr. W/Gebriel Dagne (LLB, LLM) who gave me remarkable and guiding comments for the successful accomplishment of this paper.

ACRONYMS

CSA	Central Statistics Agency
EC	Ethiopian Calendar
FDRE	Federal Democratic Republic of Ethiopia
GCC	General Conditions of Contract
ICB	International Competitive Bidding
ICRC	International Committee of Red Cross
MoFED	Ministry of Finance and Economic Development
PPA	Public Procurement Agency
PPPDS	Public Procurement and Property Disposal Service
SBD	Standard Bidding Document
UN	United Nations
US	United States
USD	United States Dollar

ABSTARCT

Public procurement is purchase of good or hiring of service by government through contractual agreement. The agreement can be framework (contract for more than three months and less than three years) or regular contract. In case of framework agreement there is fluctuation of price through time, this fluctuation is normally regulated by price adjustment. The main objective of the study is to critically examine the law and practice of price adjustment in public procurements and assessment of the case of some federal institutions. The study has employed both doctrinal and non-doctrinal methodologies over which purposive sampling technique used in conducting an interview. Price adjustment is allowed under Ethiopian public procurement laws however, there is different application. Some institutions prohibit and others apply but with different implementation mechanism. The lack of unity of application is causing economic, social and administrative difficulties. Be that as it may, institutions that adopted the price adjustment method for future price variation are able to reduce or avoid the problems resulting from price variation from time to time. Therefore, its recommended that the institutions should adopt price adjustment in framework agreement concluded with the suppliers, take part in training and experience sharing in order to improve their public procurements and the PPPDS should play its role of providing training for public institution on the application of price adjustment. Finally, the legislature should adopt unified price adjustment system over which investors(suppliers) get equal treatment.

Keywords: - Public Procurement, Price adjustment, Framework agreement and Framework agreement suppliers.

CHAPTER ONE

1. INTRODUCTION

1.1 Background of the Study

Public procurement is a government purchase in which the government hires for service and good through contractual agreement. According to United Nations procurement manual procurement includes functions of acquisition through purchase or lease of property and services¹ it's also one of the functions of the government.² There are certain general principles in public procurement for instance in UN procurements the general principles are: best value for money; fairness, integrity and transparency and; effective international competition.³ In order to comply with the general principles price adjustment is one of the mechanisms. It's not a mechanism used only by UN rather its applied by many jurisdictions.

Price adjustment is a means to give protection to the contractors against price escalation.⁴ Price adjustment can be done in two stages: during the bid by which the contactor fixes the price in the bid but leaves a stipulation to effect price adjustment in the event of price variation. While the other mechanism is non-fixed price over which price adjustment formula used to estimate price escalation in the future.⁵ It considers the fluctuation of cost of materials, equipment and labor which may result from currency fluctuation, inflation and other market related problems.⁶

Under Ethiopian law public procurement is defined as a means of obtaining goods, works, consultancy or other services through purchasing, hiring or obtaining by any other contractual

¹ United Nations, Department of Management Office of Central Support Service Procurement Division, UN Procurement Manual, 2013, revision 7 New York, Published by United Nations, regulation 5.12.

² Robert Agwot Komakech "Public procurement in developing countries: Objectives, principles and required professional skills" Public Policy and Administrative Research Review, vol.6, No.8 (2018) p.20.

³United Nations, supra note at 1.

⁴ Asian Development Bank, Price adjustment guidance note on procurement, 2018 Mandaluyong, Philippines, Published by Asian Development Bank, p.1.

⁵United Nations, supra note at 1, p.1.

⁶ Mohammed Hanifa Zaki "Examples of price adjustment as of FIDIC RED BOOK" Public Policy and Administrative Research review, (2001) P. 2.

means.⁷The contractual arrangement government enters through its administrative agencies called an administrative contract.

Before describing price adjustment in Ethiopian federal public procurement first we need to elaborate the initial points of public procurement. In order to make public procurement first there is a bid procedure over which the supplier that has better offer (i.e. in terms of price, technical requirements and qualification) awarded and concludes contract (i.e. administrative contract) with the public body. In general, contract is an agreement between two or more persons created, varied and extinguish obligation which is proprietary nature.⁸

When we come to administrative contract the requirements are beyond this for the contract to qualify as administrative contract it has to be expressly qualified as such by the law or by the parties or it is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service.⁹

The parties in a contract are expected to perform their respective obligations; specifically, the contractor is expected to participate permanently which means continuous, uninterrupted, regular and normal participation of the contractor in the relationship and the expansion of a public service.

Administrative contract for procurement can be framework contract or regular contract. As it's defined under the proclamation, framework contract is a contract by which a general agreement of procurement establishing unit price and other terms and conditions of contract which serves as a basis for supplies to be delivered under future specific contract.¹⁰ The duration of framework contract may extend to three years.¹¹

Framework contracts are under gone by the Public Procurement Agency (PPA); the agency has a list of common user items in the federal institutions that can be updated regularly. The federal institutions submit their procurement needs or requirement to the agency based on the list, then the Public Procurement and Property Disposal Service (PPPDS) based on the items specified as a

⁷ The Ethiopian Federal Government Procurement and Property Administration Proclamation No. 649/2009; (here in after the proclamation), Article 2(5).

⁸ Civil Code of empire of Ethiopia Proclamation No. 165/1960 (here in after the civil code) Article 1675

⁹ Ibid article 3132.

¹⁰Proclamation supra note at 7 article 2(18).

¹¹ Ibid article 61(4).

common user item will undergo every procurement process (from advertising bid to conclusion of the contract) afterward it will assign the suppliers to the federal institution all over the country.¹²

Up on following of the bid procedure (as a principle) administrative contracts for procurement can be entered into for a long or short term; the short term once are performed in a short time and most often they are performed once while in case of the long term the parties undertake to fulfill their obligation for a long period. In the contracts that are for a long period there are factors that keep on changing through time, these changes are normally dealt with the variation or revision of the contractual terms.

Variation of contract is common phenomenon in contractual agreements. In case of contractual agreement between individuals, it's the parties who are entitled to vary the terms of the contract.¹³ However, in administrative contract it's the court that may vary administrative contract¹⁴ provided that there is a dispute between the parties and they resorted to the court for the variation. The administrative agencies can also make certain modifications to the contract including variation if there is no contractual clause inserted prohibiting such change and there is change of circumstance that makes the change in general interest.¹⁵

However, introduction of price adjustment on the contractual agreement enables the administrative agency to make adjustment without those pre-conditions. If variation is not possible they have to resort to court or go through the procurement procedure all over again to make purchases with reasonable price (i.e. advertising of new bid and agreement on a new contract). The price adjustment in the existing contract is introduced to avoid this tiresome procedure since price adjustment does not change the whole agreement like variation rather modification of price.

Price adjustment in public procurement is allowed in certain restricted circumstances under Ethiopian procurement laws. The proclamation under article 37(k) gives the power to determine condition and manner of price adjustment to the Minister¹⁶ accordingly the federal public procurement directive under article 16.14.1 provides for firm price from the bidding to

¹² Proclamation supra note at 7 article 61 cum the federal government public procurement directive, article 27.

¹³ Ibid article 1764(2).

¹⁴ Ibid article 1767(1).

¹⁵ Ibid article 3179.

¹⁶ Proclamation supra note at 7 article 2(15) "Minister of finance and economic development."

performance of the contract as a principle. However, as an exception price adjustment is allowed for works contracts after twelve months and procurement made under framework contract after three months from effective date of the contract as per article 16.14.2.¹⁷

In addition to this requirements price adjustment is applicable only in respect of categories of items over which the Central Statistics Agency (CSA) issue periodic price index or item towards which price information is available from renowned local producer or competent foreign institute¹⁸however if the adjustment exceeded 25% the head of Public body has to be notified.¹⁹In case of consultancy service price adjustment is allowed for contract extended by fault of public body up to 15% of total contract price.²⁰

1.2 Statement of the Problem

In principle contract may not be varied because the condition of performance changed or the obligation become more onerous but of course the law grants the parties the right to regulate such change.²¹In case of administrative contract it can be revised by the court if as a result of official decision the terms of the contract has become more onerous or impossible²² or revision by administrative agency unilaterally when change of circumstance justifies a modification and it's in general interest²³while the other contracting party can request for termination of the contract if the modification upset the economy of the contract.²⁴

The troubling change in the long-term contract is the price fluctuation from time to time. The easiest mechanism through which price fluctuation regulated is price adjustment. Price adjustment is a modification made to the overall price or specific item of a contract to take account of legitimate changes in the cost of performing the contract this will protect both buyers and sellers from unforeseeable price fluctuations.²⁵

¹⁷ The federal government public procurement directive, article 16.14.1 & 2.

¹⁸ Ibid article.16.14.2.

¹⁹ Ibid article.16.14.9.

²⁰ Ibid article.16.14.5.

²¹ Civil Code supra note at 8 article 1764(2).

²² Ibid article 1767(1).

²³ Ibid article 3179.

²⁴ Ibid article 3182.

²⁵ Asian Development Bank, supra note at 4, p.4.

Price adjustment is possible according to federal public procurement directive only for framework contract, contract of work and consultancy service up to certain percent. In case of concession contract, it's possible to make change in proportion to the price change in certain commodities and services.²⁶

Framework contract mostly under gone through Public Procurement Agency (PPA) and Public Procurement and Property Disposal Service (PPPDS) based on the list of common user item. However, for items that are not under the list the federal public institutions make their own procurement through framework agreement as per the public procurement law. The PPA and PPPDS are responsible for necessary future price adjustments for framework agreements they have conclude while the federal institutions make price adjustment for framework contract they have concluded.

The problem in Jimma University is, there is express prohibition of future price adjustment on the framework agreement entered with the winning bidder. This practice is adopted by the institution to avoid the complexity of the price adjustment. Be that as it may, as a result of price rise, request for price variation by framework suppliers has become very frequent. This practice is leading to unnecessary (costly) court proceedings, termination of contract and non-performance or performance without economic efficiency.

This has created a problem in many ways: first, the forfeiture of the public institution (Jimma University) its unilateral right to vary contract under article 3179²⁷ of the civil code; second, non-performance of contract by the supplier as a result of price rise; third, court proceedings for breach of contract (i.e. claim for damages by the institution that are resulted from non-performance); fourth, reduction in number of bidders from time to time because of prohibition of price adjustment; fifth, unplanned purchase by the institution in case of interruption of supply as a result of price rise; sixth, exposure to corruption when there is direct procurement and; seventh, the institution will not benefit from price reduction if any.

²⁶ Civil Code supra note at 8 article 3213(1).

²⁷ Article 3179 of the civil code has granted the public body to make unilateral modification to the terms of the contract including price adjustment, if there is no contractual clause prohibiting such adjustment and it's in the general interest.

The effect of these problems is increase in transaction cost of public procurement that leads to economically inefficient procurement. In addition, these problems are not limited to the institution, they are casting difficulties on the suppliers and community in general.

1.3 Research Question

In order to address the objective of the study the following questions will be addressed:

1. What are the meaning, principle, theory, role & objective of public procurement and price adjustment?
2. How is price adjustment treated under Ethiopian general contract law and administrative contract law regime?
3. What are the conditions and manners of price adjustment provided under the public procurement proclamation, regulation and directive?
4. What is the practice of price adjustment in Jimma University public procurements and other federal institutions?

1.4 Literature Review

The concept, nature and manner of price adjustment have been discussed by different authors. Accordingly, Mohammed Hanif in his article Examples of Price Adjustment; described price adjustment as a mechanism to overcome unfortunate market and monetary fluctuations, and he considers systematic price adjustment as a solution. The article shows the mathematical application of price adjustment adopted by United Nations and World Bank procurement system.²⁸

Prianka N. Seneviratne on her article Costs and Benefits of the Price Adjustment Clause; defined price adjustment as a mechanism of reducing financial risk in case of input cost rise and fall. The adjustment clause should incorporate the timing, allowed range of price change and the method of adjustment. The article lists the global practice of price adjustment accordingly the United States, the Australian and Hong Kong has developed price adjustment system. In addition, the mathematical application of price adjustment based on the Asian Development Bank manual has

²⁸Zaki, supra note at 6.

been elaborated and finally, the author concludes price adjustment without sufficient and reliable source is in contrary to the purpose of price adjustment.²⁹

Yirga Tesfahun in his thesis *Public Procurement Reform in Ethiopia: Policy and Institutional Challenges and Prospects*; made an over view of the federal public procurement laws and argued the laws need reformation. The system is swamped in corruption and lack transparency and accountability, furthermore the practice of public procurement is in contrary to principle of efficiency and the Public Procurement Agency (PPA) is weak to oversight the activities of public procurement.³⁰

Abrham Yohannes on his article *Ethiopian Public Procurement Law Applicable Private Sectors*; discussed about the public procurement law framework, in doing so he analyzed the public procurement and property administration proclamation and he emphasized on how public enterprises are not under procurement procedure and how this affects price competition.³¹

Getaneh Emiru on his article *Contract Price Adjustment in Ethiopian Construction industry: Challenges Misconceptions and Antidotes*; described price adjustment as a mechanism to compensate the contractor in case of fall and rise of material price and any change in legislation. This particular article deals with price adjustment in construction contract.³²

The author argues market effect, cost change of inputs, change in monetary value and productivity necessitates price adjustment in construction contract. He presents adjustment by using rate difference between contractual rate and actual price as a best way. Generally, the article deals with

²⁹ Prianka N. Seneviratne, *Cost and benefit of the price adjustment clause*, (2016) Mandaluyong, Philippines Published by Asian Development Bank.

³⁰ Yirga Tesfahun, *Public procurement reform in Ethiopia: policy and institutional challenges and prospects*, (Addis Ababa, published by Addis Ababa University, 2011).

³¹ Abrham Yohannes "Ethiopian public procurement law applicable only to the private sector" Chilot, February 16, 2012, Found at :<https://chilot.me/2012/02/ethiopian-public-procurement-law-applicable-only-to-the-private-sector/> (Last accessed 27, 2019).

³² Getaneh Emiru, *contract price adjustment in Ethiopian Construction industry: Challenges misconceptions and antidotes*, (Bahir Dar, Publisher Bahir Dar Institute of Technology(BIT) 2016).

the mathematical application of price adjustment and concludes price adjustment as a solution to keep up with future price changes.³³

Thus, the present paper is different from the existing one because it focuses on the price adjustment in public procurement and analyze the law and practice of price adjustment in different federal institutions.

1.5 Objective of the Study

The research will be conducted in order to achieve the following general and specific objectives.

1.5.1 General Objective

The general objective of the thesis is to critically examine the law and practice of price adjustment in public procurements and assessment of the case of some federal institutions.

1.5.2 Specific Objectives

Specifically, the study will achieve the following objectives:

1. To explore the meaning, principle, theory, role & objective of public procurement and price adjustment.
2. To analyze the treatment of price adjustment under Ethiopian general contract law and administrative contract law regime.
3. To explore in depth, the nature, condition and manner of price adjustment under public procurement proclamation, regulation and directive.
4. To examine the practice of price adjustment in Jimma University public procurements and other federal institutions.

1.6 Significance of the Study

Federal Public institutions are one of the major purchasers of goods and services however the application of price adjustment is not usual that is resulting in public procurements that are not economically wise. In the absence of price adjustment in administrative contract for public

³³ Ibid

procurement the good and service providers will be forced to take the consequences of non-performance or perform economically inefficient contract.

Thus, this paper is helpful literature to avoid such problems by analyzing public procurement laws and the practice of price adjustment. The investigation made on the practice through survey conducted in governmental institutions on how price adjustment treated is helpful for institutions and stakeholders suffering as a result of the problem. It will also be vital source for other researchers who want to conduct further research on this area.

1.7 Research Methodology

The methodology employed is both doctrinal and non-doctrinal. It is doctrinal because the researcher has systematically analyzed existing literatures, rules, principles, doctrines and legislations. It's also non-doctrinal since the researcher has assessed practical problems associated with price adjustment in government procurement. It's qualitative research type.

1.7.1 Sources of Data Collection

The researcher has employed primary sources like proclamations, rules, regulation, directives and customary practices in order to answer the research questions. Secondary sources like books, journals, articles have been used while conducting the research.

1.7.2 Data Collection Techniques

Data to assess practical problems associated with price adjustment in administrative contract for public procurement is gathered through interviewing individuals from selected federal institutions.

Since the research is qualitative the type of interview that has been applied is unstructured and key informant interview. Officials and employees of the institutions and stakeholders has been interviewed. Accordingly, directors and experts of procurement and property administration and the legal office director of Jimma University, Jimma Referral Hospital, Addis Ababa University, and Tikur Anbessa Referral Hospital have been interviewed. Also supplier who enters in to framework agreement with Jimma University was interviewed.

In addition, the Federal Public Procurement and Property Disposal Service Communication Director and Central Statistics Agency (CSA) Price statistics director and the President of Jimma

Chamber of Commerce and Sectorial Trading Center are interviewed. Totally, ten individuals from the selected institutions and organization have been interviewed.

1.7.3 Sampling Techniques

The sampling technique used is purposive sampling technique. Purposive sampling can be employed when the researcher deliberately or purposively selects certain units for study from the population. It is more useful especially when some of the units are very important. This technique is selected due to the researcher's intention to investigate the problems arising in public procurement as a result of price fluctuation within federal institutions and the application of price adjustment.

This particular problem is one of the practical problems in Jimma University, thus before getting to conclusion there is need to see the situation in other similar public bodies. So, survey has been conducted in Jimma University, Jimma University Referral Hospital, Addis Ababa University and Tikur Anbessa Referral Hospital these institutions are selected because they are the largest federal government institutions in terms of size and budget consumption.

Furthermore, they frequently engage in public procurement through framework agreement that are subject to price adjustment and outside the procurements made through Federal Public Procurement Agency Thus, the situation in those institutions represents the situation in other federal institutions who engage framework agreements. Therefore, the concerned officials and employees of each institution has been interviewed about the problems through unstructured interviews.

In addition, Federal Public Procurement and Property Disposal Service experts have been interviewed about the public procurements made through their service and how price is adjusted for those purchases; the Central Statistics Agency (CSA) Family and Price Statistics Directorate Director have been interviewed about the periodical commodity price study and; the President of Jimma Chamber of Commerce and Sectorial Trading Center was interviewed concerning the suppliers and how they are responding to the problem. In order to see the problem from the stakeholder's side supplier has been interviewed through convenient sampling.

1.8 Scope of the Study

The thesis is limited to price adjustment in federal government institutions procurements. So, private procurement and price adjustment in non-administrative contracts are out of the scope of this thesis. Unless the situations in other countries used for comparative purpose the study is limited to public procurements in Ethiopia.

CHAPTER TWO

2. CONCEPTUAL FRAMEWORK OF PRICE ADJUSTMENT IN PUBLIC PROCUREMENT

2.1 Public Procurement in General

Public procurement is performed by public organization, in their behalf or when it's funded by public organizations and it also includes the process of identification of need, selection of potential sources, contract award and its administration.³⁴ Public procurement has its own objectives, principles and role in the government system.

The meaning of public procurement has been given by many literatures, public procurement is purchasing, renting, leasing or otherwise acquiring any supplies, services, or construction and includes all phases of contract administration i.e. description of requirement, selection, preparation and award of contract.³⁵ The simplest meaning of procurement is the purchasing of goods, services and works by public authorities using public fund.

2.1.1 Role and Objectives of Public Procurement

2.1.1.1 The Role of Public Procurement

All procurements have their role however this role defers based on whether it's public or private. The role of Private procurement is to maximize profit while public procurement has a function of serving the public with of course maintaining efficiency at the same time.³⁶The major role of a public procurement is social responsibility, it's when procurement is made to make the society better by following ethical code of conduct, by obeying rule and maximizing benefit of the society.

This role is not achieved by just obeying the rule or ethical code of conduct but to combine the rule and any other measures necessary for the success of public procurement. This role can be

³⁴ Reza Tajarlou & Behzad Ghorbany Darabad "The review of Principles Governing Public Procurement" International academic journal of economics vol.4 No.2, (2017) p.22.

³⁵ Robert E.Lloyd & Clifford P. Mc Cue " What is public procurement? Definitional problems and implications" Journal of International public procurement conference proceedings, Vol.3 (2014) p.10.

³⁶Jeong-Wook Choi, *A study of the role of public Procurement-Can public procurement makes society better?* (Seoul, Korea, Kookmin University press 2012) p.2.

played by government, both as a regulator (i.e. by incorporating social and environmental criteria) and as a participant of a market.³⁷

2.1.1.2 The Objectives of Public Procurement

There are set of objectives public procurement intends to achieve these objectives can be classified as political, economic and legal once. Political objectives are transparency, public confidence and elimination of corruption. Procurement is transparent when it incorporates the public as to every stage and procedure of the procurement this process will help to achieve better economic result by allowing competitive environment and helps to assume adequate commercial risks.³⁸ Public confidence and elimination of corruption are the crucial components of the political objective, this components help to increase the trust worthiness of the government agencies to engage with and improve the economic efficiency.

Economic objectives include economic and public procurement efficiency, efficiency is a major component in any economic transactions this fact makes efficiency the core of public procurement.³⁹

Finally, legal objectives include equality and fairness; legal objectives are the legal principles that help and facilitate the procurement system in public agencies, during the procedures of procurement the treatment of the suppliers has to be fair and equitable.⁴⁰

2.1.2 Principles of Public Procurement

There are principles that need to be followed in public procurement they may vary from jurisdiction to jurisdiction but they all are intended to achieve better procurement system in the administrative agencies. The incorporation of principles to public procurement legislations as a building pillar of the public procurement helps both the government and the suppliers. These principles are principle of competition, fairness and non-discrimination, effectiveness,

³⁷ Ibid p.7.

³⁸ Micheal Essig, Markus Amann, Raphael Boerner, Andreas Glas& Florian C. Kleemann, *Objective and Performance in public procurement: conceptual basics and explorative findings* (Heisenberg, Germany, Federal Armed force press, 2010) p. 5.

³⁹ Komakech, supra note at 2 p.21.

⁴⁰ Ibid

accountability & transparency, responsibility& independence, integrity and economic efficiency& value for money:

- I. Principle of competition:** according to this principle public procurement has to incorporate the liberal element of economic system by which every supplier who meets the required specification participates without any monopolistic restrictions.⁴¹
- II. Principle of fairness and non-discrimination:** this principle can range from domestic to foreign suppliers, the non-discrimination principle has international recognition in different legislations by which discriminating one supplier from the other country considered as unfair and violation of which is considered as breach of international norm.⁴²The same principle is also made applicable between domestic suppliers.
- III. Principle of accountability and transparency:** is about delivery of every information regarding procurement to the public in general and to the suppliers in particular and being held accountable to the same regarding the public body purchases.⁴³
- IV. Principle of responsibility & independence:** is all about conducting procurement with due diligence, care and making procurement decision reasonably without influence or intervention of other parties whose function does not concern the procurement process.⁴⁴
- V. Principle of effectiveness:** the principle of effectiveness states public procurement has to meet its predetermined purpose and contributes to the benefit of the public body.⁴⁵ It's more about the minimization of wastage or loss in procurements.
- VI. Principle of integrity:** integrity can be moral or legal obligation one should uphold against official responsibility; it's about refraining from corruption and collusion in conducting public procurement as well as making best mind judgment. ⁴⁶
- VII. Principle of economic efficiency and value for money:** are the core principles of public procurement, the principles mainly focus on the appropriate allocation and management of

⁴¹ International Bank for Reconstruction and Development, Core Principles on an efficient public procurement framework, Washington, D.C. Published by World Bank Group 2009.

⁴²Konkurrensverket, "Basic principles for public procurement" Swedish Competitive Authority January 8, 2016 Found at: [http://: www. Konkurrensverket.se/en/Public procurement/about-e](http://www.konkurrensverket.se/en/Public%20procurement/about-e) (last accessed August 20, 2019).

⁴³Komakech supra note at 2 p.22

⁴⁴Ibid p.1.

⁴⁵ Ibid.

⁴⁶Ibid p.22.

resource or money, the timing and the amount has to ensure efficiency and the best value for money.⁴⁷

2.1.3 Theories of Public Procurement

The theories of public procurement are theory of auction and competitive bidding, principal-agent theory, transaction cost theory and stakeholder theory.

I. Theory of auction and competitive bidding

Auction is an opportunity for competition among bidders. Auction rules are established by public authorities which set out the estimated value (market value), eligibility criteria's and criteria's for awarding the tender. The estimated value cannot be higher than the approved budget appropriations and no bidder may bid value that is higher than the estimated value.⁴⁸

II. Principal-agent theory

Related parties in public procurement are the government, tax payer, financial department, state institution and supplier. (i) Tax payer is the government procurement fund so; the primary principal-agent relation with government is tax payer. (ii) The government has very broad function as a result delegates its financial function to financial department. So, the second agent relation of government and financial department formed. (iii) Financial department cannot make the purchase by itself rather organize the purchasing center for the supervision of the standard of supplies and some requirements, the relation between financial department and purchasing center will be the third principal-agent relationship (iv) The last principal-agent relationship would be the relation between purchasing center and government officials will be formed.⁴⁹In principal-agent theory asymmetry of information, incomplete contract and opportunism are the inevitable agency problems in government procurement.⁵⁰

⁴⁷ Tajarlou & Darabad supra note at 34 p. 24.

⁴⁸ Roman Legesse W/Giorgis , Public procurement practice and challenges in Ethiopia: Evidence from selected public organizations, (Addis Ababa, Published by Addis Ababa University 2017) p. 7.

⁴⁹Zachary Bolo Awino & Pamela Nyaboke Marendi-Getuno "Public Procurement Legal Framework Implementation Challenges and Organizational Performance" DBA Africa Management Review Vol.4 No 2. (2014) p. 105; and Roman Legesse W/Giorgis supra note at 48.

⁵⁰Hezheng-Qing HE. "The analysis of government procurement in the frame of principal agent theory" Journal of modern accounting and auditing, Vol.4 No.12 (2008).

III. Transaction cost theory

Transaction cost theory related to the principle of effectiveness of procurement this relation explained as follows; public procurement should provide better service by lower price. Transaction cost can be higher due to existence of two factors; first, bounded rationality i.e. imperfect contract due to the limited rationality of individuals and; second, opportunism i.e. benefit gained through illegal or immoral act.⁵¹ The remedy taken to reverse the effect of this factor like delay in the implementation of public procurement and lawsuit will add considerable transaction cost that affects the principles of public procurement (i.e. principle of effectiveness, economic efficiency and value for money). The other common transaction cost in public procurement is organizational cost, compensations, legal knowhow of contract and public tender expenses.⁵²

IV. Stakeholders theory

In public procurement there are three set of stakeholder's; consumers, producers and suppliers. The government is the consumer in public procurement. These are groups of individuals who can affect or affected by the achievement of the organization's objective.⁵³ There are three attributes the stakeholders possess; the power to influence the organization, the legitimacy of the relation with the organization and the urgency of stakeholders claim on the organization (calling for immediate action).⁵⁴ Thus public procurement has an element of stakeholder theory and its affected by the attributes of the stakeholder theory.

2.1.4 Ethics in Public Procurement

Ethics in procurement is related to the principles of fairness, integrity and transparency. The officials that engage in public procurement should have the commitment to behave honorably in

⁵¹ Radek Jurcik "Transaction cost and transparency of public procurement" Journal of advances in economics, law and political sciences vol. 6, (2012) found at: <http://www.mendelu.cz> (last accessed August 22, 2019) p. 196.

⁵² Ibid.

⁵³ Thomas Johnsen, Joe Miemczyk & Mickey Howard "Underlying theories of sustainable purchasing and supply research: IMP and the sustainability agenda- a missing link?" (Exeter, UK, Published by University of Exeter 2012) p. 9.

⁵⁴ Dirk-Jan F. Kamann "Organization design in public procurement: A stakeholder approach" Journal of purchasing and supply management No. 13 (2007) found at: www.sciencedirect.com (last accessed August 20, 2019) p. 128.

all aspect of work and professional activity; maintain trust and confidence; refrain from taking advantage of others and; safeguard the organizational standard, policies and legislations.⁵⁵

The ethical codes of conducts that are need to be followed in public procurement by the procurement professionals and stakeholders. The purpose of the code of conducts is to make effective procurement that serves the objective of the specific procurement. These codes of conducts are intended: to avoid conflict of interest; conduct with the supplier (i.e. refrain from showing favoritism or being influenced by the suppliers) and; refrain from any corrupt activity.⁵⁶

In addition to that there are policy considerations: Competition and anti-competitive practices, supplier's diversity and equality, corporate social responsibility, sustainability, anti-discrimination policy and transparency.⁵⁷

2.2 Price Adjustment in General

For the purpose of this paper price adjustment is defined as a mechanism used to deal with price variation occurred as a result of economic factors or unusual future contingencies. Others have defined price adjustment as a mechanism used to account for fluctuation in commodity and labor prices.⁵⁸It's often used to stabilize bid prices in case of economic uncertainty and to prevent defaults in contract.⁵⁹ It's also defined as economic price adjustment as a way of protecting the contractor from price increases that may occur during the execution of the work.

During bidding price can be fixed or non-fixed, in case of fixed price and in cases of prohibition of price adjustment there will be assumption of risk in the existence of input price rise and fall, while in case of non-fixed or fixed price with adjustment mechanism the price difference can be regulated through price adjustment by application of price adjustment formula or base price.⁶⁰

⁵⁵ United Nation, Interagency Procurement Working Group, Procurement practitioner's handbook, 2006, Revision 1.1, New York, Published by United Nations, 2012 p.28

⁵⁶ International Committee of the Red Cross, Code of ethics for procurement, Washington D.C, Published by ICRC 2016.

⁵⁷ Ibid

⁵⁸ David E. Newcomb, Russell Lenz & Jon Epps, Price adjustment clauses: Report, 2012, Texas, Published by Texas A&M Transformation Institute College Station, 2013, p.1.

⁵⁹ Ibid.

⁶⁰ Ireland Office of Government Procurement, Cost control: Price variation clauses, (2016) Guidance Note 1.5.2, Dublin, Published by Ireland Government Publishing Press, 2016 p.2

2.2.1 Types of Price Adjustment

When a bid for public procurement incorporate price adjustment it can be through two modalities; proven (base price) and indices (formula). Proven price adjustment is when the prevailing price list at the time of bidding for a commodity being delivered is attached the adjustment is known as basic price list.⁶¹ If during the execution of the contract there is a price difference between basic price list and actual price there will be compensation proportional to the difference.⁶² This difference will benefit both the contractor and the public institution.

Indices (formula) method is when mathematical formula is used. The contractor develops the model by identifying the items of expenditure and combining the items with statistical derived indices, that indicates the changes in the cost of these items.⁶³ Thus through this method both the supplier and the public institutions will be benefited from the adjusted price.

⁶¹ Tesfaye Manaye Zegeye , Assessment of Challenge and best practices of price adjustment on federal road construction projects, (Addis Ababa, Published by Addis Ababa Science and Technology University, 2019) p.28.

⁶² Ibid.

⁶³ Ibid p.29.

CHAPTER THREE

3. LEGAL FRAMEWORK OF PRICE ADJUSTMENT IN PUBLIC PROCUREMENT

3.1 International Experience

Public procurement is a routine activity taken place by many jurisdictions from nation states to international organizations. In public procurement price difference from the contractual amount is unavoidable thus, price adjustment is employed in such circumstances. The United Nations, World Bank and the U.S. procurement system has more developed and variety of price adjustment mechanisms. In the next sections the price adjustment trend of the above three jurisdictions will be explored.

3.1.1 United Nations Procurement System

Among international organizations United Nations has its own procurement manual, guide and notebook. Accordingly procurement in United Nations include all actions necessary for the acquisition, by purchase or lease of property including products and real property and of services, including works.⁶⁴ In UN procurement system there are general principles: Principle of best value for Money; fairness, integrity and transparency; effective international competition and; protection of the interest of the UN.⁶⁵

Procurement through tender is the principle in UN procurement system however, as an exception if the secretary general deems necessary departure from this rule is desirable for the organization. If the tender method is used for purchase of equipment, supplies and other requirements the invitation for tender should be through advertisement.⁶⁶

As regard to price adjustment the United Nations procurement manual present the issue under amendment of contract and it's called price revision clause. It allows regular price revision for

⁶⁴ United Nations, supra note at 1, Regulation 5.12.

⁶⁵ Ibid.

⁶⁶ Ibid regulation 5.13.

standard products like fuel, food, supplies etc. This revision maybe included in the original contract to avoid repeated negotiations.⁶⁷ From this it's understandable that regular price adjustment after the conclusion of contract is possible for standard products i.e. products without specificity to a particular vendor, wide distribution of standard and easy and free or low-cost accessibility.⁶⁸ Price revision clause is possible for long term contract; the agreed price on the original contract shall be valid for one year and be subject to yearly revision during the entire contract, the said revision is made by using price index as a bench mark.⁶⁹

Therefore, the United Nations system employs price adjustment even if it does not use the terminology of price adjustment as such instead it uses price revision clause a system over which price adjustment made periodically or as a price rises.

The other issue in relation to price adjustment in UN procurement system is the principles of procurement; among which the principle of value for money and the UN interest encourages price adjustment, because to achieve this core principles one of the thing need consideration is the contractual value of the procurements i.e. as the price adjusted based on the market price, efficiency will be achieved which in turn safeguard the principles of procurement.

3.1.2 The World Bank Procurement System

In WB procurement system there are four set of principles, these are: principle of economy and efficiency; equal opportunity to bidders from developed and developing country; encouragement of development; transparency and; the interest of the bank.⁷⁰ For the procurements made under the bank the procedure is International Competitive Bidding (ICB) with preference for domestically manufactured goods and contractors in the country receiving the loan provided by the bank.⁷¹ Other methods of procurement can be made applicable if it's specified in the loan agreement.⁷²

⁶⁷ Ibid regulation 15.7.1.

⁶⁸ Ibid regulation 1.4.

⁶⁹United Nations, General Assembly, Review of long-term agreement in procurement in the United Nations system, JIU/REP/2013/1, Sixty-ninth session, New York, Published by UN, section 4 par.82.

⁷⁰ World Bank, Guidelines Procurement under IBRD loans and IDA credits, Washington, D.C, Published by WBG 1999, Paragraph 1.2.

⁷¹ Ibid Paragraph 1.3.

⁷² Ibid Paragraph 1.4, the other procurement methods are stated under section III of the guideline these are: - Limited International Bidding (LIB), National Competitive Bidding (NCB), Shopping (International and National), Direct Contracting and Force Account (i.e. Construction by the use of the borrowers own personal equipment).

In regard to price adjustment bidding document shall state the fixed price or price adjustment to any upward or downward change of price in the components of the contract (i.e. labor, equipment, material and fuel).⁷³ According to the guideline price adjustment is not allowed for simple contract involving delivery of goods or completion of work within eighteen months.⁷⁴

The price adjustment is made through application of formula that breaks down the total price into components that are adjusted by price indices specified for each component or as an alternative on the basis of documentary evidence provided by the supplier or contractor. In order to avoid confusion the payment currency has to be specified.⁷⁵ Thus, the World Bank procurement system has price adjustment mechanism for both work and supply contract.

3.1.3 U.S. Public Procurement System

In the U.S. public procurement system, the procurement contract can either be fixed-price or cost-reimbursement. The fixed price includes economic price adjustment for inflation over which the application of formula used to find the price difference and adjust accordingly.⁷⁶ All federal agencies use fixed-price contract that has an adjustable price level.⁷⁷ In US public procurement system there is upward and downward revision of the contract price.

There are three general price adjustments: Adjustment based on established prices (i.e. this price adjustment is based on increase or decrease from agreed-upon level in published or otherwise established prices of specific items); Adjustments based on actual costs of labor or material (i.e. it's an adjustment based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance) and; Adjustments based on cost indexes of labor or material (i.e. is adjustment made based on increases or decreases in labor or material cost standard or indexes that are specifically identified in the contract).⁷⁸The third

⁷³ Ibid Paragraph 2.24.

⁷⁴ Ibid.

⁷⁵ Ibid Paragraph 2.25.

⁷⁶ Yukins, Christopher R., The U.S. Federal Procurement System: An Introduction (November 1, 2017). Christopher R. Yukins, The U.S. Federal Procurement System: An Introduction, 2017 UPPHANDLINGSRÄTTSLIG TIDSKRIFT 69, <https://www.urt.cc/?q=node/187>.; GWU Law School Public Law Research Paper No. 2017-75; GWU Legal Studies Research Paper No. 2017-75. Available at SSRN: <https://ssrn.com/abstract=3063559> (last accessed September 2, 2019) p.86.

⁷⁷ Ibid.

⁷⁸ Ibid.

mechanism of price adjustment used in U.S. in circumstances where there is doubt as to stability of market and other contingencies that arise in the performance of the contract.⁷⁹

The other method to deal with contractual price is cost-reimbursement it's a system used for riskier projects because in US the government presumed to be absorbent much of the costs and performance risk.⁸⁰ Cost-reimbursement is also called cost-plus it's a type of procurement contract where a contractor is paid by the government for all of its allowed expenses up to a set limit, plus additional payment to allow the company to make profit. It's different from fixed-price contract in that, the contractor is paid the negotiated amount without consideration of the cost incurred (i.e. there is no adjustment of price at least not in principle). This mechanism is substitute for fixed-price contract in case of public procurements that are filled with uncertainty like procurements for national defense and weather service.⁸¹

The exception of price adjustment in cost-reimbursement is cost-plus-incentive-fee over which price adjustment is allowed based on the difference between the permissible cost and target cost (the actual cost).⁸² Thus in U.S. public procurement there is price adjustment even better there is mechanism of cost-reimbursement where adjustment is allowed even for procurements that has uncertain prices.

3.2 The Domestic Experience

As per the law procurement is a means of obtaining goods, works, consultancy or other services through purchasing, hiring or obtaining by any other contractual means.⁸³ The federal Public procurement takes place according to the procedures provided under the public procurement laws (i.e. the civil code, the federal public procurement proclamation, regulation and directive).

The federal public procurement law has the principles and objectives of public procurement in a well stated manner; we can drive this from the preamble of the public procurement proclamation accordingly, the public procurement law should achieve better transparency, efficiency, fairness and impartiality in public procurement. It should also enable the utilization of large sum of public

⁷⁹ Ibid.

⁸⁰ Ibid p.87.

⁸¹ Ibid.

⁸² Ibid p.6.

⁸³ Proclamation supra note at 7 article 2(5).

money economically.⁸⁴ The money spent should enable the government to get maximum benefit (principle of effectiveness); modernize the administration and introduction of integrated public property administration.⁸⁵

The principles are also incorporated under specific provisions, article 5 of the proclamation provides for set of principles public procurement and property administration should follow: Principle of value for money, non-discrimination based on nationality & other requirements that have nothing to do with qualification, transparency and fairness of criteria used for decision in procurement, accountability for such decision and proper use of public property.

The principle of competition is one of the principles that have been given great emphasis under the proclamation it has been mentioned in relation to different issues. Technical specifications,⁸⁶ usage of language of bid document,⁸⁷ record of procurement⁸⁸ and bidding documents⁸⁹ should not be made in a way that will hinder equal opportunity of competition or result in unfair competition.⁹⁰ On top of this an act of fake competition on the part of the candidates and officials who used their position to give unjust benefit to others will be punished by fine and rigorous imprisonment.⁹¹

Article 4 of the federal public procurement directive has incorporated the principles of public procurement like maximum value for money, non-discrimination, economy, efficiency, effectiveness, transparency and accountability. In addition to this the directive as per article 25 of the proclamation gives the power to ministry to give preference for Ethiopians. Accordingly, it puts the encouragement of domestic enterprises in public procurement as one of the principles of federal public procurement. Therefore, the Ethiopian public procurement laws more or less has incorporated the same principles and objectives as the international experience.

⁸⁴ Ibid Preamble, paragraph 1.

⁸⁵ Ibid Preamble, paragraph 3.

⁸⁶ Ibid article 29(1) & (3)(c).

⁸⁷ Ibid article 27(1).

⁸⁸ Ibid article 23(2)(a).

⁸⁹ Ibid article 37.

⁹⁰ Ibid article 31(1)(b) & 2(c).

⁹¹ Ibid article 77.

3.2.1 Procedures of Public Procurement

I. Procurement plan

Public bodies shall prepare annual procurement plan that shows their purchases for the budget year. This plan has to be approved by the head of public body and communicated to the relevant department and the Public Procurement Agency (PPA) until the end of the first month of the budget year(Hamle 30 of EC).⁹²

II. Record of procurement

The record of procurement public bodies keep has to constitute description of what is procured (i.e. good, work or service), invitation to bid, personal information of suppliers of submitted bid and the winner supplier, evaluation criteria, decision on compliant if any and reason why procurement procedure other than open bidding is used.⁹³

III. Form of communication

Communication as to between candidate and public bodies has to be in writing and any communication not made in writing has to be subsequently reduced in to writing. The ministry may issue directive on the use of electronic communication.⁹⁴

IV. Language of bid

For a bid only local bidders participate the language has to be Amharic but if use of English language facilitates the procurement process and wouldn't affect fair competition it's possible to use English. If procurement is conducted through international competitive bidding the document shall be prepared by English language.⁹⁵

⁹² Proclamation supra note at 7 article 22.

⁹³ Ibid article 23(1).

⁹⁴ Ibid article 26.

⁹⁵ Ibid article 27.

V. Qualification of candidates

The candidates for public procurement have to possess some qualities that are relevant for the purpose. These qualifications are: competence, financial resource, equipment, physical facilities, managerial capability, experience, reputation and personnel to perform the contract. Additionally, they need to have legal capacity to contract, stable financial position, have relevant business license, have fulfilled their tax duties and have a bank account.⁹⁶

The public body requires the candidates to provide documentary evidence and information to evaluate if they have the above qualifications. Any requirement should apply equally to all candidates and if the evidentiary document submitted is false the public body should disqualify the candidate.⁹⁷

VI. Technical specification

This specification is about the characteristics of the goods, work and services to be procured, the description has to be the one that provide correct and complete description of the object and encourage fair competition.⁹⁸ The specification should describe quality, performance, safety, dimension, symbol, terminology, packaging, marking, labeling, process and method of production and conformity assessment procedure.⁹⁹

The technical specification should be about performance not based on design, it should be national standard if any or international, free from restrictive competition. There shall be no requirement or reference of trademark, name, patent, design or type specific original producer or service provider unless there is no other specification.¹⁰⁰

VII. Rejection of bids, proposals and quotations

Rejection can be in whole or in part any time before concluding the contract. The reasons can be error, procurement with no better advantage (technical and economical), and bidder unable to meet minimum criteria, exaggeration of price as compared to market price and budgetary allocation and

⁹⁶ Ibid article 28(1).

⁹⁷ Ibid article 28(2)(3)(4) & (5).

⁹⁸ Ibid article 29(1).

⁹⁹ Ibid article 29(2).

¹⁰⁰ Ibid article 29(3) & (4).

unfair competition as a result of collusion among bidders. The public bodies have to give reason for rejection but not justification and it shall not incur liability for rejecting.¹⁰¹

3.2.2 Methods of Public Procurement

Unlike private procurement public procurement cannot be made without employing methods provided under the law. The civil code under article 3147(1) provides for conclusion of administrative contract through allocation by tender. The public procurement proclamation has provided six methods of public procurement: open bidding, request for proposal, two-stage tendering, restricted tendering, request for quotation and direct procurement.¹⁰² The preferred method is open bidding; to use other methods the conditions for use of such method has to be satisfied. Splitting procurement in order to avoid the preferred method is prohibited.¹⁰³

a) Open bidding

Open bidding is very transparent method of procurement by which the bid will be advertised in a newspaper that has wide coverage of circulation, national radio or television.¹⁰⁴ The bid need to have a bidding document¹⁰⁵ which has to contain information about the public body, the procurement, means and condition of obtaining the bidding document, place and time of deadline and opening date of the bid; through a document containing this particulars, bid will be invited.¹⁰⁶ After invitation of bid there will be submission and receipt of bids, opening of bid, examination and evaluation of bid, notification of winning bid and conclusion of contractual agreement.¹⁰⁷

b) Restricted tender

The preferred method of procurement is open bidding, thus in order to use restricted tender certain conditions has to be satisfied;¹⁰⁸ its certain that the required object of procurement is available only

¹⁰¹ Ibid article 30.

¹⁰² Ibid article 33(1).

¹⁰³ Ibid article 33(2)(3) & (4).

¹⁰⁴ Ibid article 35.

¹⁰⁵ As it's defined under article 2(12) of the federal procurement proclamation: "Bidding document is a document prepared by the public body as a basis for preparation of bids; which contains a specification of the desired object of procurement."

¹⁰⁶ Proclamation supra note at 7 article 36.

¹⁰⁷ Ibid article 41-43 & 46.

¹⁰⁸ Ibid article 49.

with limited suppliers; the cost of procurement does not exceed the threshold under the federal public procurement directive;¹⁰⁹ where bidders are not attracted after repeated advertisement.

If the object of procurement is only with limited suppliers the invitation of bid has to be sent to all such suppliers. However, if the use of restricted tender is justified because of the other two reasons (i.e. cost of procurement not exceeding the threshold and no bidders) the invitation has to be sent to limited bidders among those registered in suppliers list that is not less than five. The observance of minimum days of preparation of bid is not mandatory if all the invited bidders have submitted their bid it can be opened before the schedule by giving prior notice.¹¹⁰

c) Direct procurement

Direct procurement is allowed under certain conditions; when the object of procurement is supplied only by one supplier, additional delivery, emergency need, exceptionally advantageous purchase and for consultancy service when the original contract performed satisfactorily. The method shouldn't hinder fair competition and exceed the contractual value.¹¹¹ The conclusion of contract is subject to negotiation on the specification and approval of the head of public body.¹¹²

d) Request for proposal

The condition for request for proposal is for consultancy service or contract for which the component of consultancy service represents more than 50% of the amount of the contract.¹¹³ The selection of candidate will be determined after invitation candidates to submit expression of interest. The number of candidates should be not less than three and not more than seven. After evaluation the most advantageous proposal will be awarded.¹¹⁴

¹⁰⁹ The federal public procurement directive article 23 paragraph 3 sets threshold of total contract value for different type of procurement as follows: for work contract 2,000, 000.00; for good 500,000.00; for consultancy 300,000.00 and; for service 400,000.00.

¹¹⁰ Proclamation supra note at 7 article 50.

¹¹¹ Ibid article 51.

¹¹² Ibid article 52.

¹¹³ Ibid article 53.

¹¹⁴ Ibid article 54.

e) Request for quotation

Public bodies make procurement through request for quotation for purchase of goods that are widely available and for work and service that has established market as long as the value of contract does not exceed the amount stated under the directive.¹¹⁵ Public bodies shall request quotations from as many candidates as practicable but from at least three, if possible from among suppliers registered in the suppliers list. The request can contain quality, quantity, term & time of delivery of goods, works or services as well as other special requirements. It's the public body that gives adequate time to prepare quotations.¹¹⁶

f) Two-stage bidding

Two stage bidding is when it's not feasible for the public body to formulate detailed specification of the object of the procurement. It can be also for purpose of research, experiment, study or development except production of good cover commercial viability and to cover research and development cost. The other reason for two stage bidding is when no bid is submitted because of the object of the procurement not clearly described or where all bids are rejected as a result of failure of the public body to draw a clear and complete specification; the technical character of the required goods, works or nature of the service its necessary for the public body to negotiate.¹¹⁷

The procedure for two stage bidding are little bit complicated the suppliers submit the initial tender containing their proposal without a price based on the proposal over which there will be discussion with public body. By relying on the evaluation in the first stage the next bid will be drawn with more appropriate specifications and afterward bidders who are willing to comply with the new condition will submit their bid accordingly and the winner will conclude a contract, the parties can negotiate on conditions except for the price.¹¹⁸

3.2.3 Ethics in Public Procurement

There are certain rules the personnel's needs to follow in fulfilling their obligation in public procurement. These are obligation to notify conflict of interest and isolate oneself, give candidates

¹¹⁵ Ibid article 55.

¹¹⁶ Ibid article 56.

¹¹⁷ Ibid article 57.

¹¹⁸ Ibid article 58.

equal competition opportunity, keep confidentiality, reject bribes, report act of corruption and malpractice and show concern to public resource.¹¹⁹

The candidates has to refrain from giving any material or monetary value or service to the staff members and not to present falsified document and withhold information, not to conspire in order to hinder competition and report act of corruption and malpractice.¹²⁰

3.3 Treatment of Price Adjustment Under Federal Public Procurement Laws

Federal government public procurement in Ethiopia is regulated under different hierarchy of laws these are; civil code, public procurement proclamation, regulation and directive. In addition, there is also FDRE Ministry of Finance and Economic Development (MoFED) public procurement and property administration agency procurement manual and Standard Bidding Document (SBD) are available for guidance of federal government public procurements.

3.3.1 The Civil Code

The Ethiopian civil code has regulated public procurement under the administrative contract law and general contract law. Public procurement can be single purchase or purchases for longer period that is going to be concluded through contractual agreements. The contract for government procurement is an administrative contract which has its own provision under the civil code. Accordingly, as opposed to general contract which is an agreement created, varied and extinguished between two or more persons which has an obligation of proprietary nature¹²¹ administrative contract is a contract qualified by law or by the parties as an administrative contract as well as connected with the activity of public service and implies permanent participation of the contractor.¹²²

The general contract law deals with variation of contract, not price adjustment for the modification of price in the contract. Variation of contract is making amendment to the provision of the contract, its equivalent to amendment of law. Variation is change to the object of the contract i.e. it's a change becomes necessary because of the fundamental change in the circumstances that will not

¹¹⁹ Ibid article 32(1).

¹²⁰ Ibid article 32(2).

¹²¹ Civil Code supra note at 8 article 1675.

¹²² Ibid article 3132.

be tolerated.¹²³ Contract is varied by the parties, legislator and judiciary.¹²⁴ While price adjustment is modification to the agreed price of contract through pre-determined price list or formula; it's not by changing the objective of the contract or by amendment of the terms. Variation of contract is change in the nature of contract while price adjustment is made applicable through price adjustment clause in the same contract without change of agreement.

In administrative contract variation is not easily made to the terms of contract relatively speaking to contract between two individuals. The court can vary the terms of the administrative contract if when the circumstance changing the condition of the contract is being change by the official decision and has made the obligation to the other party has become more onerous or impossible (article 1767(1) of the civil code). In order to preserve the interest of the public the debtor in administrative contract cannot refuse the performance based on the non-performance of the administrative agency unless this fact makes the performance impossible (article 3177(1) of the civil code). In addition to this the administrative agency can unilaterally impose modifications including variation in the terms of the contract if circumstance justifies such modification in general interest and there is no contractual provision prohibiting such change (article 3179 of the civil code).

Therefore, as per the civil code price change from the contractual price in public procurement is only possible through variation of contract by the court or by the public body; the variation by public body emanates from the government exclusive power or prerogatives, Tecele Hagos Bahta on his article described the three prerogatives of the government as follows:¹²⁵

- (i) *“The right of supervision,*
- (ii) *The doctrine of l’imprevision (Unforeseen Supervening Eventualities) and*
- (iii) *The doctrine of fait du prince (Act of Government).”*

¹²³ Mesganaw Kifelew & Demelash Shiferaw, Law of contract teaching material, (Addis Ababa, Published by Justice and legal system research institute 2009) p. 120.

¹²⁴ Ibid.

¹²⁵ Tecele Hagos Bahta “ Conflicting legal regimes vying for application: The old administrative contracts law or the modern public procurement law for Ethiopia” African public Procurement Law Journal vol. 4 (2017) Found at: <http://applj.journals.ac.za> (last accessed July 25, 2019) p.12.

According to Hagos the right to supervision gives public bodies the power to unilaterally vary the terms of the contract or make price adjustment.¹²⁶

Variation of contract for the purpose of price adjustment in both ways is inconvenient than adjusting price based on pre-determined agreement before the occurrence of the change. Under the civil code price adjustment in proportion to price change in certain commodities and services is allowed only for concession contract (article 3213(1) of the civil code). So, the civil code has not covered the concept of price adjustment in its contract law regime in general and administrative contract specifically with of course the exception of concession contract, since variation of contract is not price adjustment its rather fundamental amendment on the objective of the contract.

The other mechanism stipulated under the civil code to mitigate the price fluctuation in public procurement is provided under article 3183 of the civil code. In case of unforeseen circumstance (unusual increment of price) were the balance of the contract is up set, up on the performance of the contract the supplier can request the administrative authority to share the loss.¹²⁷

As per the civil code the options for price adjustment is varying the contract proportional to the price change; sharing in the loss; cancelling the contract and drafting new agreement or; performing economically inefficient contract or accepting the consequences of non-performance of contract.¹²⁸ Thus price adjustment in the civil code is expensive since to change the price there has to be court involvement and bidding procedure that increases the transaction cost and reduce efficiency in public procurement which is contrary to the theories and principle of public procurement.

3.3.2 The Federal Public Procurement Proclamation

The Ethiopian federal government procurement and property administration proclamation number 649/2009 is one of the laws specific to public procurement in Ethiopia beside the public procurement regulation & directive.

¹²⁶ Ibid

¹²⁷ Civil Code supra note at 8 article 3183

¹²⁸ As per article 1771 of the civil code consequences of non-performance of contract is forced performance, cancellation of the contract and payment of damage to the creditor.

The proclamation covers the issue of price adjustment under 37 (k) by specifying what bidding document include. Accordingly, the bidding document may include the price adjustment that may be made during contract implementation. The conditions and manners of price adjustment are determined by the directive to be issued by the ministry. Based on this price adjustment in federal government procurement is allowed.

3.3.3 Public Procurement Regulation

The public procurement and property disposal service establishment council of ministry regulation no.184/2010. This regulation establishes the service and it's responsible for: the timely supply of goods and services used by public bodies as well as goods and services which have national strategic significance in desired quality and at prices attributable to the economies of scale resulting from bulk purchases as determined by the directive of the ministry; enable the speedy disposal by sale of properties of public bodies at fair prices; and assist public enterprises in the procurement of goods & services and disposal of asset.¹²⁹

It's also responsible for both domestic and international procurement and to give current market information, consultancy and training service in relation to procurement to federal public bodies and (on request to public enterprise, regional state and private sector).¹³⁰

The service makes the purchase based on the directive of the MoFED that has incorporated the manner and condition of price adjustment besides the service is obliged to make purchases that are economically wise. Thus the regulation even if not covered the issue of price adjustment expressly it has opened the door for the application of the price adjustment on the directive of the ministry.

3.3.4 Federal Public Procurement Directive

The federal government public procurement directive is a directive issued by the Ministry of Finance and Economic Development as per article 78(2) of the public procurement proclamation. The proclamation under article 37(k) gives the power to determine condition and manner of price

¹²⁹ The public procurement and property disposal service establishment council of ministry regulation no.184/2010, article 4.

¹³⁰ Ibid article 6(1)(c).

adjustment to the Minister accordingly the federal public procurement directive under article 16.14 is devoted to price adjustment.

As a principle bid price are firm and do not vary both during the validity period and throughout the performance of the contract (Article 16.14.1 of the Public procurement directive). However, as an exception price adjustment is allowed for work contract, framework contract and consultancy service.

3.3.4.1 Price adjustment for framework Contract

Framework contract defined under article 2(18) of procurement proclamation as follows:

“.... a general agreement of procurement establishing unit price and other terms and conditions of contract which serves as a basis for supplies to be delivered under future specification.”

Procurements taken place through framework contract are large value procurement through centrally established body i.e. Public Procurement Agency (PPA).¹³¹ The validity of award for framework contract may continue up to three years.¹³² It's used to fulfill similar procurement requirements of various public bodies or recurrent procurement requirement of a public body.¹³³ Public bodies can also forecast requirement of goods and services falling under the list issued by the PPA.¹³⁴ In order to apply price adjustment to framework contract the requirements and procedures laid down by the directive has to be followed, these are:

Requirements:

- a) Price adjustment is allowed for a contract after three months from effective date of the contract (Article 16.14.2 of the Public procurement directive);
- b) In respect of contract where the performance requires six months (Article 16.14.2(a) of the Public procurement directive);
- c) It's has to be ascertained that the Central Statistics Agency (CSA) can issue periodic price index¹³⁵ for selected categories of items or;

¹³¹ Proclamation supra note at 7 article 60.

¹³² Ibid article 61(4).

¹³³ Ibid article 61(1).

¹³⁴ Ibid article 61(2)(a) &(b).

¹³⁵ Directive supra note at 17, article 16.14.2(b)(c).

- d) Item towards which price information is available from renowned local producer or competent foreign institute (Article 16.14.2(d) of the Public procurement directive);
- e) If the adjustment exceeded 25% the head of Public body has to be notified.¹³⁶

Procedures:

Price adjustment for framework contract has to be determined based on the price information available from CSA or the PPA. The procedures are described under Article 16.14.4 of the directive:

- a) Filing request for price adjustment of procurement under framework contract after three months from the effective date of the contract;
- b) The price information the agency or the CSA applicable to a goods and services on the day of bid opening in respect of which price adjustment allowed and the time in which the framework contract is in force shall be stated in the agreement;
- c) The public body shall calculate the price difference between the price on the day of bid opening and the time of adjustment and subtract or add the difference to the price quoted and adjust the price in this manner until the next price adjustment;
- d) In circumstances the supplier doesn't conform to the delivery time in the contract the price adjustment has to be applicable based on the price information applicable at the time the supplies should have been delivered as per the agreement.

3.3.4.2 Price adjustment for work contract

Work contract is a contract concluded for the undertaking of activities described as work under the public procurement proclamation. The specifications include all works associated with the construction, reconstruction, up grading, demolition, repair or renovation of a building road, or structure, service incidental to works if the value of those services does not exceed that of the works themselves and includes build - own - operate, build- own- operate- transfer and build-operate-transfer contracts.¹³⁷

¹³⁶ Ibid article 16.14.9.

¹³⁷ Proclamation supra note at 7 article 2(3).

The price adjustment under the directive covers those works and for the works to be subjected under price adjustment the following requirements and procedures have to be fulfilled:

Requirements:

- a) For work contract that has been going for twelve months from effective date of the contract (Article 16.14.2 of the Public procurement directive);
- b) In respect of work contract requires more than eighteen months (Article 16.14.2(a) of the Public procurement directive);
- c) If the adjustment exceeded 25% the head of Public body has to be notified.¹³⁸

Procedures:

Price adjustment has to be calculated using the formula provided in the standard bidding documents in accordance with the procedures under article 16.14.3 of the directive, these are:

- a) Identify the major inputs necessary for the work and specifying the classifications under the major input;
- b) Calculating the major and specific input from the total input of the work in question and select the once over which price adjustment is allowed;
- c) The price index or price indicator used as a base for price adjustment has to be the once operating before the bid closing date;
- d) In case there is filing for price adjustment as per article 16.14.2 the price index or indicator applicable can be the one that exists at the time of filing.

3.3.4.3 Common conditions for work and framework contract

The bidding document that has item subject to price adjustment should specify:¹³⁹

- a) Type of evidence to be provided by the candidates for price adjustment;
- b) Condition for price adjustment, means request of price adjustment communicated and number of supporting document;

¹³⁸ Directive supra note at 17 article 16.14.9.

¹³⁹ Ibid article 16.14.7.

After evaluation of the bid the contract to be concluded with the successful bidder has to constitute:¹⁴⁰

- a) Goods to be produced or supplied using input in respect of which price adjustment allowed and price adjustment procedure;
- b) Source and type of document agreed upon to adjust price;
- c) No adjustment for the price rise as a result of delay of the supplier.

3.3.4.5 Price adjustment for consultancy service

One of the procurement public bodies hire is consultancy service it's a service of intellectual and advisory nature provided by consultants using their professional skills to study, design or organizes specific projects, advice client, conduct training and transfer knowledge.¹⁴¹ Price adjustment for procurement of consultancy service is provided under article 16.14.5 of the directive:

Requirements:

- a) Extension of consultancy period under the contract;
- b) The said extension of time should not be attributed to the fault of the consultant;
- c) The public body considers such price adjustment is appropriate and;
- d) Finally, the price adjustment shall not exceed 15% of the total contract price.

Procedures:

For consultancy contract there is no set of procedure since the price for consultancy cannot be derived using price index or formula it's only the judgment of the public body to determine the appropriateness of the adjustment.

3.4 Standard Bidding Document

The Standard Bidding Document (SBD) of the Federal Democratic Republic of Ethiopia has covered the issue of price adjustment under the General Terms of Contract (GCC). As per the document the contract price for supply of goods and service shall not vary from the price stated on

¹⁴⁰ Ibid article 16.14.8.

¹⁴¹ Proclamation supra note at 7 article 2(4).

the bid.¹⁴² In addition under paragraph 32 prohibits price adjustment by stipulating contract price shall be fixed throughout the suppliers performance and will not be subject to adjustment on any account for the duration of the contract.¹⁴³

However, this prohibition of price adjustment is not absolute, we can drive this from section 7 GCC paragraph 1.2 (g) defined general conditions of contract as a:

“.....conditions which shall govern the Contract, except where amended by the Special Condition of Contract or Contract Agreement.”

Therefore, the prohibition of price adjustment under the GCC has no effect if the parties agreed otherwise.

¹⁴² Federal Public Procurement Agency “The Federal Democratic Republic of Ethiopia Standard Bidding Document(SBD), For national Competitive Biddings” (2011), Section 7 General Conditions of Contract, paragraph 31.1.

¹⁴³ Ibid paragraph 32.1 cum 32.2.

CHAPTER FOUR

4. THE PRACTICE OF PRICE ADJUSTMENT

4.1 General Overview

Federal institutions make procurement through PPA which is framework agreement or by themselves either in framework agreement or regular contract. The PPA through its directorate the public procurement and property disposal service has made purchases for two terms from 2008-2011 a period over which 321 items and from 2011-2013 a period over which a framework agreement for 402 items has been concluded and distributed among 189 federal institutions. The items being procured are common user items, other items which are specific to respective institutions are procured by the institutions.¹⁴⁴

As per article 61(2) (a) of the proclamation¹⁴⁵ and article 27 (3) (b) of the directive¹⁴⁶ the PPA shall identify common user item (that are updated regularly) and issue the list of items to PPPDS and to all federal public bodies. The public bodies based on the list submit the annual procurement requirement to the PPPDS, accordingly the service prepare procurement plan, process the bid procedure, concludes contract with the bid winning supplier and assign the suppliers to the institutions.¹⁴⁷

Thus, for the items the PPPDS do not incorporate under common user item the federal institutions can make their own procurement through framework agreement by the procedures provided by the public procurement law. Accordingly they can make price adjustment based on the price index from the CSA or based on price information from renowned producer either domestic or foreign for framework agreements they have concluded.¹⁴⁸

¹⁴⁴ Interview with Mr. Asefa Solomon, Federal Public Procurement and Property Disposal Service, Communication directorate director, September 2, 2019.

¹⁴⁵ Proclamation supra note at 7.

¹⁴⁶ Directive supra note at 17.

¹⁴⁷ Proclamation supra not at 7 article 61 cum Directive supra note at 15 article 27.

¹⁴⁸ Directive supra note at 17 article 16.14.2 (d).

4.2 The Case of Jimma University

The public procurement in Jimma University is conducted according to the rules and principles prescribed under the federal public procurement laws. There are procurements made through PPA and there are other procurements made by the institution, the framework agreements made through the PPA are under price adjustment as prescribed by the public procurement laws.

However, in procurements the institution makes there is express prohibition of price adjustment on the framework agreement entered with the supplier. The terms of the contract might extend to one year. Thus, as the governing law as to between the parties the prohibition under the contract makes price adjustment impossible in the event of price variation from the agreement in the future.¹⁴⁹

As its stated by the director of procurement and property administration of the institution the avoidance of the price adjustment is beneficial since there is always increment of price and in case of non-performance the performance bond will cover the price difference in the next agreement with another supplier if any. In addition, by prohibiting price adjustment the institution is able to avoid the legal procedures of adjustment.¹⁵⁰

This approach has resulted in several problems first, reduction in number of bidders from time to time; that emanates from avoidance of price adjustment. In the event of price rise suppliers are compelled to perform the contract even though it's not economical. They will be forced to choose between non-performance, forfeiture of performance bond or payment of damages whatever option they think less costly for them.

This has problem in many levels the reduction in number of bidder's affects competition, if the bid is between few competitors the price, quality and qualifications will be limited. This will be in contradiction with the public procurement proclamation which requires the winners should propose lower price with better quality¹⁵¹ and possess certain qualifications.¹⁵²

¹⁴⁹ Interview with Mr. Zegeye Bekele, Jimma University procurement and property administration directorate director, September 9, 2019.

¹⁵⁰ Ibid.

¹⁵¹ Proclamation supra note at 7 article 43(8)(a) "The successful bid shall be the bid that is found to be responsive to the technical requirements and with the lowest evaluated price" cum article 29.

¹⁵² Ibid article 28.

Second, in order to minimize the number of contracts terminated as a result of price change the terms of contract has been reduced from one year to six months. The reduction in term of the contract means there has to be bidding process twice a year still in the existence of price fluctuation; this makes the remedy by the institution kind of double problematic. In addition, it's against the principle of economy, efficiency and value for money and; theory of transaction cost. Since the procurement law has incorporated those principles, this practice by the institution is contrary to the public procurement laws.¹⁵³

Third, the performance bond will not always cover the traction cost and the price difference with the next supplier. It's not a guarantee to hold on to, since it will not ensure the contractual stability or cover the cost of new agreement.

Fourth, in cases where the suppliers stop the provision of supplies, until the next agreement concluded by undergoing through the procurement process all over again, direct procurement will be necessitated. This practice has three problems due to the emergency nature of the procurement: the item will be expensive, its unplanned expenditure that is not preferable when its seen from the government budget perspective and its exposed to corruption (i.e. collusion between the traders and purchasing personal's).

Fifth, the express prohibition of the price adjustment on the contract will result in forfeiture of the right to unilaterally make variation to a contract by the institution as exercise of supervisory role.

In relation to price adjustment there are also legal disputes that arise from time to time and request for price adjustment is also becoming very frequent from the suppliers. In cases that get to court the university sometimes win and sometimes loses the case and pay damages.¹⁵⁴ The institution prohibits price adjustment on the contractual agreement entered with the suppliers to avoid a problem of suppliers abusing their right by claiming they are out of stock and delaying supply at the last weeks of the third month or; by proposing very lower price (a price not depended on

¹⁵³ The preamble of the federal public procurement proclamation provides for the principle of efficiency, value for money & maximum benefit from procurement has to be gained. In addition, the federal government public procurement directive under article 4 provides for the same principles.

¹⁵⁴ Interview with Yosef Alemu (Assistant Professor of laws), Jimma University Legal Service Director, August 30,2019.

market) during the bid then after winning the bid they wait the three month period and ask for price adjustment.¹⁵⁵

4.3 The Case of Jimma University Referral Hospital

Jimma University Referral Hospital shares procurement with Jimma University in items like food and other common user item in addition to procurement through the PPA. The biggest consumption of the hospital is medicine and the procurement of medicine is taken place by the hospital itself. Accordingly, after awarding the winner through open bidding they will conclude framework agreement that extend up to one year.¹⁵⁶

The approach the hospital uses is different from the Jimma University in relation to price adjustment. In the occurrence of price rise and up on request of supplier for price adjustment, there will be formation of committee which is composed of experts from procurement and property administration to determine the average price by conducting survey on other suppliers. Then if the committee finds out through survey that there is price rise and believed that the adjustment is beneficial for the hospital they will submit the memorandum of meeting that has their approval to the president of Jimma University for approval; if the president approved, the adjustment will be made effective.¹⁵⁷

In case the supplier refuses to supply with the price adjustment provided by the hospital up on forfeiture of contract security he/she can stop the supply. Then the hospital awards the second bid winning candidate provided that there is agreement on the price provided by the hospital. Thus, the hospital has incorporated price adjustment as opposed to Jimma University.¹⁵⁸

4.4 The Case of Addis Ababa University

In relation to price adjustment the trend in Addis Ababa University is different from Jimma University. In Addis Ababa University adjustment is made through instrumentality of contractual

¹⁵⁵ Ibid.

¹⁵⁶ Interview with W/ro Aserat Gezahegn Jimma University Referral Hospital Procurement and property Administration director, September 30, 2019.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

agreement that allows future price adjustment in case of price changes. The university enters in to a contract that is for long or short term two and one year respectively.¹⁵⁹

The procedure of price adjustment is as prescribed by the federal public procurement directive accordingly; up on request of the supplier for price adjustment (mostly in case of price rise) the institution with official letter will in turn request the CSA for market price of the particular item that needs adjustment. Afterward based on the price provided by the CSA the adjustment will be made after two administrative procedures: first, meeting of the procurement enquiry committee; if the committee believes that the adjustment is beneficial for the institution they will confirm the same by signing on the meeting memorandum. Second, communicating the request for price adjustment and the market price provided by CSA with the vice president of the university who is also the head of administration and student service.¹⁶⁰

The final official letter granting the supplier the price adjustment will be attached to the original contract for documentation and auditing.¹⁶¹ Due to price adjustment mechanism adopted at the procurement department of the university the problem arising as a result of need for price variation has been minimized it's even safe to say it's avoided.¹⁶²

For this matter an interview has been conducted with Mr. Alemayehu Teferi whose CSA Family and Price Statistics Directorate Director. Accordingly, the CSA conduct monthly market study of 119 cities in Ethiopia. Thus up on official request of the institution we provide the market price of the particular item or all items that monthly retail price survey has been conducted on.¹⁶³

Most of the time dispute in procurement arises only in cases when the supplier refuses to provide the service with the price provided by the CSA. Still this issue has been managed by awarding the second bid winner to supply instead of the first one or by announcing new bid and signing new agreement. Legal disputes that result in court proceeding are not that common; there is one

¹⁵⁹ Interview with Mr. Henok Kemalib Addis Ababa University Contract Monitoring Expert, September 3, 2019.

¹⁶⁰ Interview with Mr. Abebe Dememew Addis Ababa University procurement expert, September 3, 2019.

¹⁶¹ Ibid.

¹⁶² Henok Kemalib Supra not at 159.

¹⁶³ Interview with Mr. Alemayehu Teferi Central Statistics Agency, Family and price statistics directorate director, September 5, 2019.

particular case it's when the supplier stop provision of the supplies in case of prepaid contractual agreement and where there is damage as a result of non-performance.¹⁶⁴

4.5 The Case of Tikur Anbessa Referral Hospital

The trend of price adjustment at Tikur Anbessa Referral Hospital is different from Jimma University or Addis Ababa University. In the event of price fluctuation (i.e. mostly when there is price rise) the hospital has mechanism of dealing with this unfortunate situation. A committee will be established that is constituted of experts from purchasing, from respective department who uses the particular supplies that needs adjustment and from property administration of the hospital.¹⁶⁵

Afterward the committee will make study on prices of particular item over three market places or gather price information from known suppliers or producers and calculate the average price. Based on the average price the adjustment will be made after the committee confirms that it's beneficial for the hospital and communicate the matter with the head of procurement approval. Adjustment is made either when there is clause in the contract for price adjustment or where there is no contrary stipulation (when it's silent) on the contract for this effect.¹⁶⁶

This mechanism is devised to give quick remedy than CSA because monthly price index can be gathered after a month; the survey for retail price is conducted according to the European calendar from the first day up to fifteenth day and the survey will be processed up to the end of the month. Thus, the result for the last month will be known on the next month from day one up to day five.¹⁶⁷

4.6 Challenges in Relation to implementation of Price Adjustment

The institutions have implemented the public procurement laws in relation to price adjustment however, their application is different based on what believed to be more beneficial for the institutions. The prohibition of price adjustment by Jimma University procurement system has never served the purpose its set out for in the first place that is to avoid the complexity of price

¹⁶⁴ Interview with Mr. Tsadiq Mesfin, Addis Ababa University legal service advocate, September 3, 2019.

¹⁶⁵ Interview with Mr. Daniel Solomon, Tikur Anbessa Referral Hospital, Higher legal consultant and head of procurement approval September 4, 2019.

¹⁶⁶ Ibid.

¹⁶⁷ Central Statistics Agency "Retail price survey gathering directive" paragraph 5 and; Interview with Mr. Daniel Solomon, Tikur Anbessa Referral Hospital, Higher legal consultant and head of procurement approval September 4, 2019.

adjustment procedure. As a response to the prohibition of adjustment suppliers to stay ahead of the problem they inflate the price through collusion during the bid i.e. even the lowest price during the bid is not lower because of the market price rather it's the anticipated future causality price which has the probability of may not happening.¹⁶⁸

The application and method of price adjustment is optional for institutions as per the law however, the avoidance of price adjustment is contrary to the objective of public procurement law. The public procurement proclamation has the following principles as guiding instrument in serving the purpose/objective of the law. These are: efficiency, competition and effectiveness by prohibiting the application of price adjustment these principles are being violated.

Thus, based on the observation even if the law is permissive for both options (i.e. prohibition or application of price adjustment) taking options without further analysis is a violation of the law. The objective of the law and the application of the provision has to be balanced based on the circumstances i.e. the term of contract, types of item etc.

The other challenges and findings are on the side of suppliers. In public procurement there are stakeholders that can be affected and affect the procurement system. There are three attributes the stakeholders possess; the power to influence the organization, the legitimacy of the relation with the organization and the urgency of stakeholders claim on the organization (calling for immediate action).

Accordingly, the suppliers to Jimma University as stakeholders call for immediate action in case there is unnatural and unusual price rise, shortage or sometimes non-existence of supplies in the market or in the stock. The response of the University is to continue provision as per the agreement.¹⁶⁹

The political and social instabilities in the past few years and the appreciation of foreign currency (USD) in terms of birr are the major drives of the unusual price rise now a day. The need for immediate action results from the nature of the supply (i.e. supplies like food) since this supplies

¹⁶⁸ Yosef Alemu (Assistant Professor of law) supra note at 154.

¹⁶⁹ Interview with Mr. Sebsib Abafira Framework contract supplier of Jimma University and the President of Jimma Chamber of Commerce and Sectorial Trading Center, October 1, 2019.

are not suitable to stop all of a sudden like that of construction work over which the contractor negotiate the price by holding the work for a while.¹⁷⁰

As Mr. Sebseb Abafira one of framework contract supplier of Jimma University and President of Jimma Chamber of Commerce and Sectorial Trading Center stated:

“As a supplier who enters in to a contract with the university that totally prohibits price adjustment on the contractual agreement we don’t ask for price adjustment but for consideration from the university the situation causing the change. As a center of excellence we expect the university to forecast, study and take consideration of the social, political and economic situation in the country and forge mechanism to support the suppliers as a part of the community. Rather the University abuses its bargaining power against suppliers who don’t want to get in trouble with public bodies and have pledged performance bond.”

The potential economic problems in relation to this problem are:¹⁷¹

Loss of profit: when there is increment of market price above the contractual price the suppliers will be obliged by their agreement to supply in unreasonable price. This will defeat the purpose of the economic firm which is making profit. In addition, the forfeiture of the performance bond will be another loss.

Unplanned expenses: the suppliers have plan of every expenses and also the profit margin. However, the price fluctuations in recent years is very unpredictable as a result the planned expense for causalities would not cover the difference between market price and contractual price. In addition, the political and social instabilities in the country has caused problem of delay in a supply (i.e. unable to move from place to place); destruction of production (in farm crops and manufacturing’s) and; no enough production (i.e. the labor force is being consumed in political and social crises). This all factors have increased the commodity price unpredictably one way or another.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

Forced to change the nature of business: most of the suppliers are specialized in the supply of goods to higher educational institute and when this supply result in unpredictable cost and loss of profit, the change of business type will be necessitated. The deviation from the customary business type will be another problem that result in loss of profit and extra expense until they get to use to it. As a manifestation for this the number of bidders has been highly reducing from time to time.

Loss of jobs: the suppliers are investors who has employees under them, in the existence of price rise the profit margin will highly decrease and supplying as per the agreement is a lose. To survive this situation, they reduce the labor force.

The other three institutions i.e. Jimma Referral Hospital, Addis Ababa University and Tikur Anbessa Referral Hospital has adopted their own price adjustment method i.e. based on price indices from CSA and conducting survey of market. The problem with sticking in to one method is that it's not always the best. Avoidance and adjustment through survey is always exposed to corruption and bargaining. In case of avoidance the parties to get a better deal they may rely on illegal ways. While in case of adjustment through survey there will be collusion between the purchasing personals and traders. Lastly, the problem with adjustment based on indices from CSA is that the periodic retail price survey may not be the quick measure and result in delay. However, since the CSA is relatively impartial than the committee for survey and has official data collected by professionals is the better way of price adjustment. On the other hand, the survey method may be considered the best based on the circumstances of the case.

Therefore, every path adopted by the institutions has their own merits and demerits and cast their own effect on the institutions, suppliers and the community in general. The choices made in relation to price adjustment has to be well studied and considerate of every dimension. The variety of price adjustment trend has put the investors in different treatment. Some investors get adjustment some don't in the same country and in the same system, this has negative economic implication in terms of competition and fiscal responsibilities. Investors should be in a position of getting opportunities to compete with investor in other part of the country or investor who is framework supplier of other institution. The institutions that are avoiding price adjustment at least has to adopt a system that treats unforeseen circumstance that are cause unnatural and exaggerated price rise.

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATION

5.1 CONCLUSION

Public procurement is a government purchase made to serve the public or to make the society better. It can be through purchasing, renting, leasing or otherwise acquiring any supplies, services, or construction and includes all phases of contract administration. There are objectives public procurement set out to fulfill, they can be categorized in to political, economic and legal objectives. Public procurement has principle of competition, fairness, non-discrimination, accountability, transparency, responsibility, independence, effectiveness, integrity, economic efficiency and value for money.

On the other hand, price adjustment is a mechanism used to deal with price variation occurred as a result of economic factors or unusual future contingencies. Price adjustment is modification to the contractual terms based on pre-determined agreement between the parties. As opposed to variation of contract that is amendment of contract as a result of fundamental change that cannot be tolerated which is equivalent to amendment of law. In case of administrative contract variation is not simple as contract between individual parties, in administrative contract variation is possible by court or the public body as a power of supervision.

In circumstances where the contract for public procurement does not have price adjustment and there is market price change the consequences will be non-performance, court proceedings, payment of damage, forfeiture of performance bond, inefficient transaction and new procurement process all over again (beginning from bid advertisement to contractual agreement). Thus, adoption of price adjustment in to a contract is preferred to avoid all these problems.

Price adjustment is used by many jurisdictions in the world, in United Nations procurement system price adjustment is possible either periodically or at the time of price rise. The adjustment is allowed on the standard products (products without specificity to a particular vendor, wide distribution of standard and easy and free or low-cost accessibility). In World Bank procurement system price adjustment will be made applicable to contract which lasts for eighteen month or more. Lastly, in United States public procurement system there are two methods of price

adjustment fixed price includes economic price adjustment for inflation and cost-reimbursement for public procurements filled with uncertainty.

In Ethiopia there are six methods of procurement open bidding, restricted tender, direct procurement, request for proposal, request for quotation and two stage bidding. The preferred method is open bidding; to use other methods the conditions for use of such method has to be satisfied.

Federal government public procurement in Ethiopia is regulated under different hierarchy of laws these are; civil code, public procurement proclamation, regulation and directive. In addition, there is also FDRE Ministry of Finance and Economic Development (MoFED) & Public Procurement and Property Administration Agency procurement manual and Standard Bidding Document (SBD) are available for guidance of federal government public procurement.

The civil code does not cover the concept of price adjustment in its contract law regime in general and administrative contract law regime specifically (with the exception of concession contract) since variation of contract is not price adjustment its rather fundamental amendment on the objective of the contract. The other method price variation is addressed under the civil code is sharing the loss by administrative authority up on the request of the supplier and after performance of the contract. To make this happen the involvement of lawsuit is unavoidable.

The public procurement proclamation under article 37(k) dictates bidding document may include price adjustment as prescribed by the directive. Accordingly, the Federal Public Procurement Directive has incorporated the manner and conditions of price adjustment under article 16.14. The principle is bid prices are firm and do not vary both during the validity period and throughout the performance of the contract (Article 16.14.1 of the Public procurement directive). However, as an exception price adjustment is allowed for work contract, framework contract and consultancy service.

The PPA make procurement of common user items for federal institutions and adjustment the price for those items procured through framework agreement. The institutions are responsible to procure items not purchased through PPA and make price adjustments if any. The practice in Jimma University does not allow price adjustment for framework agreement it concludes with suppliers,

this practice is negatively affecting the institution and is different from other federal institutions over which the researcher conducted survey.

The case in Jimma University Referral Hospital and Tikur Anbessa Referral Hospital is similar in the event the supplier requests for price adjustment there will be formation of committee from experts from purchasing, from respective department who uses the particular supplies that needs adjustment and from property administration of the hospital to survey the market price in different places or with different known suppliers and/or producers and calculate the average price & adjust accordingly. The case in Addis Ababa University is different from the above two; in cases the supplier request for price adjustment the university procurement department will request the CSA periodic retail price index of items adjustment required for. Then, after collecting the data they adjust the price by adding the price difference from the contractual price.

Through this mechanism the three institutions (i.e. Addis Ababa University, Tikur Anbessa Referral Hospital, Jimma University Referral Hospital) among which the researcher conducted survey are able to avoid or at least minimize the problems that arise as a result of price increase from time to time; like reduction in number of bidders & terms of contract, expensive & unplanned direct procurement and forfeiture of the right to make adjustment in case of absolute necessity that are prevalent problems in Jimma University procurement. The negative effect of the practice in Jimma University is not limited to the institution, it also casting negative effect on the stakeholders (i.e. the suppliers) this effects are; loss of profit, unplanned expenses, forced to change the nature of business and loss of jobs.

Therefore, the practice is clearly problematic and very inconvenient for both the institution and the stakeholders. It's effect also has impact on the fulfillment of public procurement objectives and principles. By making price adjustment choice supported by reasonable analysis it's possible to minimize or avoid the problems the institution encountering in relation to price of framework agreement. To do so it's possible to use the retail price index from CSA through official letter since Jimma is one of the cities that the CSA makes survey of periodic retail price or make its own survey through formation of committee, whichever way beneficial and has quick remedy for the problem in the public procurement of the institution.

5.2 RECOMMENDATIONS

Based on the examination made and findings of the research, the following points are recommended as a way forward:

Recommendation for Jimma University: -

- ❖ The procedure of price adjustment is not as expensive and time consuming as the problem the prohibition of price adjustment triggers and the restriction of price adjustment is in contradiction to the purpose of the law. Thus, the institution should incorporate the application of price adjustment in the framework agreement conclude with suppliers.
- ❖ The expertise of public procurement and property administration of the institution should get training and share each other's experience on the application of price adjustment in order to bring better utilization of public resource.

Recommendation for other institutions: -

- ❖ The institutions implementing price adjustment adopt only single mechanism. The problem with such practice is that, the adopted method might not always be the best. Thus, the institutions should be flexible and employ both methods based on the specific circumstance and nature of the transaction.

Recommendation for PPPDS: -

- ❖ The PPPDS is mandated by its establishment regulation to give training, consultancy service and current market information. So, the service should play the above roles in order to bring efficiency and help public institutions fulfill their social responsibilities.

Recommendation for suppliers: -

- ❖ In contractual agreements price adjustment allowed the suppliers abuse their right by delaying, or claiming other reasons not to supply until they get to price adjustment time line. So, by avoiding such practices suppliers should build the trust of the institution and this will encourage the application of price adjustment.

Recommendation for legislator: -

- ❖ In order to ensure unified treatment of supplier, the legislature should devise a unified system of contractual price regulation, a system that makes sure unanticipated price changes treated with or without predetermined agreement, like defining what price adjustment mean so that it includes unusual price changes.

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List of interviewees

1. Yosef Alemu, (Assistant Professor of Law), Jimma University Legal Service Director.
2. Mr. Abebe Dememew Addis Ababa University procurement expert.
3. Mr. Alemayehu Teferi Central Statistics Agency, Family and price statistics directorate director.
4. Mr. Asefa Solomon, Federal Public Procurement and Property Disposal Service, Communication directorate director.
5. Mrs. Aserat Gezahegn Jimma University Referral Hospital Procurement and property Administration director.
6. Mr. Daniel Solomon, Tikur Anbessa Referral Hospital, Higher legal consultant and head of procurement approval.
7. Mr. Henok Kemalib Addis Ababa University Contract Monitoring Expert.
8. Mr. Sebsib Abarera the President of Jimma Chamber of Commerce and Sectorial Trading Center.
9. Mr. Tsadiq Mesfin, Addis Ababa University legal service advocate.
10. Mr. Zegeye Bekele, Jimma University procurement and property administration directorate director.

APPENDIX

I. Interview Questions for the Institutions

Jimma University

College of law and Governance

School of law

Dear Respondent,

My name is Jawhar Nuru, candidate for masters in Commercial and Investment Law at Jimma University School of law. I am doing a research entitled “**The law and practice of price adjustment in public procurements: the case of some federal institutions**”. Your institution is selected for this study. I have designed few questions about the practice of price adjustment for public procurement in federal institutions. I therefore kindly appreciate for your time and I hope your frank and straightforward responses for the following questions.

Name of the institution _____

Name of the interviewee _____

Position _____

Thank you in advance!

1. Does your institution conclude framework agreement outside procurements conclude by Public Procurement Agency (PPA)?
2. What is the term of the contract?
3. What are the items procured by your institution?
4. Do the framework agreements concluded at your institution allow price adjustment?
5. What is the procedure of price adjustment used? what are the challenges?
6. Do you think price adjustment is beneficial for procurements your institution makes?

II. Interview Questions for Stakeholders

Jimma University

College of law and Governance

School of law

Dear Respondent,

My name is Jawhar Nuru, candidate for masters in Commercial and Investment Law at Jimma University School of law. I am doing a research entitled “**The law and practice of price adjustment in public procurements: the case of some federal institutions**”. I have designed few questions about the practice of price adjustment for public procurement in federal institutions. I therefore kindly appreciate for your time and I hope your frank and straightforward responses for the following questions.

Name of the organization _____

Name of the interviewee _____

Title _____

Thank you in advance!

1. Do you have experience of being framework supplier of federal government institutions?
2. Does the institution make price adjustment in case of price fluctuation? If not what are the challenges?