Discriminatory procedures of disputes resolutions on public Procurement

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The Federal Democratic Republic Ethiopia Government (FDREG) is the biggest buyer of goods, services and works. According to sources from the Ministry of Finance and Economic Development (MOFED), about 80% of the total procurement of the country is made by state bodies. Public procurement, therefore, is a very sensitive matter that deserves the special treatment, attention, strict regulatory framework and transparency of state bodies entrusted to manage public funds. This is precisely because the money earmarked for procurement is often a huge amount that creates the propensity for misuse and abuse including corruption. The FDRE government issued "Determining Procedures of Public Procurement and Establishing the Supervisory Agency proclamation no 430/2005" and adopted several directives and contractual forms that guide public procurements starting from expression of interest to contract award.

These legal frameworks are intended to streamline public procurements and impose uniform procedures as well as agreements for the effective, fair, accountable and transparent use of government fund.

Proclamation no 430/2005, though undergoing a revision to produce by a newly drafted proclamation, is still the legal basis for virtually all public procurements. In a bid to harmonize the requirements of funding nations and lending institutions such as donor countries and the World Bank, this proclamation also attempts to embody acceptable modern procurement principles and rules.

Both this proclamation and the draft procurement proclamation however, introduced unconstitutional and unique ideas for separate and discriminatory treatments of the same suppliers of goods, services and works, on dispute resolution due to differing source of funding.The relevant provision of the existing proclamation reads as follow;
" 4(1) To the extent that this proclamation conflicts with the obligation of the Federal Government under or arising out of an agreement with one or more other states or with an international organization, the provisions of that agreement shall prevail."
It is known that the FDRE government receives substantial amount of loans and grants from lending institutions and friendly donor states from time to time.

The bilateral and multilateral contracts for loans and grants obtained from these institutions and countries are legally required to be submitted and approved, by the supreme legislative body, The House of Peoples' Representatives and promulgated as loan or grant approval proclamation. Nevertheless, it has never been customary under our legal system, past or present, to publish in the official law Gazette, the Negarit Gazeta, the detailed terms and conditions of the loan agreements together with the parliamentary act. As a result, it is often difficult to get access to these contractual documents for the general public to take notice of the agreement.

Among the numerous terms and conditions provided by lending financial institutions, such as the World Bank, there is a requirement for all actors of funded or financed projects to settle any dispute using arbitration and other alternative dispute resolution mechanisms. In this regard, the World Bank has adopted its own contractual rules under which all loan or grant recipient countries are required to accept and comply. Thus, the FIDIC standard conditions of

contract has been modified and adopted to serve the particular interest of the World Bank for construction works. These contractual forms have General conditions of contract (GCC), Special condition of Contract (SCC) and various kinds of formats. Thus, Parties to a construction contract are expected to follow, agree and frame there own special condition of contracts in compliance with the general condition of contract.

As one of the numerous recipients of the World Bank loans and grants, Ethiopia is required to honour the standard condition of contracts for construction works.

The standard condition of contracts on the other hand, requires contracting parties participating in the execution of the public projects or works funded or financed by the bank to resolve any disputes by arbitration and other alternative dispute resolution mechanisms. Obviously, this contradicts with the long standing position of the Ethiopian legal system that prohibit dispute resolution through the instrumentality of arbitration on public works, Article 315(2) of the Ethiopian Civil procedure code issued more than 43 years ago, and still in force, provides as follow: "No arbitration may take place in relation to administrative contracts as defined in article 3132 of the civil code or any other case where it is prohibited by law."

This rule is clearly repugnant with modern approach and international trend of business dispute resolutions. However, this provision is not unreasonable altogether. There were and there are still some overriding public concerns for such rules that could not be addressed by private justice mechanisms which shall be the subject separate treatment in another article.

This provision of the civil procedure code unequivocally requires all public procurements, fully funded by budgets allocated from local sources, to submit any contractual disputes to courts. Thus, it is not authorized for parties to agree for resort to arbitration or other alternative dispute resolution methods to solve business disputes. Where parties to such public procurement have entered in to an agreement for the settlement of disputes through arbitration, this agreement remains to be void and unenforceable.

As a result, in present day Ethiopia, public procurement laws impose twin and contradictory dispute resolution methods among parties to public procurement contracts and sometimes even on the same parties performing the same types of projects, on account of the source of financing or funding. Thus, where the source of financing of a given public road or building construction project is acquired from World Bank, the dispute settlement clause of the agreement would have to follow and comply with the standard conditions of contract adopted by the bank which clearly provide for the settlement of disputes among others, by arbitration. As I noted above, the existing as well as the draft public procurement proclamations which was tabled at least once for public discussions, clearly stipulated that where the proclamation "conflict with the obligation of the federal Government under or arising out of an agreement with … an international organization, the provisions of that agreement shall prevail." Although this is the legal ground for all contractual documents to insert dispute settlement clause referring to arbitration or other alternative dispute resolution mechanisms, at the same time it is also the source of discriminatory treatment of parties to public procurement contracts.

The FDRE constitution guarantees all Ethiopian citizens, under article 25, the right to equal protection of the law without any separate treatment." In this respect, "the constitution says, "the law shall guarantee to all persons equal and effective protection without any

discrimination." With regard to access to justice, the same constitution also provides that "every one has the right to bring a justiciable matter to and obtain a decision …by, a court of law or any other competent body with judicial power.

The Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute (AACCSA AI) is established to discharge the legal mandate of the chamber to conduct arbitration on commercial disputes in accordance with Chambers and Sectoral Association establishment proclamation no 341/2003. It is therefore one of the "competent body with judicial power" mentioned under the constitution to which disputing parties to commercial contracts have unhindered access to request for justice. However, the existing legal framework regulating public procurement and the existing rule provided under our civil procedure code, poses serious obstacle to realize the "equal legal protection and access to justice" rights of Citizens.

The AACCSA AI has voiced its concern in the appropriate for to discuss the draft bill on public procurement over the existing predicaments of the discriminatory treatments of citizens. It has also brought to the attention of appropriate authorities the practical difficulties in the implementation of constitutional rights of parties to public procurement contracts. To overcome the enigma created by the laws currently in force, the AACCSA AI has submitted three alternative suggestions to be considered in the preparation of the final draft bill taking into account private rights and public interest. We hope the laws that are discussed above and that have resulted in discriminatory treatments of citizens in relation to the constitution will be harmonized to promote access to justice and uphold public and private interests.