Implementing a risk-based approach in public procurement

This chapter discusses the development of a risk management approach in public procurement in Malta. It recalls that public procurement is a high-risk area and that risks affecting public procurement processes are multiple and can have concrete consequences on the quality and quantity of services provided by governments. Given that Malta has not yet developed a national risk management strategy in public procurement, the chapter provides key steps for the country to develop such strategy. The chapter also highlights the practices at the contracting authorities' level and the different procurement risks identified throughout the procurement cycle.

3.1. Towards the development of a risk management approach in public procurement in Malta

3.1.1. Public Procurement: a high-risk area

The sheer size of public procurement, representing approximately 12% of gross domestic product (GDP) in OECD countries, 14% in European Union economies and 6% in Malta (Government of Malta, 2021[1]), makes it a key economic activity and a crucial pillar of service delivery. Due to the volume of purchases, the complexity of the processes and the number of stakeholders involved, public procurement is a very high-risk area. Therefore, risks related to public procurement, regardless of their nature and origin, need to be identified and managed to minimise losses to the government and citizens (OECD-HAICOP, 2019[2]) (OECD, 2022[3]). In this context, risk management approaches refer to the identification and the systematic and positive assessment of threats and opportunities for the best use of resources. In addition, the COVID-19 pandemic highlighted the necessity to improve the identification and management of existing risks in public procurement systems and processes (OECD, 2021[4]). More countries have therefore been forced to rethink their procurement risk management strategies and put emergency measures in place (OECD, 2021[4]).

Risks affecting public procurement processes are multiple and can have concrete consequences on the quality and quantity of services provided by governments (OECD, 2022_[3]). Public procurement is a cross sectoral and multi-disciplinary area, therefore subject to distinct categories of risks that are highlighted in the literature and exemplified in the MAPS methodology. Beyond risks of fraud and corruption, various dimensions of risks should be considered such as fiduciary, development and reputational risks (MAPS initiative, 2018_[5]), a non-exhaustive list is provided in Figure 3.1. For standardisation purposes, these risks can be bundled into four categories:

- i. Financial (budget availability, respect of the budget)
- ii. Conformity, operational, technological (regulatory compliance, capacity, organisational aspects, public procurement process, use of e-procurement tools)
- iii. Economic, political, social/environmental (geopolitical environment, market trends, positions of market players, respect and protection of the environment and social conditions)
- iv. Integrity (reputation, corruption, conflict of interest)

Figure 3.1. Examples of risks categories impacting the public procurement system and activities

Economic and Regulatory/Compliance Sustainability risks Operational contextual · Environmental risks · Digital risks · Budgetary risks Compliance with public procurement Socials risks · Capacity risks · Market risks regulatory framework · Compliance with relevant Regulatory frameworks · Integrity risks (corruption, collusion, faud, etc.)

Source: (OECD, 2022[3])

As in any other open economy, these risks can also impact the public procurement system and activities in Malta. As public procurement is a key economic activity, some of these risks have been identified as the most problematic factors for doing business in Malta such as government bureaucracy, inadequate supply of infrastructure, access to financing, lack of capacity, poor work ethics and corruption, etc. (see Figure 3.2)

Inefficient government bureaucracy 14.6 Insufficient capacity to innovate 12.4 Inadequate supply of infrastructure 11.7 Access to financing 11.7 11.2 Inadequately educated workforce Poor work ethic in national labor force 98 Corruption 7.9 Restrictive labor regulations 5.0 4.0 Tax rates 3.7 Tax regulations Policy instability 3.0 Government instability/coups 2.3 Foreign currency regulations 2.0 Inflation 0.7 Poor public health 0.1 Crime and theft 0.0

Figure 3.2. Most problematic factors for doing business in Malta

Note: From the list of factors, respondents to the World Economic Forum's Executive Opinion Survey were asked to select the five most problematic factors for doing business in their country and to rank them between 1 (most problematic) and 5. The score corresponds to the responses weighted according to their rankings.

Source: (World Economic Forum, 2017-2018[6])

Regarding the lack of capacity, in the recent years, Malta faced many challenges such as labour shortages in the private sector (Malta Employers' Association, 2021_[7]), but also in the public sector, regarding the public procurement field. Aware of this risk, the government launched several reforms in the public procurement area to address capability gaps in the public procurement workforce in Malta including initiatives on professionalisation, role clarity, training courses on the public procurement regulation, on the electronic procurement system, and on Green Public Procurement (OECD, 2019_[8]).

Malta is also facing high risks of systemic corruption, including in the public procurement field. The country however developed regulations and policies to enhance accountability and transparency over the years and recently introduced a National Anti-Fraud and Corruption Strategy (Office of the Prime Minister Malta, 2021[9]). The National Audit Office has also become increasingly proactive. A number of high-level officials have been prosecuted for corruption offences, showing a willingness by the state to bring to account corrupt actors (Gehrke, 2020[10]). Nevertheless, challenges remain as Malta is ranked 52/180 in the corruption perception Index in 2020 (Transparency International, 2020[11]) with 28% of people who think corruption increased in the previous 12 months (Transparency International, 2021[12]). Among the business community, corruption is identified as the 7th most problematic factors for doing business in Malta (see Figure 3.2.). With the large volumes at stake and the interaction between the private and public sector, public procurement is likely to be particularly at risk in Malta.

The growing awareness on environmental issues and economic wellbeing have increased the popular environment health concerns in Malta, including regarding ambient air quality, water quality, and sanitation (Ministry for the Environment, Climate Change and Planning, 2020_[13]). The country has the second-worst air pollution in Europe and construction of building work is the leading contributor for poor air quality in the country (EARTH5R, 2020_[14]) (European Environment Agency, 2015_[15]). The environmental risks are likely

to impact the way public procurement is conducted. In response to environmental risks, many initiatives have been developed such as the National Air Pollution Control Programme.

3.1.2. Developing a risk management strategy at the national level

For a long time, the OECD recognises adequate risk management as a relevant feature of a well-functioning public procurement system and encourages countries to integrate risk management strategies into them (OECD, 2015[16]) (see Box 3.1).

Box 3.1. Principle "Risk Management" of the OECD Recommendation on public procurement

The Council recommends that Adherents integrate risk management strategies for mapping, detection and mitigation throughout the public procurement cycle.

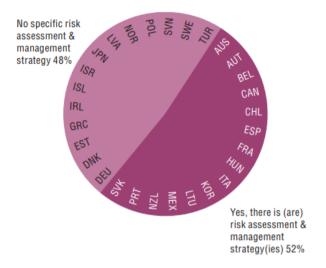
To this end, Adherents should

- i. Develop risk assessment tools to identify and address threats to the proper function of the public procurement system. Where possible, tools should be developed to identify risks of all sorts – including potential mistakes in the performance of administrative tasks and deliberate transgressions – and bring them to the attention of relevant personnel, providing an intervention point where prevention or mitigation is possible.
- ii. **Publicise risk management strategies**, for instance, systems of red flags or whistle-blower programmes, and raise awareness and knowledge of the procurement workforce and other stakeholders about the risk management strategies, their implementation plans and measures set up to deal with the identified risks.

Source: (OECD, 2015[16])

Given the relevance of risk management in public procurement, some countries have developed a dedicated strategy for assessing, preventing and mitigating public procurement risks, although the uptake is still below expectations. In 2018, only 52% of OECD countries, developed a strategy for assessment prevention and mitigation of public procurement risks (see Figure 3.3.).

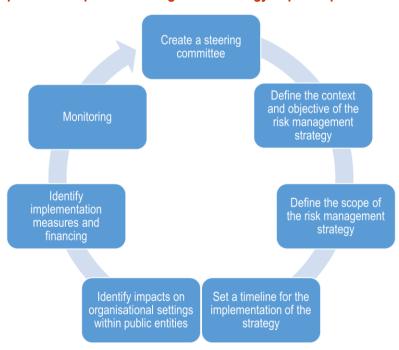
Figure 3.3. Existence of a strategy for assessment, prevention and mitigation of public procurement risks, 2018



Source: (OECD, 2019[17])

Malta has not yet developed a risk management strategy in public procurement, neither at a national scale nor through a sectoral approach. However, the DoC is highly committed to advancing the development of a risk management approach and strategy in public procurement. To this purpose, Malta should adopt a more comprehensive approach towards risk by developing a national public procurement risk management strategy covering all public entities. The development of such strategy requires taking into account the different parameters described in Figure 3.4.

Figure 3.4. Key steps to develop a risk management strategy in public procurement



Source: (OECD, 2022[3])

3.1.3. Initiatives to promote risk management at the national level

In Malta, very limited initiatives have been taken to promote risk management in public procurement. Effective risk management frameworks and activities are nonetheless a crucial part of the response against the numerous risks threatening the well-functioning of public procurement processes.

The need for an efficient control system to embed a risk management approach in public procurement

The good management of public procurement risks needs to be grounded into a sound institutional framework with strong control mechanisms. Furthermore, appropriate external oversight and control mechanisms, opportunities for challenges and complaints from citizens and businesses can also help gaining and maintaining public trust in institutions and ensuring a good management of public funds (OECD, 2019_[18]). Controls are usually either internal or external and can support risk identification and the implementation of mitigation measures (OCDE, 2019_[19]).

An internal control system refers to the policies and processes that enable an organisation to identify and adequately respond to internal or external risks and ensure an efficient and proper use of public resources (OECD, 2019_[20]). Internal control measures ensure the efficient fulfilment of a public procurement cycle while safeguarding integrity (OECD, 2016_[21]). In Malta, depending on the categories of public entities (Schedule 2, 3 and 16), several entities or bodies are part of the internal control measures system and contribute to identify and mitigate public procurement risks. Among them: the three DoC directorates (Procurement Policy and Quality Assurance Directorate - PPQAD, Operations Directorate - OD, and the Sectoral Procurement Directorate - SPD), and different committees, namely the Tender Evaluation Committee (TEC), the Departmental Contracts Committee (DCC), the General Contracts Committee (GCC), and the green public procurement – GPP focal points (see Table 3.1.). In addition, some specific measures have been implemented namely to reduce risks related to the capabilities of the procurement workforce such as developing standard templates and promoting dedicated capacity building activities (see Chapter 5). As mentioned in section 2.2, some control measures such as the vetting of procurement document and BPQR are considered cumbersome by the interviewed contracting authorities. Malta should evaluate the efficiency of the different control measures in place and provide additional measures when necessary based on the identification of risks impacting the public procurement system.

Table 3.1. Example of entities/ bodies involved in the internal control system of public entities in Malta

	Example of measures	Scope
SPD (DoC)	 Vetting procurement documents, Publishing and managing the publication process, Coordinating evaluation reports for recommendations to the DCC 	Schedule 16 entities
OD (DoC) - Evaluation and Contracts Agreement Unit:	 Vetting procurement documents, Publishing and managing the publication process, Coordinating evaluation reports for recommendations to the DCC 	Schedule 2 and 16 entities (depending on the threshold)
OD (DoC)- Special Projects Unit:	- Vetting tenders which vary from the default procedures such as Concessions, Design Contests, Competitive Dialogues and Innovation Partnership	Schedule 2 and 16 entities
DPPQA (DoC)- Quality Assurance Unit	- BPQR approval	Schedule 2, 3 and 16 entities
Tender Evaluation Committee (TEC)	- Evaluation of tenders	All CAs (for each tender)
Departmental Contracts Committee (DCC)	- Approval of tender award	Tenders administered by SPD

General Contracts Committee (GCC)	- Approval of tender award - Approval of Negotiated procedure or direct orders above EUR 139,000	Tenders administered by OD
Direct Order's Office within the Ministry for Finance and Employment.	- Approval of the Negotiated procedure or direct orders above EUR 10,000 and below EUR 140 000 excluding	All CAs
GPP focal point	- GPP clearance	All CAs (Calls for Tenders above EUR 10 000 / Calls for Quotations above 5 000)

Source: Based on information provided by DoC and (OECD, 2019[8]).

In addition to internal control, external controls are essential to ensure an efficient and effective management of public resources. In Malta, different bodies oversee external audit such as the National Audit Office (NAO) and the Internal Audit and Investigation Division (IAID) and can play a key role in risk identification. For instance, in its 2020 report, the NAO identifies several public procurement risks including those related to the lack of planning, non-compliance with the PPR, excessive use of direct orders, lack of market research, procurements carried out without approval from the DoC (NAO, 2020[22]). In addition, for the use of European funds, other stakeholders are performing control on public finance management and public procurement activities: the Planning and Priorities Coordination Division (PPCD) and the Funds and Programme Division (FPD) (Government of Malta, n.d.[23]) (Government of Malta, n.d.[24]). In addition, the Compliance & Monitoring Unit (DoC) investigated alleged irregularities in public procurement procedures and collects information, analyses findings and disseminates submitted feedback.

As described in section 1.1.3, the coordination between the DoC and other key stakeholders in public procurement is relatively limited which can hamper the efficiency of the control system and does not favour the development of a risk management framework. All stakeholders involved in the control and oversight of public procurement activities should contribute to the development of a risk management framework and tools, and to the development of adequate mitigation measures.

The need to develop specific tools to implement a risk management approach

While the development of risk strategies could foresee the development of risk management tools, it is possible to develop risk management tools independently from a related strategy. Although most OECD countries adopted a risk management strategy in public procurement, only a few have developed tools to assess public procurement risks. As illustrated in Figure 3.5., out of 29 countries surveyed in 2018, only 9 had developed risk databases, 7 had a risk assessment methodology, 5 had a risk register and 4 had risk assessment results (OECD, 2021[4]).

No. 29 25 20 22 24 15 10 5 n Databases Risk assessment Risk register Risk assessment methodology results

Figure 3.5. Number of countries with tools in place to assess public procurement risks, 2018

Source: (OECD, 2021[4])

While a formal risk management strategy has not been developed yet in Malta, a few tools have been developed by different entities to reduce public procurement risks. For instance, the SPD provided a checklist for contracting authorities to be used before submitting a procurement procedure for vetting as a mitigation measure for internal and external checks. One of the SPD units (former MPU) developed a risk register covering the whole public procurement cycle which is considered as a good practice. For each public procurement stage, the register highlights the risks likely to occur, the potential consequences and the mitigation actions to implement. Table 3.2 provides an example of procurement risks at the needs identification and planning phase. Many risks identified in this register are consistent with the risks encountered by the majority of surveyed contracting authorities (see section 3.2.2). However, according to the OECD survey, this good practice has not been replicated in other SPD units, in other directorates in DoC or in other contracting authorities. Despite the limited number of initiatives related to risk management in public procurement in Malta, the willingness of DoC to embark on a risk-based approach and the few existing tools tackling risks (such as the risk management register) are very promising and encouraging signals for the elaboration of a formal risk management strategy and tools. In this context, the DoC should lead the development of risk management tools to be used by all public entities. When contracting authorities use risk management tools developed by DoC and report their results (risk identification, risk registers etc.), it will enable the DoC to centralise the information on potential risks and lead to an update of a general risk register to be spread and used across all contracting authorities. In addition, to formalising a risk management approach, it will contribute to reinforce the capacity of contracting authorities on risk management which should result in better management of public funds.

Table 3.2. Procurement risks identified by one SPD unit

Risk	Likely consequences	Action
Understatement of the need	Purchase of unsuitable product or service Funds underutilised [or wasted] Need partially or not satisfied	Analyse need accurately and ask for the ultimate scope, aims and goals of the Contracting Authority.
Overstatement of the need	Greater expense leading to unnecessary procured works, services or supplies Limited competition due to overtechnical requisites	Analyse need accurately, seeking the realistic functional and performance requirements
Misinterpretation of user needs	Totally unacceptable purchase or not most suitable product or service Time lost Increased costs Possible downtime	Improve consultation and discussions with users Obtain clear statement of work and definition of need

Insufficient funding	Delay in making the purchase Additional costs for re-tender	Obtain appropriate approvals before undertaking process such as but not limited to Commitment Forms [MFIN templates] Improve planning especially for long term contracts
Impractical timeframe	Inadequate responses from tenderers Reduced competition Delivery schedule not met	 Improve forecasting, planning and consultation with users Improve communication with potential tenderers Submission of annual plans vis-à-vis procurement necessities by the Contracting Authority
Integrity issues	Increased procurement costs Misuse of resources Most suitable product not obtained Unethical conduct	 Implement best practice policies, guidelines and practices, especially in line to the general rules governing tendering and procurement policies issued by the Central Contracting Authority [Department of Contracts] Maintain ethical environment Improve training of personnel Put suitable controls and reviews in place – with increased segregation of duties Using legal advisors Improve communication with potential tenderers whilst promoting equal, clear and transparent procurement procedures.

Source: Data provided by the Ministry of Gozo

3.2. Risk management practices at the contracting authorities' level

3.2.1. Initiatives to promote risk management at the contracting authorities' level

At a contracting authority level, and as described in Figure 3.6, risk management in public procurement activities has not been deeply rooted yet in Malta. Most surveyed contracting authorities (57%) do not undertake any risk management activities. Some contracting authorities are familiar with risk management in other areas than public procurement (e.g. IT system, fire engineering, financial services). Among all surveyed contracting authorities, only 7% undertake risk management activities in their public procurement processes. For instance, the Ministry of Gozo- MGOZ is using the risk register developed by the former SPU unit (MPU of MGOZ). The Malta Information Technology Agency (MITA), which is the central purchasing body of Malta for procurement related to Information and Communications Technology (ICT), is also maintaining a risk register. This tool is key for MITA as the agency that not only manages its own procurements and the related risks, but also centralises other contracting authorities' procurements needs in the ICT field. In practice, the scarcity of risk management activities and tools supports the need for DoC to develop risk management tools.

In addition, in some cases (21%), risk management actions in public procurement are set up by contracting authorities without being formalised, communicated or documented, which hampers informed and adequate decision-making. Formalisation of risk management activities is essential to anchor the practice of risk management in contracting authorities' culture. The tools that will be developed by the DoC could support these entities in formalising the risk management approach to enhance the management of public funds.

Undertaking limited risk management activities in public procurement (without being formalised)

Undertaking risk management activities in other areas than public procurement

Undertaking risk management activities in public procurement

Figure 3.6. Risk management activities at the contracting authority's level

Note: Based on a survey carried out between November and December 2021 with a representative sample of 14 contracting authorities in Malta. Source: OECD survey

0%

10%

20%

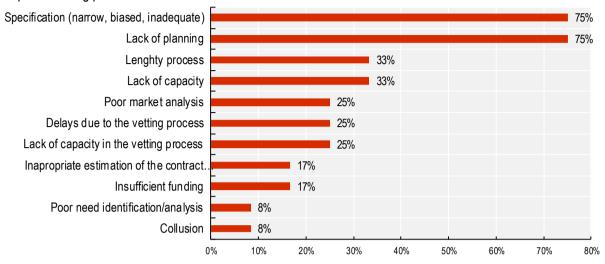
60%

3.2.2. Various procurement risks identified throughout the procurement cycle

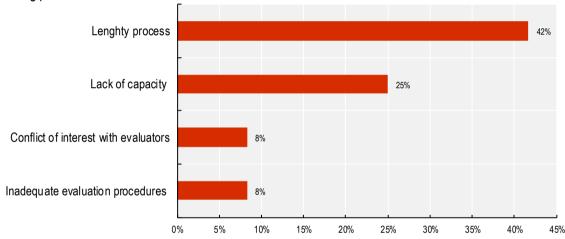
An efficient risk management framework in public procurement relies on a thorough risk identification and involves various relevant stakeholders including the public procurement authority, contracting authorities, oversight bodies (see section 3.1.3), and the private sector. The risks that could affect the proper functioning of the public procurement system are present throughout the procurement cycle. Responses collected from a sample of contracting authorities in Malta provided some useful insights on the main risks impacting different procurement stages (see Figure 3.7.). For instance, the main risks affecting the public procurement processes in the pre-tendering phase are related to inadequate specifications and lack of planning. At the tendering phase, respondents highlighted the length of processes as the main risk. The contract management stage is strongly exposed to the workforce lack of capacity (according to 58% of respondents). The DoC could strongly benefit form involving contracting authorities in risk identification when developing risk management tools.

Figure 3.7. Main risks affecting the public procurement processes through the procurement cycle

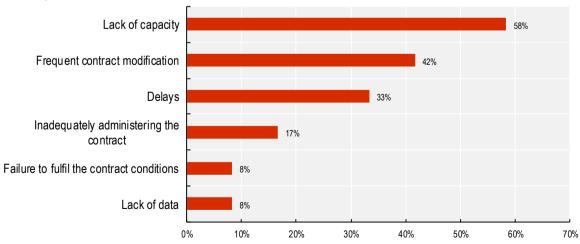
At the pre-tendering phase



At the tendering phase



Contract management phase



Source: Based on a survey carried out between November and December 2021 with a representative sample of 14 contracting authorities in Malta.

Many risks identified by contracting authorities in the OECD survey are consistent with challenges and risks faced and highlighted by the private sector in Malta. For instance, the development of narrow, biased, or inadequate tender specifications has been identified as the main risk threatening public procurement processes by 75% of responding contracting authorities. This result is consistent with the Malta Chamber of Commerce report and survey on challenges faced by economic operators in public procurement. Indeed, 55% of economic operators surveyed by the Malta Chamber of Commerce responded that tender specifications were drafted in such a way that competition was artificially narrowed (The Malta Chamber, 2021_[25]). Risks related to the development of specifications may have different causes including the poor needs and market analysis (see section 2.1.2). Other risks, associated with distinct stages of the procurement cycle, such as the inappropriate estimation of the contract value or the length of the evaluation process, have also been identified by the Malta Chamber of Commerce (The Malta Chamber, 2021_[25]). Given their experience in i) responding to public procurement opportunities initiated by contracting authorities and ii) performing public contracts, Malta should therefore consider involving suppliers and business associations in the discussion, exchange and sharing of experiences related to establishing and improving the management of public procurement risks in the country.

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