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ACCOUNTABILITY AND PUBLIC PROCUREMENT REGULATORY FRAMEWORK

Shahid Karim and Muhammad Abdus Salam

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Public procurement regulatory framework is a means to an end. At the highest level, it originates from the necessity of public procurement accountability where executive authority for procurement is delegated by the government to its officials, on the premise that they have the professional resources, competence and means to carry out this task in greater public good. What is meant by public good also merits a clear understanding. Simply, public, as the owner of public funds, demands that its money is spent in the most efficient manner, in a transparent way, with integrity in achieving the best economic outcome. Both the ingredients and the outcome are of significance. Public procurement framework comes as a critical administrative tool, in fulfillment of the above stated goals and objectives. Item 4 of Pakistan Procurement Regulatory Authority (PPRA) Rules is quoted below as reference:

> 4. Principles of procurements.- Procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the object of procurement brings value for money to the agency and the procurement process is efficient and economical.

Basis of accountability of public procurement framework rests on the following:

i. An accountability mechanism must exist to ensure public funds are spent in the most optimal manner satisfying the above stated conditions. To eliminate the chance of corruption, favouristism, or nepotism, the public procurement framework must be rule based, formal and robust.

ii. Lack of accountability will impact the procurer's ability to extract maximum value for public money in the short and long term. For example, procurer will have more opportunity to exercise discretion, resort to corrupt behaviours, not invest required physical and intellectual input, disincentivise efficient suppliers to bid for government contracts and hence not achieve the desired outcome.

iii. Transparency in public procurement process is paramount in the scheme of things, where general public is able to transparently see that its money is being spent to extract maximum value.

Against this backdrop, two types of control mechanisms are ordinarily available. The first also known as **ex ante** control (Latin for before the fact) refers to an elaborate, rule based, and formal public procurement framework which leaves little or no room for the

procurement official to exercise discretion. Hence the possibility of corruption or favoritism is minimised if not completely eliminated. The other type of control measures is what is generally referred to as **ex post** oversight(Latin for after the fact). It is implemented in several ways, the most common is to institute independent state agencies to intervene should they find anything untoward in a public procurement event. Institutions like NAB, FIA, Audit office and other anti-corruption watchdogs in Pakistan are an example. Media also plays the same role by whistle blowing an apparent non-compliance. Judicial intervention is also an example of both **ex ante** and ex post oversight where the judiciary involves itself in public procurement matters as an attempt to ensure the original objectives of transparency and value extraction are achieved. It is logically convincing that more comprehensive and robust ex ante controls will result in meaningful and objective ex post measures. It is this context that PPRA Rules, as the primary ex ante control measures is viewed as the enabling tool for an effective ex post regime.

It goes without saying that emphasis on accountability needs to be balanced with the value proposition of public procurement and hence the words "efficiency, value for money and economical value" must be given due consideration.

The entire scheme narrated above works on a fundamental premise, that all the actors involved in procurement function, whether ex ante or ex post are competent and professional to discharge their responsibilities diligently. To clarify, some of these actors or stakeholders are outlined in the following table.

Actors/Stakeholders Involved in Public Procurement

Actors/Stakeholders	Requirement	Role/Scope		Required Competence Level
Public		Assurance		Low
Political Government	Efficiency	Oversight-Policy formulation	Ex Ante/Ex Post	Medium
PPRA	Integrity	Develop Regulatory Framework, ensure compliance		High
Procuring agency	Transparency	Implement		High
Legislature	Accountability	Oversight		Medium
Market	Value for money	Fair play, equal treatment		High
Anti-corruption agencies		Probe	Ex Post	High
Media		Watchdog		High
Auditors		Audit		High
Judiciary		Watchdog		High

The dilemma is that, despite both ex ante and ex post measures being firmly in place, so much noise is generated on the issue of mis-procurement, corruption, nepotism and favouritism in the realm of public procurement. One is bound to explore the reasons behind a climate of aggressive accountability and the reluctance of procuring officials to

follow PPRA Rules in true letter and spirit, beyond a compliance in letter only. A recent case in point is the procurement of LNG from spot market where the procurer resorts to monthly tenders in the market on a regular basis. Despite various measures (lumping more than one month's demand, cancelling the bid, etc.), the procurer was only able to get higher than market bids, thus creating significant loss to public funds. It appears that the fundamental principles of demand forecasting, market analysis, seasonality, future currency exchange value and future predictive analysis whether qualitative or quantitative were not fully considered by the procuring agency; although not in violation of compliance with PPRA Rules. In other words, the key objective of achieving maximum value for public money wasn't entirely adhered to while apparently conforming to PPRA Rules.

It is situations like these, where although the procuring agency is apparently compliant with PPRA Rules, is not able to achieve the stated goal of achieving public good. This generates some probing questions. This paper is an attempt to test just some of the situations where PPRA Rules are either deficient; or do not allow sufficient flexibility to satisfy at least one stated objective, i.e., extract optimal value for public money, and hence do not satisfy the criteria of a robust public procurement regulatory framework. This would be followed by a brief analysis whether it is the deficiency in PPRA Rules which is the cause of an aggressive accountability drive or some other factor. This paper is not a critique on either public procurement regulator, or the agencies involved in both ex ante or ex post measures, but an objective commentary intended to understand the root cause and propose some recommendations.

We'll endeavour to examine some situations, to establish if the public procurement regulatory framework in Pakistan satisfies the theoretical governance scheme.

Exemption to International or Intergovernmental Commitment

International government to government investment may be in the form of loan, and/or grants, or some other scheme. Regardless, all such instances are exempted from the ambit of public procurement regulator. Relevant excerpt from PPRA Rules produced below:

> 5. International and inter-governmental commitments of the Federal Government.-Whenever these rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States, or any international financial institution the provisions of such international treaty or agreement shall prevail to the extent of such conflict.

> 3. International and inter-governmental commitments of Federal Government.- "Whenever a sponsoring Ministry/Division is of the view that prospective procurement are required to be made by invoking rule-5 of Public Procurement Rules, 2004, it shall bring a case to the ECC after undertaking due consultations with the stakeholder Ministries/Divisions/Departments etc. as prescribed in the Rules of Business, 1973. The ECC shall consider such case(s) and authorize, or otherwise the sponsoring Ministry/Division whether or not to proceed in terms of rule-5 of the Public Procurement Rules, 2004".
>
> [No.2/1/2010-RA.III/PPRA.]
>
> Sd/

In essence, it is up to the people of Pakistan to pay back the amount, if it's a loan. In case of a grant, the consequent indebtedness to the donor country can also be construed a form of loan. The open exemption provided by PPRA for such commitments

is in conflict with the norms of transparency and accountability, Interestingly, the need to institute a probe in a recent government to government LNG procurement contract was strongly felt and pursued to a greater or lesser extent.

Restriction on Post Tender Negotiations

In line with global best practice in public procurement, PPRA Rules restrict any negotiations to be carried with the lowest evaluated bidder. Accordingly Rule 40 prohibits the procuring agency to resort to negotiations with the lowest bidder and is produced below:

> 40. Limitation on negotiations.- Save as otherwise provided there shall be no negotiations with the bidder having submitted the lowest evaluated bid or with any other bidder:
>
> Provided that the extent of negotiation permissible shall be subject to the regulations issued by the Authority.

Post tender negotiations are generally discouraged where markets are hotly competed and contested, scope of work documents are of high quality and are consistently understood by all bidders, demand planning is optimal especially while procuring volatile commodities, and strict anti-collusion laws exist. One wonders if all these factors exist in the Pakistan situation.

Contract document-no specified rules

PPRA Rules do not obligate the procuring agency to use a designated model contract document, leaving it to the whims of the procuring agency to invent one. There is no regulated mechanism to assure that "best" contract terms will be used. If the general assumption that suppliers are smarter than the government procurer, is believed; it means the procuring agency is leaving some money on the table. Contract clauses provide for a risk allocation mechanism and most, apparently "legal' looking clauses have a commercial bearing on the transaction. Recent move by PPRA to prescribe FIDIC model contract as the standard for public procurement works contracts is in the right direction although one need to consider that FIDIC contract is essentially a works contract and may not ideally fit into situations involving services and goods procurement.

Response Time

PPRA Rules provide for a minimum submission time of 30 days for international bids, while leaving it to the discretion of procuring agency to decide the submission time. Relevant excerpt below:

> 13. Response time.- (1) The procuring agency may decide the response time for receipt of bids or proposals (including proposals for pre-qualification) from the date of publication of an advertisement or notice, keeping in view the individual procurement's complexity, availability and urgency. However, under no circumstances the response time shall be less than fifteen **[days] for national competitive bidding and thirty **[days] for international competitive bidding from the date of publication of advertisement or notice.

It is a well-known fact that for large and complex infrastructure projects, 30 days is not sufficient for any bidder to submit a meaningful bid, who has otherwise not been engaged, prior to issuance of tender. It is evident that while there is a provision in PPRA Rules for allowing the procuring official to suggest an optimal bid submission time; one must consider that certain unprofessional motives can at times drive the procuring official to resort to the minimum time for bid submission and yet pass the conformance test. Such factors can include a lack of planning resulting in urgency, alignment with a preferred bidder engaged well before tender issuance yet keeping other bidder at a disadvantage, etc.

Procurement planning and the need for a documented contracting strategy

PPRA Rules talk of an initial planning process but are completely silent on the need of having a documented and approved contracting strategy. It is a widely accepted and followed practice that contracting strategy provides the front-end loading "brain" of any large and important procurement activity and is approved by the same level of authority which approves the contract award. This is because the contracting strategy provides for a strategic plan, the execution of which shall only yield the expected result. PPRA Rule-8 and 9 serving the purpose at present, are insufficient and vague at best to fulfill the stated need.

PPP contracts

The scope of PPRA Rules is very clear, i.e., any instance involving use of public funds for procuring goods and services. PPP contracts provide for a joint investment of public and private funds. Why then, are some PPP (public private partnership) contracts not subject to comply with PPRA Rules. An example could be the consortium of companies created in the petroleum and power sector where the President is represented through public companies like OGDCL and PPL to invest while not following PPRA Rules. Relevant excerpt below:

> 2. The Board discussed the proposal and after detailed deliberations, observed that Public Private Partnership (PPP) projects may broadly be of the following two types:-
>
> a) PPP projects in which the Federal Government does not have any equity of ownership and procurement are made by the private party
>
> b) PPP projects in which the Federal Government and the private party have joint equity or ownership through a corporate body and procurement are made by such body.
>
> 3. The Board clarified that the PPRA Ordinance, 2002 and Public Procurement Rules, 2004 will not be applicable to the type (a) mentioned at para-2 above, while type (b) will be governed by the PPRA Ordinance and Rules.

The above are just some of the examples where the **ex ante** PPRA Rules provide a room for improvement, in the spirit of achieving best value for public money in letter and spirit. Numerous other areas can be pointed out which exhibit similar gaps, perhaps the most important is the fact that rules prescribed on "Specifications" should be much more objective and comprehensive. Sub-optimal specifications can lead to serious consequences and the entire procurement value proposition can be jeopardized.

CONCLUSION AND RECOMMENDATION

With a GDP of ~USD 280 billion, Pakistan spends approx. $60-70 billion every year on public procurement. It is evident that some part of this money is lost because of waste, corruption, fraud, lack of adequate controls and competence of actors involved. Public procurement is the key to the success of Pakistan's economy. Reforming procurement forms a key priority in hard times Pakistan is facing economically. Pakistan needs to immediately recognise the need to enhance value for money and mitigate the risk of waste and corruption throughout the procurement cycle.

The deficiencies in PPRA Rules may result in difficulties for an objective and meaningful procurement process but generally the scheme is well designed. Public regulatory framework, built upon UNCITRAL model needs some improvements to cater to a changing marketplace in a post-pandemic world, some of these reforms could include:

1. A complete reconsideration by Executive of providing an exemption to governing international and bilateral grants and loans from PPRA Rules. The sole authority for allowing any exemption should be PPRA itself and not the federal or provincial cabinets. This also fits into the spirit of independent regulatory regime.
2. PPRA should consider allowing post tender negotiations while qualifying the essential ingredients of such instances. For instance, where lowest price is much higher against benchmark price, a pattern of winning bids suggesting a trend of rotation between the bidders, tenders are frequent as the case of LNG procurement, etc.
3. Only standard model contracts should be proposed to procuring agencies allowing more robust contractual risk allocation schemes in their relationships with external market.
4. There should be a clear guideline for minimum bid submission timeline for large, complex tenders including international infrastructure projects. In any case this should be more than 30 days which is the current minimum time offered as guideline.
5. Contracting strategy for all procurement above a certain value threshold must be made a mandatory document, the approval of which within the procuring agency must rest with the same authority which ultimately approves the contract award.
6. Procurement under PPP contracts should be brought under the ambit of public procurement regulatory framework.

While the above is not an exhaustive list, one needs to acknowledge that no set of procurement rules would cater to a hundred percent of the situations and there would always be a lacking. In this backdrop, an argument can be made that fear of an aggressive public procurement accountability potentially restricts the procuring official to "follow the rules in letter" despite knowing that best value for money may not be achieved. In other words, the ability to take initiatives and innovate in greater public good is eliminated.

Based on above analysis, one can argue, that while there is a room for improvement in reforming and modernizing PPRA Rules, the need for a radical transformation in rules

may not be required. The actual deficiency lies elsewhere. Transforming public procurement apparatus from an administrative to a strategic function is an urgent need and is the recipe for success. Moving away from a strict compliance-based approach to a more professional approach to relentlessly pursue value for money is the need of the hour. To promote good governance and ensure meaningful accountability, PPRA Rules need some reforms in their construct, including some of the areas highlighted in this paper, but **the critical deficiency is the lack of procurement capability in most actors involved in implementing public procurement and driving accountability.**

Hence the most critical recommendation would be a comprehensive elevation of procurement capability in practitioners involved in both ex ante controls and ex post oversight to allow for a transparent, meaningful and focused accountability process in public procurement. For procuring agency staff, Executive may consider introducing a new cadre of "**Procurement of Supply**" group in the civil service structure. This group should provide the resource to carry out public procurement after a modern and comprehensive training at a purpose-built public procurement academy, imparting modern curriculum. Accreditation from a global standard CIPS can be made mandatory for induction and promotion of officials involved in any aspect of public procurement. Meaningful accountability can be forced if the commercial science of procurement is better understood by state agencies including investigation agencies, anti-corruption watchdogs, auditors, civil society, media and judiciary. As the world has realised the power of procurement, the science has clearly evolved to include modern practices which needs incorporation in public procurement framework. Inclusion of more representation of independent competent procurement professionals in PPRA boards is a dire need. Unless we as a nation, decide to transform the current "transactional public purchasing" to a more modern "strategic procurement", the waste of public funds will continue, and objective accountability will be missing.