

IDENTIFICATION AND SPECIFICATION OF THE NEEDS IN THE BENIN PUBLIC PROCUREMENT PRACTICE

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INTRODUCTION

The public procurement process is performed through many steps. The early first activity of the process rests on the identification and the specification of the needs. Upon this activity depend all the public procurement contractual phases for it has great correlative links with the whole contracts' cycle. However, it is often carried out by the contracting authorities without with many considerations to the whole procurement contractual phases. The contracting authorities think that the needs identification and specification task belongs exclusively to their sovereign power of decision to define what they need and what they want to procure or not. In fact, the needs identification and specification is very determinative for the ongoing procurement process: the bids preparation by the participants, the bids evaluation, the contracts award, the contracts' performance and for the disposal management. In a public procurement process, there are two main actors interacting with each other to perform an excellent procurement contract's cycle: the contracting authorities who take the decision to procure and the potential bidders who sell goods, services and realise works to satisfy the needs identified and specified by the former. To make the procurement process a perfect cycle, the requirements set out by the contracting authorities should meet the market evolution and reciprocally. The identification and the specification of the needs should not only fit the market as it looks like at a given moment, but also its evolution in order to take into account the rapid changing of the new technologies. At the same time, the market should also, take into account the evolution of the contracting authorities' needs to make relevant offers. It appears that the identification and the specification of the needs is a high interactive

process whereby the intrinsic public entities' needs impact on the extrinsic market's offers. This interaction, if it is adequately performed, will shape a dynamic economic environment in which the contracting authorities needs will transform and give incentive to the production mechanisms of the enterprises to make qualitative offers by improving the quality of their products in order to become very competitive and innovative. Therefore, innovative market should help the contracting authorities to specify more properly their needs in order to choose adequately the suitable procurement methods and contracts terms and conditions to get the optimum satisfaction from the market. Then the needs identification and specification far from being a mere administrative task should be done in ties with economic, legal requirements and market evolution. This paper intends to stress on how the identification and specification of the needs activity is carried out regarding to **the actors, the legal and regulatory backgrounds and the economic considerations** that should be the rationale of this activity. Otherwise are the identification and the specification of the needs performed in accordance to some standards in such a way that the contracting authorities can achieve value for money in the Benin public procurement practice?

THE ACTORS IN THEIR ROLES

Firstly, in any public procurement contracts procedures there are two main actors, namely the contracting authorities and the participant firms searching business opportunities. The public procurement contracts notion relates to the public bodies activities pertaining to the purchase of goods, services and the realization of works using the public funding.

Secondly, in any modern states, the society is organised in such a way the public bodies do take care of the general interest activities. Then, people refer to them to get satisfaction in the fields of their social welfare, health, education, employment, justice, security etc. To fulfil these missions, the central, local and other public bodies need staff, office furniture, services, and constructions. These tasks incur costs which are definitively borne by the tax payers. The public bodies as representative of people who pay the taxes are entitled to ensure that the public resources are used efficiently and in an effective way to achieve value for money.

Thirdly to provide for the goods, services and works they need, the public bodies relied mostly on their own staff to produce the goods, deliver the services and realize the works on behalf of the people.

Due to the economic changes, rapid technological evolution requiring more and more accurate techniques, skills and cutting-edge knowledge, the Benin public bodies can no longer assure the provision of their needs on an in-house model. They are obliged to outsource many of their activities by contracting out with the private companies deemed to be more competent. Moreover, it has become very costly as well as inefficient to run some activities on in-house model due to the misgovernment that often characterises the public Administrations.

Therefore most of Benin public entities have come up with the decision to procure certain goods, services and works through external sources. This decision entails some activities as well as the qualified entities to carry out a public procurement contract process. As far as the qualified entities are concerned, we won't elaborate too much on **the debate** of the contracting authorities which may vary from one country to another depending upon different public procurement laws. We just like to refresh our mind, assuming that generally the actors who are in charge of the public procurement activities initiation are the contracting authorities or their representatives through a delegation act in according to each public procurement law in force in a jurisdiction. As a process, a procurement contract consists in many activities that may be divided into many phases starting from the needs identification and specification. This stage of the process seems very determinative and all the following phases will deeply depend upon it. According to the legal and managerial frameworks set up by the Benin public procurement rules, the actors in the procurement procedures are the contracting authorities, the procuring entities or agencies.

THE LEGAL AND MANAGERIAL BACKGROUNDS OF THE NEEDS IDENTIFICATION AND SPECIFICATION ACTIVITIES

The public procurement management is a regulated activity in many countries like USA and EU member's states, in African countries etc. Then in accordance with the rules in force in a jurisdiction, the contracting authorities' criteria are defined either by the law, supplemented by the case law or shaped by the practice. Likewise, the

activities relating to each step of the procurement process are well known from the needs identification and specification, to the bidding documents establishment and publication, from the reception and the evaluation of the offers to the award and the contracts administration. The contracting authorities do run the needs identification and specification activities within a legal framework.

Legal requirements and management framework governing the needs identification activities

For instance to identify genuine needs, any public procurement contract projects, before being carried out, must be examined to check whether they are indispensable and are approved by the technical relevant government Offices. Those Offices are in fact the Directors or Chief of specific Departments, Projects managers in charge of different technical tasks fulfilment. Thus, they are supposed to know with accuracy what is necessary to reach the results they have been assigned. Those technical offices are components of the public bodies that are the contracting authorities like the central government or local communities and other public Institutions like Supreme Court, Constitutional Court, High Court of Justice, Economic and Social Council, High Authority of Communication and Audiovisual Regulation, and all owned companies. Within those contracting authorities, the technical offices intervene at the very beginning of the public procurement process. Due to the specific knowledge of the members of the technical offices and to hierarchical organization of the public Administration, they help specify more precisely the needs at the first stage of the procurement process because they are more skilled than other public officers to identify and specify the needs related to the procurement of the services, goods and works of the contracting authorities. They do that together with the public procurement cells under the supervision of the National Public Procurement Directorate. The Public Procurement Cells and the National Public Procurement Directorate are the public procuring agencies in charge of the public procurement process at all contracting authorities' level. It is stated that at the end of each fiscal year from November, the Public Procurement Cells reporting to a contracting authority should carry out for the next year a procurement planning. This procurement planning consists of identifying and specifying the needs in terms of services, goods and works necessary to the contracting authorities to achieve their goals related to the general interest activities. To set up this procurement planning, the Public Procurement Cells collect the needs

expressed by the technical offices which are specific Departments within the contracting authorities and require the budget holder opinion to ensure that the funds are available to pay the potential incumbents. The budget holder is the public account in charge of a public entity budget running. He knows the procurement budget of the public entity to which he reports as well as the amount of the money earmarked for the personnel expenses etc. He plays the role of the financial watchdog by keeping eyes on his Department expending in respect of the budget equilibrium principle which does not allow running a budget deficit. Therefore, he tries to make the needs identification and specification activity stay within the budget availability. To recapitulate on, the needs identification and specification activity is performed by the Public Procurement Cells reporting to a contracting authority with the collaboration of the technical offices within this entity under supervision of the National Public Procurement Directorate.

Further more, the decree n°2000-601 of 29th November 2000 relating to the public expenditure reform has set up the projects managers in the public expending management chain since they are the last consumers of the project procurement outputs or outcome who are supposed to know more accurately what they need to achieve the project goals. In accordance with the public expenditure procedures, the projects are people who manage a project. Since they manage a project, they also run the budget allocated to the project in such a way they play the main role in the needs identification and specification. The project managers are often civil servants not specific officers. Sometimes, a private qualified person may be appointed as a project manager. In accordance with the public expenditure procedures, any officers running a specific Department within public contracting authorities should play a main role in the needs identification and specification. Things are organised in such a way that within a contracting authority, there is a budget holder: specialist of finance who is a public accountant dependent only on the Minister of Finance regarding any financial matters. Since the budget holder does not have specific knowledge any aspects relating the contracting authorities' mission, he can not identify and specify the needs of any technical Offices of the contracting authorities in the case they are comprised of many Offices. Then, the technical officers intervene to specify the needs. For long time things have been run in way until it has been noticed in recent years it was cumbersome to run the needs identification and specification within that managerial framework.

That is why the public procurement reform has provided for the Public Procurement Cells to assist the contracting authorities to carry out their procurement activities process. So the Public Procurement Cells are supposed to be the specialised agencies depending on the contracting authorities to help them performing their procurement activities. To carry out according and in an effective manner their tasks, it was stated that they should mandatory be comprised of some qualified persons like a procurement specialist, a law, and secretary to file the procurement procedures. Unfortunately, the needs identification and specification process suffers from the lack of a procurement specialist within the Public Procurement Cells and the market research at their level. There is no national training school in the public discipline as consequent, no qualified person. Then, the procurement activities merely rely on routine and clerical tasks. That why until now, the market research activities are completely absent in the Public Procurement Cells. Thus, it is difficult to call for adequate competition and to achieve value for money in the procurement process. As solution for the public procurement specialists training, there a first addition starting this year. However, the matter of the qualified will remain as well the administrative carer framework to run the career of the procurement specialists who be trained to enable them to be effective.

Finally, the needs identification and specification activities should be performed strictly in ties with the budget availability and appropriation which are relevant to the budgetary law annual provisions. In French public law system like in Benin, the financial public bodies' activities fall within the budgetary law scope. The budgetary law deals with the rules governing the financial resources of a public entity like the central government, the local ones or other public Institutions. The budget law is voted by the Parliament with respect to the prior authorisation principle of public financial resources management. Basically, the genuine identification of needs of the public entities is performed during the budget preparation. Moreover, the needs identification and specification activities should be done not only with regard to the law provisions but, also faithfully in compliance with the public procurement principles and the contracts administration considerations established and accepted in the world.

Public Procurement Principles

During the preparation of the year budget and at the stage of the needs identification and specification, the contracting authorities should comply with core public procurement principles like confidentiality (not disclose information that may disrupt fair competition), transparency (carry out the needs identification and specification according to the rules set in advance to allow predictability in the procurement process), equality (equal treatment of all potential bidders during the market research operation for procurement budget preparation), non discrimination and competition. In fact, fraud and corruption practices may occur when the contracting authorities are identifying their needs, they may breach the rules of:

a) Confidentiality by disclosing information to favour some potential participants and preventing the contracting authorities from taking advantage from a fair competitive bidding process.

b) Transparency by willingly failing to identify genuine needs for the end users' satisfaction apart from the product misinterpretation case because there is no compulsory procedures set in advance to identify the needs. In this case, the needs identified do not take into account the end users' real requirements because the needs are identified without any procedure where there is a due discussion with the end users to require their essential will. Most of the time the needs are identified and specified irrespective of the end users real needs especially in terms of training where an important amount of public funds are spent to recruit trainers carrying out a training program solely designed by the heads of offices to improve the knowledge of their staff.

c) Equality rules may also be breached in that the contracting authorities run in a discriminatory manner the needs identification activities that will disrupt the equal treatment of the potential participants in the following steps of the process.

e) Competition rules, to foster the competitive bidding process, which is the default and the core method in public procurement procedures in any countries, most of the legislators, due to the sensitivity of this step of the procurement process, regulate how the needs should be specified by the contracting authorities in order not to bias the contract award towards or against a firm or a group of firms.

Contract Administration Requirements

f) It is important that the contracting authorities try to carry out the needs identification and specification activity by thinking about the contract performance conditions.

g) To ease and clarify the whole contractual relationship between the parties in a public procurement process, the contracting authorities who are entitled to identify and specify their needs, should do so with accuracy and consistence as much as possible.

h) Admittedly, the specifications should be clearly separated from the contracts terms and conditions.

These legal and managerial frameworks set up the rules and the institutional environment that should guide the contracting authorities' actions whenever they carry out the needs identification and specification. It practically remains a big issue for the contracting authorities to cope with these legal requirements and to take into account some economic and managerial conditions.

**THE IDENTIFICATION AND SPECIFICATION IN PRACTICE
UNDER THE MANAGERIAL AND ECONOMIC CONSTRAINTS**

In any regulated public procurement system, the managerial public procurement framework should rest on the legal framework. However, the implementation of the rules designed to raise best practices in public procurement process, is often faced with economic and social factors that do not allow every time a strict observation of the rules and principles.

With regard to the management of the process, in Benin for instance, the first step of the needs identification and specification should start by a good stock management of the goods like school stationeries, offices furniture, cars and so on that are needs expressed. If a good material accountancy is handled, it will allow assessing the needs expression to ensure that there is a real lack to fill. Unfortunately this is not the case in the practice although the provisions of the decree n° 2001-039 of the 15th of February 2001 relating to the general public accountancy recommend to any public account to hold a regular record on daily, weekly, monthly and annual basis of the public assets to inform the budget holder and to make a report to the Chamber of Account which is in charge of assessing all public financial management within a year. It appears that a defective

recording of the public procurement outputs does not help assess with adequacy the needs identified to ensure that they are relevant to a real lack or to public entities' missions scope. Therefore, the needs are generally identified by the contracting authorities based:

- neither on a reliable record of the existing materials,
- nor on ongoing contracts' performance, since there is no statistics relating to the public procurement contracts' performance,
- nor on ongoing contracts' award.

That means each procurement contract is solely managed in single environment that does not enable to streamline the resources.

That fact raises the overall matter of efficiency occurring in the public resources management in general and particularly in public procurement in Benin also in some West African countries. Since it is fundamentally impossible to keep a good watch on the stock management, it is then likely to run hazardous needs identification. It happened that the contracting authorities after receiving delivery of some goods did not have any room in their warehouse or even a warehouse to keep them. Adequate needs identification should rest on a flawless stock management to focus on what is missing actually so that it will help avoid needless procurement.

Needless procurement also occurs due to the lack of statistics, or reliable ones, the lack of knowledge of the staff profile and the volume of the tasks to achieve in a given administrative unit. The needs expressed should reflect as well as possible the number and the skills of the staff involved in the volume of the tasks pertaining to the public entities' goals achieving. Then there is a link between the needs identification and overall administration tasks like the Human Resources Management, good Information System to make data available and the overall objectives of the public entities. That explains why most of the contracting authorities fail to set out their annual public procurement plans according to the rules. These causes of defective needs identification activities on the public entities side will certainly entail huge obstacles to carry out a good specification in the compliance with market evolution. Since the contracting authorities do not practice the market research, they do not have a clear idea of their intrinsic needs and they can not draw the specifications of those needs to suit appropriately what the market offers.

Therefore, not only the contracting authorities fail to identify needs, but as consequence, they also do not succeed in specifying properly their needs since they do not know clearly the market. In these circumstances, they are not able to interact with the market to benefit from the technologies evolution and innovation. That is due to the lack of a qualified staff to perform the market research activities.

Lack of Market Development Activities

According to the Benin rules, the public procurement cells are in charge of the procurement plans establishment. To fulfil accordingly this task they need to have a good knowledge of the market. That implies that some activities pertaining to the market research should be done by these cells. Unfortunately, it's not the case in the practice. Any Public Procurement Cells do not have reliable information enabling them to know the market. They fail to establish a database recording the suppliers, the services providers or the contractors. They do not have reliable information neither on the new firms nor on the changing technologies. The needs identification is done based only on the routine whereas the public entities' tasks evolve speedily. **It leads to identify and specify obsolete needs to fit nowadays requirements.** This kind of the public procurement process prevents the end users from benefiting from the science and techniques progress providing nowadays human being for a lot of means to improve his standard of living in numerous fields to ease his life. For instance in a procurement of software, the contracting authority has specified the Windows 2003 and some suppliers have offered the Windows 2007 because Microsoft is not supplying the Windows 2003 any more. Those suppliers were penalized in terms of their technical offers and of course financial ones and as consequence, they did not win the contract. In this event, the needs were specified without taking into account the market evolution as any market research is not compulsory prior to the needs specification in Benin.

In the health sector the medical equipments specification is carried out on a mere routine base although these equipments are subject to rapid technologies changing due to the explosion of the scientific research to suit the complex evolution in area of medicine. To specify the needs, most of the Public Procurement Cells depending on the public entities intervening in health sector that are not comprised of specialists in medical equipments purchasing or they use the catalogue of the manufacturers that is often outdated. Besides, the medical doctors as end

users do not always have current information on the market. As consequence, the needs specification does not fit the market requirements and during the bids evaluation the bidders offering innovative items are rejected for non compliance to the bidding documents requirements. Sometimes the non compliance of the specification matters during the contract performance whereby the winning firm, supplier or service providers' delivery does not conform to the specifications. This incumbents' shortcoming is sometimes due to the market evolution which does not offer any more the specified products after the contract award especially in a very innovative procurement. The traditional solution is to amend the initial contract terms to handle these contingencies that we would have better addressed through a flexible bidding documents taking into the changing character of rapid evolving products.

Same to the fleet procurement management where any reliable data do not exist about the quantity and the value of the official vehicles. There is critical lack of record to know about the quantity of both cars and motors procured by the public entities. Then the Office in charge of the public vehicles procurement management is not capable to hold real statistics and assess the needs expressed by the end users. But it but only procures without being involved in the outputs management in order to help determine and assess appropriately the needs for a next procurement cycle.

In the services procurement, the specifications of the outcome are always subject to the unclear requirements due to the contracting authorities' insufficient knowledge about the outcome. This is the case of the cleaning services procurement where there is no clear benchmark to monitor the service providers performance. Basically, the contracting authorities and the market do not interact accordingly when the needs identification and specification are taking place. That is due to the lack of professionalism within the procuring agencies.