

Circumventing the Tender Process: Why PNG Should Be Cautious with the Administration of Coronavirus (COVID-19) Funds

Michael Kabuni

In Brief 2020/21

Introduction

Under normal circumstances, the [Public Finance Management Act 1995](#) (PFMA) in Papua New Guinea (PNG) mandates rigorous tendering processes to safeguard the proper use of public monies. To deal with the COVID-19 pandemic, the government's declared state of emergency (SOE) from 22 March to 16 June 2020 allowed for the suspension of regular tendering processes, and on 12 June the [National Pandemic Act 2020](#) (NPA) was passed.

In the absence of the usual tendering processes during the SOE, Certificates of Inexpediency (COIs) — a provision under PMFA intended to circumvent the tendering process — were used. Additionally, the new NPA provides for the suspension of the PMFA if a pandemic is declared. Both COIs and the NPA bypass the tender processes that were set up to ensure transparency, and aggregate power to fewer individuals. This In Brief presents two cases where the use of a COI was found to be illegal because it did not occur during an SOE. Such examples of the past abuse of COIs can be applied to the provisions under the NPA, as the new legislation sets up similar methods to circumvent regular public procurement procedures.

Circumventing the tendering process under the PFMA

Section 40(3)(b) of the PFMA states that tenders shall not be publicly invited or contracts let if a board, that is, the Central Supply and Tenders Board (CSTB), certifies that the inviting of tenders is impracticable or inexpedient in times of crisis. There are four circumstances where this applies because procurement processes must be undertaken urgently to remedy the situation: declared natural disasters, defence emergencies, health emergencies or civil unrest. The SOE declared to deal with COVID-19 therefore allows for the use of COIs. Sections 50–54 of the NPA set out similar arrangements as those under a COI during a 'declared period'. Declared is defined under section 4 as a declaration of the existence of a 'pandemic, pestilence or a Public Health Emergency'.

During an SOE, the person making the request for the use of a COI, usually the head of department or controller of

the SOE, is required to demonstrate the existence of a natural disaster, defence or health emergency or civil unrest and the preferred service provider to deliver the services. The public solicitor ensures that the legal requirement to circumvent the PMFA and related laws has been met, and the chairman of the CSTB authorises the release of public funds without tender. Under the NPA, the controller acting as the chairman and the heads of departments for finance and treasury determine the funds to all procurements and the PMFA and its requirements are suspended for the entirety of the declared period. Both COIs and the NPA circumvent the tendering process whilst restricting financial power to the hands of three or fewer individuals.

The purpose of the PMFA, as stated in the legal case [Robmos Ltd v Punangi \[2017\] PGNC 3 \[25\]](#), is:

to ensure that the State or the people of Papua New Guinea get the best possible goods and services for the best possible price from a person or company which has the necessary proven ability and expertise.

The size and volume of government procurement does, however, give rise to considerable potential for corruption.¹ Both contractors and public officials may resort to corrupt practices for either personal or political reasons. Corruption undermines the value for money in contracts as well as the fair treatment of contractors (ITFS 2012:3).

The use and abuse of COIs in the past

This section examines two court cases that dealt with the abuse of COIs.

1. [State v Eremas Wartoto \[2017\] CR780; N6695](#)

An amount of K7,989,892 (US\$ 2.3 million) was allocated for the renovation of Kerevat National High School in East New Britain Province in December 2008. Claiming it was a matter of urgency, the Department of National Planning and Monitoring (DNPM) secretary requested a closed tender process from the CSTB. The CSTB chairman approved the issuance of a COI without an open or public tender. The contract was awarded to

Sarakolok West Transport Limited, of which Eremas Wartoto, a Papua New Guinean businessman based in Kokopo, was the sole director and shareholder.

The National Court of Justice ruled that this case did not meet the criteria for the use of a COI, namely a declared natural disaster, defence emergency, health emergency or situation of civil unrest. The argument by the defendant that the use of a COI was justified because the deteriorating state of the facilities posed a significant health risk to students and the school community did not convince the court. Furthermore, by January 2009 the renovations were incomplete and substandard whilst the funds had been misappropriated — Wartoto had diverted most of them to start the Travel Air company. Wartoto was sentenced to 10 years in prison and the judge recommended that both the DNPM secretary and the CSTB chairman face prosecution for ‘blatant facilitation of procedural breaches in this matter’ (*State v Eremas Wartoto* [2017] CR780 [30]).

2. *Robmos Ltd v Punangi* [2008] PGNC 70; N3372

The second case concerns a decision by the National Executive Council to award a K2.2 million (US\$0.6 million) contract for the supply of defence uniforms to an Australian company, Australian Defence Apparel Pty Limited, ahead of a lower bid from a national company, Robmos Ltd. The PNG company submitted a bid for K1.8 million (US\$0.5 million) inclusive of all charges for freight and government taxes and duties. After the contract was awarded, the secretary for finance requested a COI because of a stated urgency to have the uniforms delivered. The CSTB chairman approved the request. In 2008, the court held that it was obvious the COI was retrospectively requested to shut out Robmos Ltd, because with a COI there is no need for a tender. The court ruled that the COI was not valid because it failed to meet any of the four qualifications; a ‘declared health emergency’ is not defined in the financial instructions or the PFMA. The court further ruled that the COI could not be retrospectively granted after the contract was awarded.

The contract awarded to Australian Defence Apparel Pty Limited had already been executed by the time the court ruled in favour of Robmos Ltd in 2008. In 2017, Robmos Ltd sought compensation for tender breaches through the court on the basis of an expectation of net income loss from the tender price (*Robmos Ltd v Punangi* [2017] PGNC 3; N6585).² The court ruled that the loss of the contract price was the actual loss of Robmos’ net profits and awarded damages worth K1,065,161.80, which the state was instructed to pay.

Conclusion

Not only did these cases fail to meet the COI requirements, a system largely duplicated by the NPA, but they also demonstrate a blatant abuse of the process. As demonstrated by the *Robmos Ltd v Punangi* [2008] PGNC 70 case, COIs can be used to bypass more reasonably priced contractors. The same can be done under the NPA. By bypassing the CSTB and related financial procedures under the PFMA, authorities are able to award contracts to private companies not qualified for the job, as *State v Eremas Wartoto* [2017] CR780 shows. Of the [K5.6 billion](#) (US\$1.6 billion) economic stimulus announced to combat COVID-19, K5 million (US\$1.4 million) has been allocated to health and defence and can be accessed without the protection of the PFMA provisions. It is imperative that the government avoid the wastage of its limited resources through abuse of COIs or similar arrangements under the NPA.

Author notes

Michael Kabuni is a lecturer in the Political Science Department at the University of Papua New Guinea. He was a participant in the Department of Pacific Affairs’ 2017 Pacific Research Colloquium.

Endnotes

1. For instance, the ITFS *Final Report* found severe corrupt practices involving millions of kina during tendering processes, including in the *State v Eremas Wartoto* [2017] CR780 case.
2. Earlier, the national court did not award damages, as the plaintiff failed to show net loss of profit that should be awarded based on prior period of profit calculations.

References

- ITFS (Investigation Task Force Sweep) 2012. [Final Report Containing Findings, Implementations and Recommendations](#). The Independent State of Papua New Guinea.

