



## **BASELINE STUDY**

# **FOR THE CONSTRUCTION SECTOR TRANSPARENCY (CoST) INITIATIVE IN MALAWI**

### **Final Report**

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## List of Acronyms and Abbreviations

ACB	Anti-Corruption Bureau
BAAC	Business Action Against Corruption
CACM	Coalition Against Corruption in Malawi
CoST	Construction Industry Transparency Initiative
DfID	Department for International Development
ESCOM	Electricity Supply Commission of Malawi
IPC	Internal Procurement Committee
MHC	Malawi Housing Corporation
MK	Malawi Kwacha
MPI	Material Project Information
MSG	Multi-Stakeholder Group
NCIC	National Construction Industry Council
NIC	National Integrity Committee
NRWB	Northern Region Water Board
ODPP	Office of the Director of Public Procurement
PEs	Procuring Entities
RA	Roads Authority
RFEI	Request for Expression of Interest
RFP	Request for Proposals
SAFAC	Southern African Forum Against Corruption
SAHRIT	Human Rights Trust of Southern Africa
SPU	Specialised Procurement Unit
TI	Transparency International
UNDP	United Nations Development Program

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Lastly and not least, our gratitude goes to Mr. Ungwe, Mr. Kaitane, Mr. Msyali, Mr. Kalinde, Mr. Nyirenda, Mr. Waya, Mr. Kazembe and all respondents whose input and views contributed to the successful completion of this assignment. These people spared time to avail themselves for the interviews.

Thank you very much.

## Executive Summary

This document is a report of a Baseline Study for the Construction Sector Transparency Initiative (CoST) in Malawi. The purpose of the Baseline Study was to provide information against which to evaluate the short and longer-term impact of CoST in Malawi, during the pilot project and any subsequent phases. CoST is a multi-stakeholder initiative designed to increase transparency and accountability in publicly financed infrastructure development projects. CoST is about disclosing to the public material project information (MPI) throughout the construction project life cycle. It aims at providing sufficient information to enable stakeholders to make informed judgements about the cost and quality of the infrastructure concerned.

Done between June and September 2010, by Salephera Consulting Ltd, the study involved a desk review of procurement laws and regulations, reports on studies conducted on procurement and construction project management, articles and circulars posted on the Office of the Director of Public Procurement (the department responsible for monitoring public procurement) website.

Data was collected from a sample set of public procuring entities through key informant interviews with procurement specialists appointed by the sampled procuring entities. Much information was collected except for items which were not applicable to the commonly used methods of procurement and project execution among procuring entities in Malawi.

Procurement laws and regulations reviewed require that procuring entities keep a detail record of procurement proceedings mainly for use by oversight and monitoring bodies. Some items of MPI on the tendering process are required to be released through the invitation to tender or pre-qualify and through the contract award notice. However, the current legal procurement documents are silent on the disclosure of MPI relating to contract execution and post contract completion details.

Varying responses were obtained from one PE to the other on MPI required by law to be released to the public. This is a reflection of the differences in understanding among PEs of MPI disclosure requirements and suggests that most PEs are not adequately aware of what information is required by law or oversight bodies to be released to the public.

Most MPI on the tendering process were released by PEs into the public domain. There were generally more disclosures by PEs implementing donor funded projects than those implementing locally funded projects. The prevalent channel of disclosure was newspapers except where information was also posted on donor websites. MPI on project execution and post-contract completion phases was not normally released except on demand.

PEs were generally willing to release most MPI although they rarely received requests for full information disclosure on projects. Their observation was that the public is not keen to get such information or is not aware that it is in the framework of its rights to request and access information on publicly funded projects.

There were five key barriers to the release of MPI that were identified. The first was the limited provisions for disclosure of information by procurement laws and regulations. Additional barriers were the financial and human resource requirements necessary for the disclosure, the need to process information into a form that could be disclosed to the public and fear of potential distortion or exaggeration of facts through improper use of disclosed information by the media.

For the sampled projects, the PEs mostly carried out design in-house, while supervision would be either carried out in-house or by a consultant. All the PEs except one contracted out all the main contract works. Most of the final contract prices were higher than the initial contract price at contract start. The higher costs generally resulted from additional works given to the contractor. The projects where a lower amount had been claimed by the contractor at completion actually had fewer quantities than had been estimated at design stage.

The Procurement Regulations permit giving of additional works to a contractor with whom another contract already exists as long as the threshold is not exceeded. Once the increase in quantities results in a price increase exceeding 15% of the contract sum, new procurement proceedings are required except where there is appropriate justification.

Much as such a provision exists, it seems that the PEs tend to overuse this provision and this has become one of the major contributing factors to contracts being completed later than planned. It was actually noted that the threshold was exceeded on some of the projects.

Three initiatives on transparency were found. These are fundamentally addressing corruption but relate to CoST in that they feature transparency and accountability in procurement and public infrastructure projects. CoST may benefit from their transparency related sensitisation activities. At the same time the implementing agencies will be equipped, through CoST, with construction related information for effectively achieving their goals.

An important recent reform of interest to CoST is the introduction of levies to be paid to the National Construction Industry Council on consultancy fees and on the certified sum of each contractor's payment certificate. Consulting firms and contractors are, therefore, required to register all projects with the council and file a copy of invoices or payment certificates with the council.

The provision will allow NCIC to build a database of projects awarded to consultants and contractors as well as the associated contract prices. The provision therefore gives the council access to some items of MPI under the CoST initiative.



## SECTION ONE: INTRODUCTION

### 1.1 Construction Sector Transparency (CoST) Background

CoST is a multi-stakeholder initiative designed to increase transparency and accountability in publicly financed infrastructure development projects. CoST is supported by the UK Department for International Development (DfID) and the World Bank. CoST is being piloted in seven countries in three continents. In Africa, CoST is piloted in Ethiopia, Tanzania, Malawi and Zambia while in Europe, the UK is the pilot country and in Asia, the Philippines and Vietnam are the pilot countries. CoST relies on cooperation between stakeholder groups to observe public construction and to highlight differences between specification and delivery.

In each country, stakeholders are organised within a Multi-Stakeholder Group (MSG), which includes public financial management bodies, construction companies and associations, and the civil society. Each MSG is supported at a high level by a national CoST champion. It is not the role of CoST to make accusations of Corruption, instead, stakeholders are empowered under CoST to receive accurate information, understand what the information means, and act upon it as necessary to support the country's own procedures for uncovering and prosecuting corrupt practices.

In each country, CoST provides for disclosure of information on public construction projects to MSG. Among others, CoST provides for disclosure of items of information such as project identification, funding, tender process for design, supervision and main contract for works, execution of main contract of works and post contract completion details.

CoST is about disclosing to the public material project information (MPI) throughout the construction project life cycle. The CoST process aims at providing sufficient information to enable stakeholders to make informed judgments about the cost and quality of the infrastructure concerned.

The CoST process involves appointment of a CoST champion, formulation and adoption of constitution of MSG, development of country work plan and budget, design of monitoring and evaluation system, preparation of baseline study, establishment of project thresholds, appointment of assurance team, assessment of report by MSG and public disclosure of CoST reports.

### 1.2 Call for CoST

Construction Sector Transparency Initiative is essential because public sector building and infrastructure projects make a major contribution to economic growth and poverty reduction. Mismanagement and corruption during planning and implementation undermine economic and social benefits from projects and is a major obstacle to doing business. Lack of transparency allows unnecessary, unsuitable and dangerous construction projects to go ahead and undermines the rule of law and

development of accountable institutions, necessary for economic growth and social justice.

CoST is based on a belief that public sector infrastructure projects should support sustainable economic growth that contributes to sustainable development and poverty reduction, and that mismanagement during construction can undermine their potential social and economic benefits and value for money. CoST is governed by a set of fundamental principles in carrying out its operations. These principles state that CoST:

- Believes in accountability by government to all citizens for public expenditure on construction projects, and is committed to encouraging high standards of transparency and accountability in all parts of the construction sector, both public and private.
- Promotes disclosure of basic project information throughout the project cycle to ensure effective and efficient way to improve value for money of construction projects over time.
- Believes that open and transparent tendering processes are a precursor to greater transparency during project implementation.
- Views transparency and accountability as an enhanced environment for domestic and foreign direct investment.
- Recognizes that a collaborative multi-stakeholder group is an important conduit for lasting solutions and oversight in ensuring greater transparency and public understanding of information disclosed on projects.

### 1.3 Objectives of the Baseline Study

The main purpose of the baseline study was to provide information against which to evaluate the short and longer term impact of CoST in Malawi, during the pilot project and any subsequent phase. The CoST baseline study aimed at achieving the following five specific objectives:

1. To assess which items of 'Material Project Information' (MPI) are currently required to be released into the public domain by the agencies responsible for procuring construction projects (Procuring Entities or PEs);
2. To assess, for a sample set of PEs, which items of MPI are currently being released into the public domain;
3. To assess (for the same sample set of PEs) the barriers to the release of this information;
4. To provide a point of reference for those core indicators that are expected over time to be subject to change as a result of CoST (others will be identified and

measured as part of routine project reporting) for a sample set of projects completed between June 2006 and June 2008 and selected at random from the same sample set of PEs;

5. To provide information on other on-going initiatives affecting the procurement and management of construction contracts and how these might affect activities under CoST.

#### 1.4 Scope of the Baseline Study

Information was collected from secondary sources that included legal documents, reports, publications and interviews with key personnel. The information was summarised and presented for each of the following in section two of the report:

1. Number and type of procuring entities in Malawi, at national and local level;
2. Summary of the Laws and Regulations on procurement, in particular the procurement of works, including recent changes and progress of reforms;
3. Other on-going or planned transparency / anti-corruption / good governance initiatives that affect the construction sector in Malawi, focusing on processes and outcomes and the way in which they relate to the CoST initiative;
4. Requirements under the laws of Malawi for the release of any of the MPI listed
5. Documented barriers to the release of MPI list

Further tasks carried out involved collecting data in two stages from a sample set of PEs identified by the MSG. In the first stage, data was recorded for each of the selected PEs on items of the standard list of MPI. These are:

1. Stored by the PE, indicating whether it is available in a hard copy file or stored electronically as a management resource.
2. Forwarded from the PE and stored by others.
3. Released into the public domain (e.g. on website, newspaper, brochures etc) (indicating a sliding scale of always/majority of cases/minority of cases/never)
4. Made available to the public on demand (indicating a sliding scale of always/majority of cases/minority of cases/never)
5. Required by law to be made available to the public
6. Prevented by law from being made available to the public
7. Prevented by other factors (political, managerial, administrative, etc) from being made available to the public

The PEs identified in stage one provided completed projects from which the Malawi MSG selected a sample set of projects for the second stage of the study. The following were calculated and recorded for each of the selected projects, wherever applicable:

1. Number of companies expressing interest in the main contract for works
2. Number and proportion of short-listed companies subsequently bidding for the main contract for works
3. Number of companies expressing interest in bidding for the contract for project supervision
4. Number and proportion of short-listed companies subsequently bidding for the contract for supervision
5. Number of companies expressing interest in the contract for project design
6. Number and proportion of short-listed companies subsequently bidding for the contract for project design
7. Time from contract commencement date to completion date as a % of the original contract programme at commencement date
8. The percentage change from (a) initial estimated price to contract price on commencement date and (b) from contract price on commencement date to final cost at completion date.
9. The percentage change from (a) engineers cost estimate to contract price on commencement date and (b) contract price on commencement date to final cost at completion date for the main works contract.
10. Instances of re-award of the main contract with recorded reasons
11. The number and value of formal instructions to remedy defective works (a) issued (b) implemented
12. Any other recorded indication (e.g. in project completion reports) of the contractor failing to meet the specification, listing the source of the information and a brief comment on the nature and severity of the failure.

## 1.5 Methodology and Approach

### 1.5.1 Description of Sample

The baseline study used a sample of six procuring entities (PEs) and a total number of sixteen completed projects. The PEs were selected and provided by the MSG in Malawi that also selected completed projects from each PE. One PE was chosen

from each of the four main sub-sectors of the construction industry in Malawi namely energy, water, roads and housing. Two additional PEs were selected to increase the sample size and number of projects. Table 1 below shows the PE, sub-sector, region and selected projects.

**Table 1 Sampled PEs and projects**

No	Procuring Entity	Sub-sector	Region	Completed Projects
1	Northern Region Water Board (NRWB)	Water	Northern	1. NRW/W/06 <sup>1</sup> 2. NRW/07A-1 <sup>2</sup>
2	Electricity Supply Commission of Malawi (ESCOM)	Energy	Southern	1. KAP 55 <sup>3</sup> 2. TLR/01 <sup>4</sup>
3	Roads Authority (RA)	Roads	Central	1. 11T/RM/NR/NB/09 <sup>5</sup> 2. 17T/REH/SR/BTCKMN/09 <sup>6</sup> 3. 16T/RM/CR/KK/09 <sup>7</sup>
4	Malawi Housing Corporation (MHC)	Housing	Southern	1. MHC/2006/01 <sup>8</sup> 2. MHC/2007/02 <sup>9</sup> 3. MHC/2008/03 <sup>10</sup>
5	Blantyre Water Board (BWB)	Water	Southern	1. 025-1-6813 (BWB) <sup>11</sup> 2. 025-1-6842 (BWB) <sup>12</sup> 3. BWB Head Office Renovations <sup>13</sup>
6	Lilongwe City Council (LCC)		Central	1. City Centre Fountain 2. LCA/10/08/Falls Main Road 3. LCA/10/08/Mchesi Tarmac Road

<sup>1</sup> NRW/W/06 – Construction of service reservoirs in Mzuzu

<sup>2</sup> NRW/W/07A-1 - Construction of water supply scheme for Likoma Island

<sup>3</sup> KAP 55 - MALAWI POWER V PROJECT: Kapichira Hydro-Electric Power Scheme; Generation Rehabilitation; Transmission Reinforcement; Distribution Reinforcement and Institutional Strengthening of ESCOM

<sup>4</sup>TLR/01 -Rehabilitation of Lilongwe “B” to Salima 132 kV line and installation of a transformer at Lilongwe “B” substation

<sup>5</sup> 11T/RM/NR/NB/09 – Shoulder reconditioning of a road in Blantyre

<sup>6</sup> 17T/REH/SR/BTCKMN/09 – Drain broadening and shoulder improvement of a road in Nkhokakota

<sup>7</sup> 16T/RM/CR/KK/09 – Drain excavation, shoulder reconditioning and rehabilitation of earth road in Nkhatabay

<sup>8</sup> MHC/2006/01- Construction of 23 number houses and associated external works in Ngumbe

<sup>9</sup> MHC/2007/02 – Road works, ancillary works and utilities (water and power reticulation) in area 47

<sup>10</sup> MHC/2008/03 – Construction of 34 number houses and associated external works in Ngumbe

<sup>11</sup> 025-1-6813 (BWB) – Water Supply to Namiwawa

<sup>12</sup> 025-1-6842 (BWB) – Water Supply to Limbe West

<sup>13</sup> Blantyre Water Board Head Office Renovations

## 1.5.2 Data Collection Instruments

Two sets of questionnaires provided by the CoST International Secretariat were used to collect data for the baseline study. The first questionnaire was structured and addressed to individual Procuring Entities. It aimed at establishing the current practice in material project information storage and release to the public. The questionnaire contained the following key sections:

- a. Information storage – aimed at finding out whether project information is available in hard copy, electronic copy or forwarded to others for storage (donor agencies, government departments).
- b. Release of information into the public domain – aimed at finding out the frequency of information release, mode of information release and if the information is released on PEs' volition or public demand.
- c. Legal requirements governing project information release.
- d. Other prohibitive factors to information release to the public.

The second questionnaire was aimed at collecting, from the same PEs, specific data relating to individual completed projects. The project level information related to tendering (number of bidders for contracts for works, design and supervision) and key measures of project performance. The questionnaire was designed to track changes in price and duration of the design, supervision and works contracts at the planning, contract start and completion stages, initial and final project scope and the associated reasons.

## 1.5.3 Data Collection

### 1.5.3.1 Desk Review

The desk study of available literature included procurement documents, national construction policies, laws and other documents related to public procurement in Malawi (see Annex 1: List of Documents Reviewed).

### 1.5.3.2 Key Informant Interviews with Procuring Entities

During interviews, responses were recorded on hard copies from the printable version of the spreadsheet provided by the International Secretariat. The baseline study focused on interviewing procurement specialists/managers appointed by the management of the sampled PEs. Consultants from Salephera Consulting conducted interviews with the procurement specialists. Wherever inconsistencies were noted in the responses obtained, the consultants made follow-up visits to seek clarification.

Requests were made for missing data through visits, email and telephone conversations. The consultants explained and clarified each and every question in

detail and ensured that the persons to complete the questionnaires had fully understood the questions and what was expected of them. Further, the completed questionnaires were discussed at length with the procuring specialists from the PEs.

### 1.5.3.3 Data Entry, Cleaning, Analysis and Verification

Data was entered into the electronic version of the questionnaires by the consultants involved during data collection. The team leader checked the hard copies against the data entered on electronic spreadsheet to ensure consistency and quality. The electronic data was then taken to the respective PEs to verify and validate the entered data for consistency with their current practice and procedures.

The final stage involved getting approval from the PEs' top management that their data was correct, accurate and could be incorporated into this baseline study report. Qualitative analysis was a continuous process while quantitative data analysis involved summarising statistics obtained from the electronic spreadsheets.

### 1.5.3.4 Field Experiences and Challenges

Summarised below are the main field experiences and challenges:

- Due to the delay in implementing the pilot phase of CoST in Malawi, the baseline study was done within a constrained timeframe. As a result the initial number of 25 projects to be reviewed was not achieved. Only 16 were reviewed in this baseline study.
- Some designated officers were not available on several occasions of the agreed and scheduled appointments despite making prior logistical arrangements and explaining the purpose and urgent nature of the exercise. This lack of cooperation resulted in making several unproductive trips to the same PE.
- Delay in data collection from some PEs due to unavailability of staff responsible for filing and archiving.
- One PE provided a new recruit who had little knowledge about previously completed projects as the contact and liaison person for that PE. This proved to be time consuming as the person kept asking for more time to consult the members who had stayed with the entity for a longer time. Time was further wasted as the contact person took more time to retrieve the files containing the MPI from the archives. It took more than two long trips and several appointments to obtain the requested information. This was time consuming and most of all, costly.
- Some PEs had difficulty retrieving project information due to unorganised filing system. One PE could not provide details on some sections of the questionnaire and actually agreed that the corresponding fields be left blank.



## The Study Team

The study team comprised the following:

1. **Hestern Banda (MPhil, BSc, Dip)**, Organisation Development and Management Specialist, Salephera Consulting Ltd
2. **Chikondi Makwiza (MSc, BSc)**, Engineering Specialist and Lecturer in Engineering Department, University of Malawi, Bunda College of Agriculture
3. **Lombola Gama (BSc)**, Economics and Research Specialist, Salephera Consulting Ltd



## SECTION TWO: FINDINGS AND DISCUSSIONS

The CoST Malawi Baseline Study was conducted to highlight some of the critical issues in the construction industry in the country. The findings presented in the following sections of this report describe the current situation, issues and challenges as portrayed by a sample of 16 projects from six Procurement Entities involved in the construction sector in Malawi. The order of the presentation of the findings follows the scope of work provided in the terms of reference for the baseline study.

### 2.1 Number and Type of Procuring Entities in Malawi

A list of public procuring entities was obtained from the Office of the Director for Public Procurement. The ODPP requires all public institutions that are involved in procurement of goods, works and services to register with the office. The number of private PEs could not be established because they are outside the jurisdiction of ODPP. Non-governmental Organizations are also not required to register with ODPP, as much as they operate for the most part on donor funds and work closely with the government.

There is not particular categorisation of PEs registered with the office. A total of 155 public PEs was obtained comprising all government ministries, government departments, district and city councils, statutory corporations, and academic institutions, among others. Some of these operate entirely on funds from the national budget or donor funds. Other PEs receive subvention from the government but also raise funds from levies, revenues and charges on services provided. A few PEs are commercial parastatals though they get government support on large development projects.

### 2.2 Malawi Construction Industry Profile

The construction sector in Malawi is categorised into five main sub-sectors namely water, energy, housing, roads and irrigation. Consultants and contractors are key private players in the construction industry. Only firms registered with the National Construction Industry Council (NCIC) are qualified to work on government jobs.

The two main categories are civil and building contractors that comprise 80 percent of the firms registered with the council while electrical contractors make up 10 percent. Consultants are amongst the minor categories of the registered firms with 4 percent representation with the council. Firms are also registered into financial categories that determine the limit of the value of works they can carry out. At the time of this baseline study, NCIC had a total of 1355 firms registered.

### 2.3 Summary of Laws and Regulations on Procurement in Malawi

The Government of Malawi has been progressively developing a legal framework that can increase accountability, transparency, effectiveness and efficiency of public procurement systems. A large proportion of government funds and donor aid goes to infrastructure development projects making procurement of construction works a focus of donors and the government. The following are some of the policies and

legal instruments that relate to transparency and accountability in public procurement within the construction sector in Malawi.

### 2.3.1 The Constitution of Malawi

Malawi adopted a new constitution in 1995 following the coming of the new system of multiparty politics in 1994. One of the policies promoted by the new constitution is public trust and good governance. The constitution seeks to promote measures that would guarantee accountability, transparency, integrity and financial probity<sup>14</sup>. The effectiveness of such measures is eventually expected to increase confidence in public institutions.

Sections 36 and 37 of the bill of rights, meant to protect human rights and freedoms, are two important components of the Malawi constitution that could partly facilitate the achievement of the goals of CoST. The constitution grants all persons in Malawi the right of access to information held by the State or its organs. The exercise of this right is subject to the provisions of Acts of Parliament, the most important in this context being the Public Procurement Act discussed in the following section.

The constitution equally gives the press the right to report and publish freely as well as access to public information. These provisions of the constitution set a base on which the CoST initiative may build to promote transparency by actually making MPI available to the public.

### 2.3.2 The Public Procurement Act

The Public Procurement Act was a result of a Procurement and Supply Management Reform Programme conducted by the Government of Malawi with its development partners, particularly the World Bank in 1996. The Public Procurement Act was enacted in 2003 to provide principles and procedures to be applied in the procurement of goods, works and services in the public sector to ensure transparency, fairness and competitiveness of the procurement process. The Act brought a fundamental shift from centralised procurement with a network of government stores towards external procurement<sup>15</sup>.

According to the Act, all public procurement has to be realised by means of open tendering with exceptions subject to provisions in the Act. The Act provides four other alternative methods that PEs may use with strict conditions. PEs are required to seek approval from the Office of the Director of Public Procurement to use any of the alternative methods and to provide justification for opting to do so<sup>16</sup>.

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<sup>14</sup> SECTION 13(o), Constitution of the Republic of Malawi, 1995.

<sup>15</sup> Building National Procurement Capacity to Implement the Public Procurement Act, available at [www.undp.org.mw/index.php](http://www.undp.org.mw/index.php)

<sup>16</sup> Section 30(11), Public Procurement Act, 2003.

Restricted tendering may be employed where services are only available from a limited number of suppliers and where there is a constraint in time or cost. The PEs may undertake the two-stage tendering procedure, or may request for proposals from a short list drawn from entities that express interest in response to Requests For Expression of Interest (RFEI).

The Act permits single-source procurement for a limited contract sum, where services can only be realised from a sole company, in cases of emergency, or as additional works or services to an existing contract. A request for proposals (RFP) for services is the method to be used for the procurement of consultants' services and other types of intellectual services.

### **2.3.2.1 The Office of the Director of Public Procurement**

One important provision of the Public Procurement Act is the establishment of the Office of the Director of Public Procurement (ODPP). It is staffed by the Director and a Deputy Director, supported by other officers and staff. The main function of ODPP is to monitor and to provide oversight to all public procurement in the country through the implementation of the Public Procurement Act.

As a regulatory and monitoring body, ODPP is not operationally involved in conducting procurement activities or approving procurement decisions but requires each public institution to establish an Internal Procurement Committee (IPC) and Specialized Procurement Units (SPUs) with specific membership sizes and compositions to handle procurement.

ODPP is also responsible for the development of procurement related regulatory and legal framework and for professional capacity building in public procurement. It advises the Government on procurement policy, recommends any desirable changes to the public procurement system, and establishes review committees to conduct administrative reviews and issues standard documents and lists of bidders debarred from public procurement.

ODPP expects all PEs to conduct all procurement through open tendering. Even where the PE wishes to request for quotation for small works, ODPP requires that such be obtained from the pre-qualified list of contractors or suppliers. ODPP circulates procurement thresholds<sup>17</sup> annually to guide PEs in choice of method of procurement based on the value. The procurement thresholds for works and consultancy services for 2010 are presented in Table 2 below.

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<sup>17</sup> Section 9(1c), Public Procurement Act, 2003.

**Table 2 Procurement value and method**

	<b>Procurement Value (MK)</b>	<b>Procurement Method</b>
Works	Up to 5 million	Request for quotations
	5 million to 1 billion	National competitive bidding
	More than 1 billion	International competitive bidding
Consultancy Services	Up to 3 million	Short listing
	3 million to 50 million	Request for proposals (local consultants only)
	More than 50 million	Request for proposals (local and international consultants)

### 2.3.3 Malawi Government Public Procurement Regulations

The Procurement Regulations were issued by ODPP in 2004. The purpose of the regulations was to establish detailed rules and procedures for achieving the requirements of the Public Procurement Act. The regulations were meant to apply to all procurement covered in the Act. All public procuring entities are obliged by the procurement regulations to comply to stipulations therein.

Measures to promote transparency are documented in Part X of the regulations where it is required that procuring entities keep the record of public procurement proceedings. Apart from the project description released through the publication of invitation to tender or to pre-qualify, disclosure is restricted to the summary of the evaluation and comparison of bids. Release of information that would prejudice legitimate commercial interests or that would inhibit fair competition is not permitted by the regulations. Detailed information is only accessible by ODPP, the Auditor General and other oversight organs.

### 2.3.4 Malawi Government Desk Instructions for Public Procurement

The Government of Malawi Desk Instructions for Public Procurement is a document that was developed to provide straightforward, but detailed, guidance on the procedures to be followed in procurement using government or public funds. They contain uniform and standard working procedures that implement the legal requirements of the Act and Regulations. The Desk Instructions cover the whole procurement cycle from initiation through to contract completion. They provide guidance on all methods of procurement and on the procurement of goods, works, routine services and consultancy services.

Where donor funded procurement is required to follow the procurement rules of the donor or funding agency, those rules will prevail over these Desk Instructions to the extent that there is any conflict. However, the Desk Instructions continue to apply in all areas where they are consistent with the rules of the financing agency.

The Desk Instructions are designed to be simple to use and understand. They give definitions and explanations of each aspect of the tendering process. The overall tendering process is broken down into a series of individual procedures and each procedure is broken down into step-by-step instructions.

### 2.3.5 The National Construction Industry Act

The National Construction Industry Council was established in 1996 by an Act of Parliament for the regulation, promotion and development of the construction industry in Malawi. NCIC registers and certifies contracting and consulting firms that can legally carry out construction works in the country. It is through these roles that NCIC is able to enforce ethical practices among participants in the construction industry registered with the council.

The National Construction Industry Act empowers the council to “*exercise disciplinary control over the conduct of any person engaged in the construction industry and practicing in Malawi*”<sup>18</sup>. The council has developed a Code of Ethics that aims at upholding and advancing integrity, promoting fair competition among contracting firms and enforcing fidelity in public service, among other things. The code empowers the council to sanction those in breach of the code of conduct by issuing a warning or a fine, suspending, barring or deregistering their firm. The code of ethics also requires that all firms registered under the board refrain from corruption and corrupt practices and avoid all deceptive acts.

### 2.3.6 The Corrupt Practices Act

The Corrupt Practices Act was adopted in 1996 and amended in 2004. It was a direct result of the adoption of the new constitution in 1995 that would promote transparency and accountability. The Act was an attempt to provide a comprehensive legal framework for combating corruption in Malawi. Corruption is viewed as a major obstacle to doing business in Malawi and government procurement is one area where serious allegations of corruption have been made. This is partly due to the large fraction of government expenditure that passes through public procurement. It may be debatable, though, whether corruption involving public procurement is indeed a common practice in Malawi but it is certainly highly publicised.

The Corrupt Practices Act is enforced by the Anti-Corruption Bureau that was established in 1997. The bureau receives complaints, reports or information of any alleged or suspected corrupt practice. The Corrupt Practices Act mandates the Anti-Corruption Bureau (ACB) to investigate such allegations and prosecute corrupt practices. The director of the bureau must seek the consent of the Director of Public Prosecutions (DPP) before proceeding with prosecutions. To ensure that withholding of consent is not abused, the DPP is required to provide reasons for withholding the consent, in writing, that should be based on fact and law to the Director of ACB<sup>19</sup>.

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<sup>18</sup> Section 11(s), National Construction Industry Act, 1996.

<sup>19</sup> COMBATING CORRUPTION: CHALLENGES IN THE MALAWI LEGAL SYSTEM by Ivy Kamanga. Resource Material Series No. 76. Page 155.

ACB takes necessary measures for the prevention of corruption in public and private bodies. The outcomes of CoST can contribute significantly to one of the core function of the ACB that aims at *examining the practices and procedures of public bodies and private bodies in order to facilitate the discovery of corrupt practices and secure the revision of methods of work or procedures which may be prone or conducive to corrupt practices*<sup>20</sup>.

### **2.3.7 Recent Changes in Procurement Laws and Regulations and Progress of Reforms**

NCIC is lately implementing an amendment to the National Construction Industry Act that was released in 2004 to promote local construction consulting firms. The amendment requires foreign construction consulting firms wishing to provide services in Malawi to form a joint venture with a local firm. The foreign firm is required to register through the local firm and the contractual relationship to be approved by NCIC. The local firm takes full professional responsibility of the services and provides at least fifty-one percent of the services.

Another recent reform is the introduction of levies to be paid to NCIC on consultancy fees and on the certified sum of each contractor's payment certificate. Consulting firms and contractors are required to register all projects with the council and file a copy of invoices or payment certificates with the council. Every consultant and contractor shall then pay a levy of one percent of their claims to the council. The provision will allow NCIC to build a database of projects awarded to consultants and contractors as well as the associated contract prices. The provision therefore gives the council access to some items of MPI under the CoST initiative.

## **2.4 On-going Transparency / Anti-corruption / Good Governance Initiatives Affecting the Construction Sector in Malawi**

Ensuring transparency and accountability in Malawi has been the aim of many initiatives over the years with some considerable measure of success. The initiatives that were identified to be promoting transparency and accountability in Malawi have mainly been geared towards combating corruption. It is generally expected that transparency in public procurement would reduce opportunities for personal gain in public procurement and so discourage corrupt practices. The following are some of the on-going transparency, accountability and good governance initiatives affecting the procurement and management of construction contracts.

### **2.4.1 Procurement Capacity Building by ODPP**

At the time the Public Procurement Act was adopted, ODPP lacked capacity as a large percentage of the recruited staff was unqualified. Through a series of evaluations and assessments, ODPP received both financial and technical support to have its staff trained in order to execute their duties with efficiency, effectiveness,

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<sup>20</sup> Section 10(1a), Corrupt Practices Act, 1996.



competence and aptitude in making procurement a far more accountable and transparent transaction.

In 2006, two hundred procurement officers were trained from ODPP as well as specialized procurement units within ministries and other government agencies to increase human resources to implement the Act. Capacity building in procurement is continuing to increase as ODPP implements its functions. One of the functions of ODPP is to promote the development of a professional procurement workforce through organizing and conducting training programmes, and developing government-wide policies and programmes aimed at establishing procurement-related positions, career paths and performances incentives.

ODPP with support from UNDP on capacity building spearheaded and pioneered the establishment of a Bachelor of Science in Supply Chain Management at one of the University of Malawi's constituent colleges – the Malawi Polytechnic in 2008. ODPP was responsible for lecturing the students at the early stages of the establishment of the course. ODDP, with support from UNDP in 2010, is still supporting tuition fees of 11 students on the program.

The curriculum for the study programme comprises specific courses on transparency and accountability in procurement services which is also in line with the CoST initiative. The graduating students are expected to be engaged by the various government departments including ODPP and also the private sector organizations. These experts shall help to enforce the implementation of the procurement regulations.

#### **2.4.2 National Anti-corruption Strategy**

The National Anti-corruption strategy was launched by His Excellency the State President of Malawi, Dr. Bingu wa Mutharika in 2009. The strategy was launched under the theme “Fighting Corruption: Responsibility for All”. Implementation of the strategy is being done by the National Integrity Committee (NIC) comprising members drawn from all sectors of Malawi, including the construction sector. The initiative affects the procurement and management of construction contracts in that it intends to reduce corrupt practices in all sectors including the construction sector.

Having the Head of State spearhead the initiative showed the importance the government of Malawi has placed on transparency and accountability especially in the procurement and management of public construction contracts. The strategy may complement the current CoST process by facilitating smooth disclosure of MPI by PEs as it promotes policies that minimize corrupt practices. The implementation of the strategy is designed in such a way that it includes all stakeholders, including the private sector most of which are part of the National Multi-Stakeholder Group.

In particular, the CoST process interfaces with the Anti-corruption Strategy through the joint implementation of the shared core values such as integrity, transparency and accountability that aim at preventing corrupt practices. For example, members of

the Multi Stakeholder Group are involved in the development of institutional specific anti-corruption policies and action plans with the Anti-Corruption Bureau.

### 2.4.3 Business Action against Corruption (BAAC) Malawi

Business Action Against Corruption (BAAC) is an international anticorruption initiative that was launched in 2005 in Johannesburg with support from Southern African Forum Against Corruption (SAFAC), which includes the region's anticorruption commissions. Implementation is led by the Commonwealth Business Council and the Human Rights Trust of Southern Africa (SAHRIT) and involves joint working groups of business and anticorruption commissions in Botswana, Malawi and Zambia.

In Malawi, BAAC was formed by the business sector as a body that deals with corruption issues within the private sector. BAAC Malawi comprises 37 members who consider corruption a serious hindrance to the general growth and operation of business. BAAC Malawi fights corruption through the implementation of a business code of conduct that provides a framework for good business practices and risk management strategies for countering corruption.

The majority of the contractors and consultants who engage in civil works are from the private sector hence having the private sector be the vanguard is crucial to reducing corruption and increasing transparency and accountability.

### 2.4.4 Transparency International Malawi (TI-Malawi)

In its quest to promote transparency and accountability, TI-Malawi organized and established the Coalition Against Corruption in Malawi (CACM). CACM was established by bringing together stakeholders from likeminded organizations in the fight against corruption. The coalition was formed by putting in place a participatory plan of action for effective implementation of activities in fighting corruption. CACM's vision is to have a corruption free nation by the year 2020.

CACM complements the efforts of CoST by building capacity of different institutions and organizations that require expertise to effectively execute duties in fighting corruption in all sectors in Malawi, including the construction industry.

## 2.5 Barriers to the Release of MPI

The following were identified and provided by the PEs as barriers to information release regarding the procurement process in Malawi:

- **The process of releasing information is costly for most PEs:** Release of information requires financial and human resources to be set aside for information processing and dissemination to the relevant stakeholders.
- **The information is not available in end-user format:** The information needs to be converted into a form that can easily be incorporated into the available



channels of information disclosure and that can be easily understood by the target audience. The PEs also hinted that some information is contained in large documents that would be difficult to give out to the public. Such documents are too big for most people to read through and would require more resources to be made available to the public, although the report may be available on demand at the head office.

- **The media tend to distort or exaggerate information when reporting:** Experiences reported by PEs show that information given out to reporters is usually exaggerated and distorted and eventually depicts a wrong picture of what actually transpired in the project. As such PEs have to exercise a lot of caution in giving out information. For example, for one of the PEs, information can only be obtained from the top management or the public relations officer thereby making it difficult for an ordinary citizen to access project information on demand.
- **Disclosure of most of the MPI has not been provided for by legal documents on procurement:** The public Procurement Act, the Procurement Regulations and the Desk Instructions prepared by the ODPP, which are the key documents governing procurement, limit the procurement information that can be released to the public to a few selected items. Some information is only accessible to bidders.
- **Most post-contract award and completion information is not required by law to be released to the public:** In cases where there are no special requirement for such information to be released in the conditions of contract or the financing agreement, the PEs do not see the need to publish such information there being no benefits that the PE would realize from releasing the information to the public. Releasing such information would actually rouse the public to demand more detailed information necessary to give sufficient and comprehensive explanation of what transpired during the execution of a project, thus putting pressure on PEs to justify decisions taken during the project.

## 2.6 Core Indicators for the CoST Baseline Study

There are two groups of core indicators for the CoST initiative. The first group comprises indicators that measure current levels of material project information disclosure for the sampled PEs. Findings on these indicators are presented and discussed in section 2.6.1 below. The second group of indicators relates to projects implemented by PEs and measures competition at tendering stage and the performance of projects. These indicators are discussed in sections 2.6.2. The findings shall serve as a reference for assessing future CoST initiatives.

### 2.6.1 Baseline Indicators on MPI Disclosure

Information on indicators presented in this section was obtained from a review of legal MPI disclosure requirements and data collected during the study showing current understanding and practice of PEs as regards MPI disclosure.

### 2.6.1.1 Material Project Information Currently Required to be Released to the Public by PEs

Procurement documents are rather more stringent on procurement information storage by PEs. Internal Procurement Committees and Specialised Procurement Units within all PEs are required to keep detailed records of the whole procurement process for purposes of accountability. Such information has to be kept mainly for reference by monitoring and oversight organs of the government, particularly, ODPP. Disclosure of such information to the public, however, is rather limited. No requirements to disclose MPI developed by specific PEs were found.

Information disclosure is guided by the Public Procurement Act, the Government of Malawi Procurement Regulations and the Desk instructions for Public Procurement. Not all items on the standard list of MPI as outlined by CoST have been specifically addressed in these documents. There are also slight differences in the provisions and on the level of detail of the information to be released to the public in these documents. This being the case, the Public Procurement Act technically overrules the other two documents. In practice, however, the Desk Instructions for Public Procurement is assumed to be the working document that is followed step-by-step throughout the procurement process.

In addition, the requirements for disclosure of information are all related and limited to the procurement process. MPI related to contract execution and post-contract completion stages are not addressed by the legal documents on procurement. This needs to be an area of focus for the CoST initiative. It should also be noted that the documents mentioned above are generic to all forms of procurement. The documents also apply to procurement of services in other sectors other than construction.

In this regard, requirements for disclosure of post-contract award details would best be handled in another document specifically prepared for construction projects. Table 3 shows, for each item of MPI, whether there is a requirement to disclose the information to the public and the associated section in the applicable document.

**Table 3 Legal requirements for MPI release**

Project Stage	Item of MPI	Required by Law to be Released to the Public	Reference
Project Identification	Project specification	Yes	<ul style="list-style-type: none"> <li>Regulations 59(1b); 92(a); 173(2), Public Procurement Regulations, 2003.</li> <li>Desk Instruction 4A(28), Desk Instructions for Public Procurement, 2003</li> </ul>
	Purpose	Yes	<ul style="list-style-type: none"> <li>Regulations 59(1b); 92(a); 173(2), Public Procurement Regulations, 2003.</li> <li>Desk Instructions 4B(37); 5A(44), Desk Instructions for Public Procurement, 2003</li> </ul>
	Location	Yes	<ul style="list-style-type: none"> <li>Regulations 59(1b); 92(a), Public Procurement Regulations, 2003.</li> <li>Desk Instructions 4B(37), 5A(44), Desk Instructions for Public Procurement, 2003</li> </ul>
	Intended beneficiaries	No	
	Feasibility study	No	
Project funding	Financing agreement	No	
	Budget	No	
	Project cost estimate	No	
Tender process for the contract for project design	Tender procedure	Yes	<ul style="list-style-type: none"> <li>Regulation 59(1d), Public Procurement Regulations, 2003.</li> </ul>
	Name of main consultant	Yes	<ul style="list-style-type: none"> <li>Section 26, Public Procurement Act, 2003.</li> <li>Regulation 173(2), Public Procurement Regulations, 2003.</li> </ul>
Tender process for the contract for project supervision	Tender procedure	Yes	<ul style="list-style-type: none"> <li>Regulation 59(1d), Public Procurement Regulations, 2003.</li> </ul>
	Name of main consultant	Yes	<ul style="list-style-type: none"> <li>Section 26, Public Procurement Act, 2003.</li> <li>Regulation 173(2), Public Procurement Regulations, 2003.</li> </ul>
Tender process for main contract works	Tender procedure	Yes	<ul style="list-style-type: none"> <li>Regulation 59(1d), Public Procurement Regulations, 2003.</li> </ul>
	List of tenderers	Yes	<ul style="list-style-type: none"> <li>Regulations 75(1&amp;2), Public Procurement Regulations, 2003.</li> </ul>

Project Stage	Item of MPI	Required by Law to be Released to the Public	Reference
			<ul style="list-style-type: none"> <li>Desk Instructions 12A, Desk Instructions for Public Procurement, 2003</li> </ul>
	Tender evaluation report	No	
Details of contract for project supervision	Contract price	Yes	<ul style="list-style-type: none"> <li>Section 26, Public Procurement Act, 2003.</li> <li>Regulation 173(2), Public Procurement Regulations, 2003.</li> </ul>
	Contract scope of work	No	
	Contract programme	No	
Details of the main contract of works	Contractor name	Yes	<ul style="list-style-type: none"> <li>Section 26, Public Procurement Act, 2003.</li> <li>Regulation 173(2), Public Procurement Regulations, 2003.</li> </ul>
	Contract price	Yes	<ul style="list-style-type: none"> <li>Section 26, Public Procurement Act, 2003.</li> </ul>
	Contract scope of works	Yes	<ul style="list-style-type: none"> <li>Regulation 59(1c), Public Procurement Regulations, 2003.</li> </ul>
	Contract programme	Yes	<ul style="list-style-type: none"> <li>Regulation 173(2), Public Procurement Regulations, 2003.</li> </ul>
Execution of the contract for project supervision	Significant changes to contract price, programme, scope with reasons	No	
Execution of contract for the main contract of works	Individual changes to the contract which affect the price and reasons for those changes	No	
	Individual changes to the contract which affect the programme and reasons for those changes	No	
	Details of any re-award of main contract	No	
Post contract completion details of the main	Actual contract price	No	
	Total payments made	No	
	Actual contract scope of	No	

<b>Project Stage</b>	<b>Item of MPI</b>	<b>Required by Law to be Released to the Public</b>	<b>Reference</b>
contract for works	work		
	Actual contract programme	No	
	Project evaluation and audit reports	No	

Most of the items of MPI required to be made available to the public at PEs discretion are released in the invitation to tender or pre-qualify and the contract award notice through the local press. The Act, Regulations and Desk Instructions require the invitation to tender to give a clear description of the works or services sought.

The provisions for release of further information after bid submission differ on some items in the three main procurement documents. For example, the Public Procurement Act <sup>21</sup> specifies that the recorded information on procurement proceedings should be made available to any person, **on request** after the bid has been accepted except where the release of such information compromises national defence or security.

The record for disclosure has to be prepared in a manner that avoids disclosure of proprietary commercial information. Thus the Act provides for disclosure on demand of all MPI relating to the tendering process and details that may relate to the tender evaluation and selection process. On the contrary, the Procurement Regulations limit information accessible by the public at contract award to the summary of the evaluation and comparison of bid and the Regulations do not clearly state the specific items to be included in this disclosure.

The Desk Instructions are more specific on the items to be disclosed to the public at this point and the disclosure is restricted to project description, the name of the successful bidder and the contract price.

#### **2.6.1.2 The Understanding of PEs on Items of MPI Currently Required to be Released into the Public Domain**

Table 4 shows the responses of the procuring specialists from the sampled PEs on MPI required by law to be released to the public. Varying responses were obtained from one PEs to the other. A common observation in all the interviews was the difficulty to relate the specific items outlined by CoST to the items listed in the legal documents on procurement. This is a reflection of the differences in understanding among PEs of MPI disclosure requirements in the procurement documents. It seems that there is limited knowledge of the procurement legal instruments by the procurement specialists in the sampled PEs.

The lack of adequate knowledge and understanding of procurement legal instruments in procuring entities is perhaps the single most important challenge to the PEs appreciation of what MPI need to be released. This can be explained by observing the trend of responses summarized in Table 4.

This limited understanding can also be attributed to the fact the legal instruments on procurement do not clearly express the items of MPI required to be released to the

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<sup>21</sup> Section 27(4), The Public Procurement Act, 2003.

public. For example, the Act states that recorded information on tendering be made available to any person after the bid has been accepted, but it does not explicitly state the specific items that should be released.

**Table 4 Understanding of sampled PEs on MPI required by the law to be released to the public**

Project Phase	Information	Required by Law						
		NRWB	ESCOM	RA	MHC	BWB	LCC	Legal Requirement
Project Identification	Project specification	No	Yes	Yes	Yes	Yes	Yes	Yes
	Purpose	No	Yes	Yes	Yes	Yes	Yes	Yes
	Location	No	Yes	Yes		Yes	Yes	Yes
	Intended beneficiaries	No	Yes	Yes	Yes	Yes	Yes	No
	Feasibility study	No	No	Yes	Yes	Yes	Yes	No
Project funding	Financing agreement		No	Yes	Yes		Yes	No
	Budget	No	No	No	Yes	Yes	No	No
	Project cost estimate	No	No	No	Yes	Yes	No	No
Tender process for the contract for project design	Tender procedure		Yes	Yes				Yes
	Name of main consultant		Yes	Yes				Yes
Tender process for the contract for project supervision	Tender procedure		Yes	Yes	Yes			Yes
	Name of main consultant		Yes	Yes	Yes			Yes
Tender process for main contract for works	Tender procedure	Yes	Yes		Yes	Yes	Yes	Yes
	List of tenderers	Yes	Yes		Yes	Yes	Yes	Yes
	Tender evaluation report		Yes	No	Yes	Yes	Yes	No
Details of the contract for project supervision	Contract price		Yes	Yes	Yes			Yes
	Contract scope of work		Yes	Yes	Yes			No
	Contract programme		Yes	Yes	Yes			No
Details of the main contract for works	Contractor name	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Contract price	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Contract scope of work	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Contract programme	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Execution of the contract for project supervision	Significant changes to contract price, programme, scope with reasons		No	No	Yes			No



Project Phase	Information	Required by Law						
		NRWB	ESCOM	RA	MHC	BWB	LCC	Legal Requirement
Execution of contract for the main contract for works	Individual changes to the contract which affect the price and reasons for those changes	No	No	No	Yes	Yes	Yes	No
	Individual changes to the contract which affect the programme and reasons for those changes	No	No	No	Yes	Yes	Yes	No
	Details of any re-award of main contract		Yes	No	Yes	Yes	Yes	No
Post contract completion details of the main contract for works	Actual contract price	No			Yes	Yes	Yes	No
	Total payments made	No			Yes	Yes	Yes	No
	Actual contract scope of work	No			Yes	Yes	Yes	No
	Actual contract programme	No			Yes	Yes	Yes	No
	Project evaluation and audit reports	No	Yes		No	Yes	Yes	No

The responses from MHC were not consistent with the consultant's experience during data collection. For example, some project information was missing from their sampled project files. In addition, it took the officer more than two weeks to retrieve requested detail information on the sampled projects.

### **2.6.1.3 MPI Currently Being Released into the Public Domain by Sampled PEs**

All PEs generally released much of the information on project identification, tendering and details of the contracts for supervision and main works. There was however, reluctance to release information on full tender evaluation report, though an extract from the report would be published. Similarly, the PEs did not release MPI on project funding and cost estimates except for donor funded projects where it is a requirement by a donor to make this information available to the public. Not much information is disclosed for the later stages of the construction project life cycle.

MPI on contract execution and post-contract completion details were mostly never released into the public domain or were reported to be released in a minority of cases. One PE alluded failure to release such information to the fact that it is not a requirement by law to publish this information (see Table 4), arguing that such information would merely put pressure on PEs to disclose a lot more information to justify decisions taken during the execution of the project.

On donor funded projects, there were more disclosures than on locally funded projects. These were a result of donor requirements on transparency and the availability of resources and facilities for releasing the information to the public.

**Table 5 MPI currently being released by PEs into the public domain**

Project Phase	MPI	Procuring Entity						
		NRWB	ESCOM	RA	MHC	BWB	LCC	Required by Law
Project Identification	Project Specification	Always	Always	Majority	Always	Never	Majority	Yes
	Purpose	Always	Always	Never	Always	Never	Majority	Yes
	Location	Always	Always	Majority	Always	Never	Majority	Yes
	Intended beneficiaries	Always	Always	Never	Always	Never	Majority	No
	Feasibility study	Always	Minority	Never		Never	Majority	No
Project funding	Financing Agreement		Never	Never	Always		Majority	No
	Budget	Always	Minority	Never	Always	Never	Never	No
	Project cost estimate	Always	Never	Never	Always	Never	Never	No
Tender process for the contract for project design	Tender procedure		Always	Always				Yes
	Name of main consultant		Always	Always				Yes
Tender process for the contract for project supervision	Tender procedure		Always	Always	Always			Yes
	Name of main consultant		Always	Always	Always			Yes
Tender process for the main contract for works	Tender procedure	Always	Always	Always	Always	Always	Majority	Yes
	List of tenderers	Always	Minority	Always	Always	Minority	Minority	Yes
	Tender evaluation report		Minority	Never	Minority	Minority	Majority	No
Details of the contract for project supervision	Contract price		Always	Always	Always			Yes
	Contract scope of work		Always	Always	Always			No
	Contract programme		Always	Always	Always			No
Details of the main contract for works	Contractor name	Always	Always	Always	Always	Minority	Minority	Yes
	Contract price	Always	Always	Always	Always	Minority	Minority	Yes
	Contract scope of work	Always	Always	Always	Always	Minority	Minority	Yes
	Contract programme	Always	Always	Always	Always	Minority	Minority	Yes
Execution of the contract for project supervision	Significant changes to contract price, programme, scope with reasons		Minority	Never	Never			No
Execution of	Individual changes to the	Never	Never	Never	Never	Never	Minority	No

Project Phase	MPI	Procuring Entity						
		NRWB	ESCOM	RA	MHC	BWB	LCC	Required by Law
contract for the main contract for works	contract which affect the price and reasons for those changes							
	Individual changes to the contract which affect the programme and reasons for those changes	Never	Never	Never	Never	Never	Minority	No
	Details of any re-award of main contract	Never	Never	Never	Always	Never	Minority	No
Post contract completion details of the main contract for works	Actual contract price	Never	Minority	Never	Always	Never	Minority	No
	Total payments made	Never	Minority	Never	Always	Never	Minority	No
	Actual contract scope of work	Never	Minority	Never	Always	Never	Minority	No
	Actual contract programme	Never	Minority	Never	Always	Never	Minority	No
	Project evaluation and audit reports	Never		Never	Never	Never	Minority	No

#### 2.6.1.4 MPI Storage by Sampled PEs

All the PEs included in the survey had a central library or Archives where all reports (hard copy) and correspondence on different completed projects are kept. Efficiency in information retrieval varied from PE to PE, some PEs having well organised system and retrieving information on sampled projects with ease and in a short time. For example, NRWB proved outstanding in information storage and access as evidenced by the ease of access and release of information when requested by the baseline study team. However, the housing sector had struggles in retrieving the requested information from their archives.

PEs normally kept both electronic and hard copies of their reports and correspondence. The electronic copies were, however, normally available from specific individuals who were involved in the implementation of the project but no centralised system for storing electronic files and information existed in the PEs.

#### 2.6.1.5 Methods of MPI Disclosure

The study noted that PEs normally used newspapers to reach a wider audience. This is considered a more effective channel accessible to most Malawians. It is recommended in this study that PEs release MPI through the internet as well to broaden the target audience. Despite the fact that most Malawians do not have access to internet, using the internet as a method of disclosure would solve the problem of failing to publish larger documents in the newspaper. Documents like feasibility study reports among others would easily be posted on the PEs websites as a portable document format (pdf) and other electronic document formats.

#### 2.6.1.6 Access to MPI on Demand

It was generally noted that PEs rarely received requests for full information disclosure on projects. By and large, the public seemed not keen to get such information or is not aware that it is in the framework of its rights to request and access information on publicly funded projects. This is not surprising considering the fact that Malawi is just 16 years old in democracy after a 31 year period of one party system where no citizen dared to demand explanation on any public funded project for fear of being arrested.

Perhaps, this is a point where the civil society can take a leading role in making checks and balances for publicly funded construction projects on behalf of the public. The PEs indicated that they would make MPI available to the public on demand except for cost estimates, budgets, project evaluation reports and audit reports.

#### 2.6.1.7 Forwarding of MPI to Others

All the PEs except two forwarded MPI to others. The information was mostly forwarded through reports. The four PEs that forwarded information indicated that information was normally forwarded to the responsible sectoral ministry and respective donors for donor funded projects. One PE that did not forward its

information to others justified its cause to be due to the fact that it implements a programme that is ongoing and not a project. As such, periodic assessments and audits are performed on the PE where the documents are available for such exercises even after 10 years.

#### **2.6.1.8 Other Factors Prohibiting Information Release to the Public**

The study found that most PEs do not disclose the tender evaluation report, feasibility study report, cost estimates and budget for management reasons. Disclosing information to a tenderer /bidder who has not been successful as to why the other bidder has been successful would unintentionally be revealing trade secrets of the winning bidder.

Some of the PEs hinted that disclosing the feasibility study report before the tendering process is over, would reduce competitiveness of the process as other bidders would use extracts from the report to develop their technical proposals. One PE actually argued that releasing the feasibility study report, even after completing the project, would compromise bidding in subsequent projects.

Most PEs did not disclose cost estimates and budget for the sole reason that the public procurement documents in Malawi (Public Procurement Act, Desk Instructions and Procurement Regulations) only provide for the disclosure of what the project is about, who has been awarded the contract and how much the contract is worth. The same reason was given for not disclosing details of contract execution and post contract details.

### **2.6.2 Project Level Indicators on Competitiveness of Tendering and Project Performance**

Summaries were derived from the data collected on the sampled projects included in the baseline study. These are presented and discussed in the following subsections.

#### **2.6.2.1 Bidding Statistics**

Several approaches were encountered in the implementation of contracts at design stage, supervision stage and at the execution of the main contract works. The PEs mostly carried out design in-house, while supervision would be either carried out in-house or by a consultant. All the PEs except Malawi Housing Cooperation contracted out all the main contract works. Malawi Housing Cooperation used direct labour for the main contract works for the two residential housing projects but engaged a contractor in the road works contract. Table 6 below shows a summary of the modes of delivery of the design, supervision and main contract works for the sampled projects.

**Table 6 Modes of delivery of the design, supervision and main works contract**

Procuring Entity	Project	Design	Supervision	Main Works
NRWB	NRWB/W/06	In-house	In-house	Contractor
	NRWB/W/07A-1	In-house	In-house	Contractor
ESCOM	KAP 55	Consultant	Consultant	Contractor
	TLR/01	Consultant	Consultant	Contractor
RA	11T/RM/NR/NB/09	In-house	Consultant	Contractor
	17T/REH/SR/BTCKMN/09	In-house	Consultant	Contractor
	16T/RM/CR/KK/09	In-house	Consultant	Contractor
MHC	MHC/2008/03	In-house	In-house	Contractor
	MHC/2006/01	In-house	In-house	Direct labour
	MHC/2007/02	In-house	In-house	Direct labour
BWB	025-1-6813 (BWB)	In-house	In-house	Contractor
	025-1-6842 (BWB)	In-house	In-house	Contractor
	BWB Office Renovations	In-house	In-house	Contractor
LCC	City Centre Fountain	In-house	In-house	Contractor
	LCA/10/08/Falls main Road	In-house	In-house	Contractor
	LCA/10/08/Mchesi Tarmac Road	In-house	In-house	Contractor

The study did not use fields on expression of interest and short listed bidders. These did not apply because open tendering was used to select both consultants and contractors in all the sampled projects. Instead the study used number of firms purchasing bidding documents and number of firms submitting the bidding documents. The percentage of interested companies who went on to bid was calculated from the two values to determine the competitiveness of the tendering process as presented in Table 7 below.

**Table 7 Summary project level statistics**

MALAWI		NRWB		RA			ESCOM		MHC			LCC			BWB		
	Average	NRWB/W/06	NRWB/W/07A-1	11T/RM/NR/NB/09	16T/RM/CR/KK/09	17T/REH/SR/BT.C K.MN/09	TLR/01	KAP 55 Trans. line	MHC/ 2007/02	MHC/ 2006/01	MHC/ 2008/03	City Centre Fountain	Falls Main Road	Mchesi Tarmac Road	025-1-6842	025-1-6813	Head Office
<b>1. Bidding Statistics</b>																	
Companies expressing interest: Works	14.10	5	7				13	8				3	7	8	30	30	30
Companies shortlisted: Works	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Companies bidding: Works	7.31	3	3	6	3	7	4	5				3	7	6	16	16	16
% of companies interested who went on to be shortlisted	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
% of companies shortlisted who went on to bid	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Companies expressing interest: Supervision	0.00																
Companies shortlisted: Supervision	0.00																
Companies bidding: Supervision	6.33			4	7	8											
% of companies interested who went on to be shortlisted	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
% of companies shortlisted who went on to bid	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Companies expressing interest: Design	0.00																
Companies shortlisted: Design	0.00																
Companies bidding: Design	0.00																
% of companies interested who went on to be shortlisted	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
% of companies shortlisted who went on to bid	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
<b>2. Main Works Contract Time (%)</b>																	
Time from contract start to completion as % of original estimated length	197.47%	140%	131%	147%	124%	141%	142%	106%	129%	200%	500%	300%	125%	150%	75%	300%	450%



MALAWI		NRWB		RA			ESCOM		MHC			LCC			BWB		
	Average	NRWB/W/06	NRWB/W/07A-1	11T/RM/NR/NB/09	16T/RM/CR/IKK/09	17T/REH/SR/BT.C K.MN/09	TLR/01	KAP 55 Trans. line	MHC/ 2007/02	MHC/ 2006/01	MHC/ 2008/03	City Centre Fountain	Falls Main Road	Mchesi Tarmac Road	025-1-6842	025-1-6813	Head Office
3. Main Works Contract Cost (% change from)																	
Estimated price to contract start date price	4.76%	50.17%	17.78%	2.35%	-10.57%	0.62%	4.62%	64.12%	-17.34%	5.26%	5.26%	-23.61%	-17.41%	-5.11%	0.00%	0.00%	0.00%
Contract start date price to contract completion price	7.74%	7.25%	5.03%	15.00%	13.91%	-26.70%	0.69%	-11.13%	3.10%	11.73%	26.60%	0.00%	19.12%	3.89%	-11.94%	-14.41%	81.79%
4. Works Supervision Cost (% change from)																	
Estimated price to contract start date price	112.78%	n/a	n/a	n/a	n/a	n/a	112.78%	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Contract start date price to contract completion price	16.79%	n/a	n/a	-100.00%	-100.00%	-100.00%	16.79%	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
5. Instances of re-award of the main contract for works																	
Number	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. Number of formal instructions for remedy of defects																	
Issued	0.94	0	0	1	0	1	6	0	3	0	0	0	1	2	0	0	1
Implemented	0.81	0	0	1	0	1	4	0	3	0	0	0	1	2	0	0	1

### 2.6.2.2 Contract Price for Main Contract of Works

Most of the final contract prices were higher than the initial contract price at contract start. The percentage change in contract price ranged from -27 to 82 percent. The higher costs generally resulted from additional works given to the contractor. For example, in two projects, some aspects had to be re-designed to suit site conditions and this contributed to the rise in contract price at completion. The projects where a lower amount had been claimed by the contractor at completion actually had fewer quantities than had been estimated at design stage (see Table 8).

The Procurement Regulations permit giving of additional works to a contractor with whom another contract already exists as long as the threshold has not been exceeded. Once the increase in quantities results in a price increase exceeding 15% of the contract sum, new procurement proceedings are required except where there is appropriate justification. Much as such a provision exists, it seems that the PEs tend to overuse this provision and this has become one of the major contributing factors to contracts being completed later than planned. It was actually noted that the threshold was exceeded on some of the projects.

### 2.6.2.3 Contract Duration

All the sixteen sampled projects were completed later than the estimated length except one. Using 'actual length of project as percentage of estimated length' as an indicator, the earliest completed project had a length 75 percent as long as the initial estimated length. The most delayed project had the actual length 500 percent longer than the estimated length (see Table 8). The project was supervised in-house and implemented using direct labour that was engaged only when works were in progress, thus having a minimal effect on the final price.

In one project, the extension resulted from delay in getting electric power connection that was required to complete some of the works; eight projects were extended to accommodate additional works; and one project delayed due to adverse weather conditions (see Table 8).

### 2.6.2.4 Cases of Re-award of Main Contract of Works

There were no cases of re-award in any of the sampled projects because none of the sampled projects had serious breaches of conditions. As a result, none of the sampled projects was terminated and given to another contractor. The first successful contractor completed the works in all of the sampled projects.

### 2.6.2.5 Statistics on Formal Instructions to Remedy Defective Works

Formal instructions to remedy defective works were reported in seven projects. In one project, the contractor failed to meet specifications due to misinterpretation of drawings, in another due to redesign to match site conditions. In the rest of the projects, the contractors were instructed to correct some defects during the maintenance period. Generally, the defects were successfully corrected.

**Table 8 Reasons given by PEs for observed project cost and time overruns**

PE	Project	% change in duration of works contract from estimated to actual	Reason for significant change in duration	% change in price of works contract from start to completion date	Reason for significant change in price
NRWB	NRWB/W/06	40	Contractor was given extension to complete additional works.	7	Contractor was given additional works: a 4 <sup>th</sup> tank in addition to the original number of 3, pipe work and fittings to connect to existing supply system.
	NRWB/W/07A-1	31	Works delayed because a tank had to be redesigned due to site conditions. Further delay resulted from failure to carry out some activities due to delay in getting electricity connection.	5	
ESCO M	KAP 55	6	Contractor had to wait for another contractor to finish certain works before final items on the contract could be completed.	-11	Actual measured quantities were less than the estimated quantities in the bill of quantities.
	TLR/01	42	Project was delayed by unforeseen land access problems.	1	
RA	11T/RM/NR/NB/09	47	Contractor was given extension to complete additional works.	15	Contractor was given additional works: quantities were increased for some items.
	16T/RM/CR/KK/09	24	Contractor was given extension	14	Contractor was given additional

PE	Project	% change in duration of works contract from estimated to actual	Reason for significant change in duration	% change in price of works contract from start to completion date	Reason for significant change in price
			to complete additional works.		works: addendum to re-deck bailey bridge.
	17T/REH/SR/BTCKM N/09	41	Contractor was given extension to complete additional works.	-27	Actual measured quantities were less than the estimated quantities even after giving the contractor additional works: road grading.
MHC	MHC/2006/01	100	Delay due to internal budgetary allocations and approvals	12	Price increase due to cost of maintaining key site personnel and escalation of material costs
	MHC/2007/02	29	Contractor was given extension following delay due to heavy rains during the contract period.	3	
	MHC/2008/03	400	Delay due to internal budgetary allocations and approvals	27	Price increase due to cost of maintaining key site personnel and escalation of material costs
BWB	025-1-6813 (BWB)	200	Delay due to difficulty in identifying beacons and re-installation of stolen pipes.	-14	Contract price was not exceeded because actual measured quantities were less than the estimated quantities in the bill of quantities.
	025-1-6842 (BWB)	-25	Actual measured works were less than the initial estimated quantities.	-12	Actual measured quantities were less than the estimated quantities in the bill of quantities.
	BWB Head Office Renovations	350	Contractor was given extension to complete additional works.	82	Contractor was given additional works: quantities were increased for most items.

PE	Project	% change in duration of works contract from estimated to actual	Reason for significant change in duration	% change in price of works contract from start to completion date	Reason for significant change in price
LCC	City Centre Fountain	200	Contractor was given extension following issue of a variation order.	0	Quantities in variation order were adjusted to maintain contract price.
	LCA/10/08/Falls Main Road	25	Contractor was given extension to complete additional works.	19	Contractor was given additional works: resurfacing instead of pothole patching.
	LCA/10/08/Mchesi Tarmac Road	50	Contractor was given extension following issue of a variation order.	4	Quantities in variation order were adjusted to minimise change in contract price.

## SECTION THREE: CONCLUSIONS AND RECOMMENDATIONS

### 3.1 Conclusions

The following conclusions can be made in connection to the five objectives of the Malawi CoSt Baseline Study:

- Public procurement in Malawi is governed by the Public Procurement Act. The Act is supplemented by the Public Procurement Regulations and the Malawi Government Desk Instructions for Public Procurement. These procurement documents require that PEs keep detail records of all procurement proceedings. The records contain all MPI relating to the tendering process.
- Release of this information into the public domain is limited to items included in the invitation to tender or pre-qualify and the contract award notice. No requirements were found on release of MPI on contract execution and post contract completion details.
- Most of the MPI on tendering process were generally found to be released to the public by PEs. Newspapers were the main channel for disclosure and the information was released through the invitation to tender or pre-qualify and through the contract award notice.
- Most MPI on project execution and post contract completion were not released to the public but PEs were generally willing to release the information on demand. Specific items of MPI not included in the disclosures and not normally released, even on demand, were the project cost estimate, the budget, the tender evaluation report, and project evaluation and audit reports.
- Five key barriers to release of information were identified. These are the financial and human resource requirements; the need to process the project information to the appropriate end-user form; the distortion or exaggeration of facts through improper use of disclosed information by the media and the limited requirements for MPI disclosure by legal documents.
- Two sets of core indicators have been measured and documented. The first relates to current levels of MPI disclosure by the sample set of PEs and the second relates to competition at tendering stage and project performance. The results obtained at this stage provide a reference point for comparison with changes in future resulting from the CoST initiative.
- The major on-going initiative affecting procurement identified is the capacity building program by the Malawi Government through the ODPP. Three other initiatives on transparency and accountability have been presented. These are geared towards combating corruption in the private and public sector, procurement transactions and management of infrastructure development projects being key areas of interest as they make up a large percentage of public

expenditure. CoST may benefit from the transparency and accountability sensitisation activities under these programmes. Equally, CoST will provide these initiatives with tools for advancing transparency in procurement and management of construction projects.

### 3.2 Recommendations

The Baseline Study team would like to put forward for consideration by CoST some recommendations based on the findings of the study. Some of the recommendations may have financial, time and material resource implications and therefore their implementation may not be instant.

- a. There is a need to review the current public procurement documents if the proposed MPI disclosures in the CoST process are to be adopted. The applicable documents need to address more items than is the case at the moment. The documents also need to address each item on the standard MPI list to eliminate ambiguity in interpretation and understanding during use.
- b. The disparity of responses obtained from different PEs on legal requirements of release of information into the public domain (see Table 4) suggests that most PEs are not adequately aware of what information is required by law or oversight bodies to be released to the public. It is recommended, therefore, that PEs be trained on legal MPI disclosure requirements. For example, the currently running ODPP capacity building programme could be extended to procurement officers and members of the IPCs and SPUs in PEs.
- c. Extensive training is required in Malawi among PEs to create a common understanding of the proposed disclosure requirements. To be effective, such trainings will need to be specially designed to objectively feature transparency at all stages of construction projects. Internal procurement committees should be targeted for this training.
- d. The data collection exercise revealed that difficulty in retrieving information especially on completed projects is an important limitation to release of MPI. Improvements to the information storage and retrieval system are necessary to make the disclosure process smooth.
- e. ICT installations providing local area networks and central servers for Information storage would provide an easy to use and efficient facility for MPI disclosure. Thus the process would take less time and eliminate the need to meet specific individuals for certain project information.
- f. RA and LCC reported that their information is not forwarded to other entities but rather stored at a central library at their head office. These PEs could facilitate regular checks and balances on their operations from the possible feedback they could receive by forwarding information to others. It is recommended that forwarding of information to other government organs be promoted among PEs.

- g. It is recommended from this study that PEs in Malawi release MPI through the internet as well to broaden the target audience. Despite the fact that most Malawians do not have access to internet, using the internet as a method of disclosure would solve the problem of failing to publish larger documents in the newspaper. Documents like feasibility study reports among others would easily be posted on the PEs websites in portable document format (pdf) and other electronic document formats.
- h. The findings and recommendations of the CoST Malawi Baseline Study should be discussed by MSG and the relevant construction industry stakeholders in order to generate a debate that should lead to the development of an Action Plan for Malawi to address the critical issues and gaps in achieving high levels of Transparency and Accountability in the construction industry in Malawi.



## ANNEXES

### Annex 1: List of Documents Reviewed

1. The Constitution of Malawi
2. The National Anti-Corruption Strategy
3. The Public Procurement Act, 2003
4. Desk Instructions for Public Procurement, 2003
5. Public Procurement Regulations, 2003
6. Procurement Threshold for 2009 - 2010
7. Procurement Capacity Development and System Strengthening Plan
8. National Construction Industry Act, 1996
9. NCIC Code of Ethics for Contractors
10. NCIC Code of Ethics for Consultants
11. Combating Corruption: Challenges In The Malawi Legal System by Ivy Kamanga. Resource Material Series No. 76

## Annex 2: List of People Interviewed

No.	Name	PE	Position
1	A.N.A. Ungwe	NRWB	Project Implementation Manager
2	A. Kaitane	ESCOM	Senior Civil Engineer
3	D. Kalinde	RA	Procurement Specialist
4	G.S. Msyali	MHC	Quantity Surveying Services Manager
5	L. Nyanda	MHC	Senior Civil Engineer
6	W. Kazembe	MHC	Corporate Secretary & Chairperson of Internal Procurement Committee
7	B. Waya	BWB	Civil Engineer
8	Y. Nyirenda	LCC	Deputy Director of Public Works

### **Annex 3: Member Agencies of the Malawi National Multi-Stakeholder Group**

1. Ministry of Water and Irrigation (MoIWD)
2. Buildings Department
3. National Audit
4. Department of Statutory Corporation
5. Accountant General
6. Anti-Corruption Bureau (ACB)
7. Office of the Director of Public Procurement (ODPP)
8. African Institute of Corporate Citizenship (AICC)
9. Malawi Economic Justice Network (MEJN)
10. Human Rights Consultative Committee (HRCC)
11. African Development Bank (AfDB)
12. Business Action against Corruption (BAAC)
13. Malawi Buildings & Civil Contractors Allied Trade Association (MABCATA)