

**PUBLIC PROCUREMENT AS A SOCIAL, ECONOMIC AND  
POLITICAL POLICY**

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**ABSTRACT.** Public Procurement is an indispensable economic activity for good governance. Government agencies of independent nations, multilateral funding institutions and international aid organizations implement their development assistance and humane relief programs aimed at fighting diseases, reducing poverty and fostering economic and social development. In the process they generate incredible business opportunities worth trillion of dollars for trade & industry. Public procurement subject has drawn significant political attention worldwide resulting in grouping of countries for varied economic interests. Government Procurement Agreement of WTO, though piloted with the objective to be the ultimate regulator of global procurement still remains a pluralistic agreement. In this article, the social, economic and political aspects of public procurement have been examined with cohesive and coherent approach.

**INTRODUCTION**

Public procurement is a major development mechanism, the potential of which has not been fully tapped. “Despite the scale and complexity of government purchases, the field of public procurement has remained a relatively under-researched area amongst economists, lawyers and other social scientists” Arrowsmith & Hartley, 2000, p. ) Public procurement activities till last decade had been more or less restricted to domestic operations to provide protection to the country’s own industrial & business companies. The rapid progress on globalization front and the increased business diversification motives of multi national corporations has generated new interest in cross border supplies. With the formation of WTO, the public procurement subject has acquired new dimensions.

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Government procurement of goods and services typically accounts for 10-15% of GDP for developed countries and up to as much as 20% of GDP for developing countries. “In the United States, the government sector procures between \$1.4 and \$1.6 trillion annually. The Federal government alone procured \$231.08 billion and made 33.19 million procurement actions in fiscal year 2000” (Thai, 2001). Government agencies of independent nations, multilateral funding institutions and international aid organizations implement their development assistance and humane relief programs aimed at fighting diseases, reducing poverty and fostering economic and social development. In the process business opportunities worth trillion of dollars are generated all over the world.

The term public procurement refers to the purchasing by governments and local authorities of the works, goods and services they need to operate - ranging from simple office items to sophisticated high-tech equipment. The procurement also includes purchasing, hiring, leasing or any other contractual means of engaging suppliers in the provisions of public services.

#### UNCITRAL MODEL LAW

The United Nations Commission on International Law (UNCITRAL) has formulated in 1994 *UNCITRAL Model Law*. This law deals with competitive procedures for selecting suppliers and contractors. The purpose of UNCITRAL law is to regulate procurement of goods and of construction so as to promote the objectives of:

- Maximizing economy and efficiency in procurement;
  
- Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
  
- Promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;
  
- Providing for the fair and equitable treatment of all suppliers and contractors;

- Promoting the integrity of, and fairness and public confidence in the procurement process; and



- Achieving transparency in the procedures relating to procurement.

### **PROCUREMENT POLICIES**

Public Procurement seeks to provide positive interaction between economic, social and political policies, which are mutually reinforcing. These policies cannot be compartmentalized, as public procurement is an action that results into diversified usages and implications. Economic progress and social development go hand in hand. Political actions are needed to achieve these goals. Public procurement policies are reflected in the following basic code of conducts.

#### **Good Governance**

Public procurement is one of the building blocks of good governance as it determines whether public resources are used adequately in purchases of goods, works, and services by governments and other public entities by providing value for money. Governments have a genuine interest in ensuring that their public procurement systems operate in proper perspective. It is important for a country to set up an efficient system of government procurement in order to ensure the appropriate allocation of limited government resources, which come mostly from taxes collected from its citizens.

#### **Economy & Efficiency**

Procurement policy requires agencies to seek value for money in procuring goods and services for their entity. Value for money is the basis for comparing alternatives. So buyers can choose the most cost-effective outcome. This requires careful comparison of costs, benefits and options. In any particular case, the benefits should at least commensurate with the costs. Value for money is the essential test against which agencies must justify any procurement made. Price alone is not often a reliable indicator of value for money. Best value for money means the best available proposal when all relevant costs and benefits over the procurement cycle are considered. Buyers will not necessarily obtain the best available value for money by accepting the lowest-priced offer that meets mandatory requirements.

**Transparency**

The degree of transparency helps to determine the effectiveness of the public procurement system. Transparency, in the context of public procurement, refers to the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed by the concerned procurement entity. Transparency is a central characteristic of a sound and efficient public procurement system and is characterized by:

- Well-defined regulations and procedures open to public scrutiny,
- Clear, standardized tender documents,
- Bidding and tender documents containing complete information, and
- Equal opportunity for all in the bidding process

In other words, transparency means the same rules apply to all bidders and that these rules are publicized as the basis for procurement decisions prior to their actual use. It is an effective means to identify and correct improper, wasteful--and even corrupt--practices.

“The laws, regulations, judicial decisions, administrative rulings, policies (including any discriminatory or preferential treatment such as prohibitions against or set aside for certain categories of suppliers), procedures and practices (including the choice of procurement method) related to GP should be transparent” (APEC Government Procurement Experts Group, 1999, p. 2)

**Open and Effective Competition:**

Procurement processes should be designed to encourage levels of competition among suppliers commensurate with the anticipated value for money benefits from that competition. To obtain best value, quality and service, it is good procurement policy to encourage the most competitive and able suppliers to respond to their procurement requirements. The procurement authorities must set procedures, which are fair, non-discriminatory, and transparent, lays down the standard specifications and well-defined conditions of contract. The other norms such as adherence to the Government’s obligations under the contract including the terms of payment and good working relationships with suppliers etc should be taken care of. It is the responsibility of public

buyers to uphold practices, policies, and procedures built around these concepts.

Competition may be limited by factors such as existence of monopolies or cartels, limited number of qualified suppliers, urgency of requirements, need for compatibility with existing products and difficulty in persuading suppliers to bid. Depending upon the nature of requirement, in international procurement, the procurement entities publicize their requirement through number of publicity channels available to them and reach to the concerned suppliers irrespective of their location in any corner of the world. Procurement notices are published in newspapers and specific periodicals like Development Business for World Bank & other multilateral funded projects. The text of procurement notices and other relevant details are also made available at the respective internet sites of these institutions especially the United Nation Organizations. Suppliers on their part are now quite vigilant to constantly monitor the various sources of information so that they gather timely information about various projects and the procurement component. In fact to remain updated the suppliers have to be watchful from the stage of conception to the commissioning of the project.

#### **Procurement Policies of International Organizations:**

The procurement policies of multilateral funding institutions e.g. World Bank, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development as well as UN System of Organizations are almost the same. While UN Procurement Agencies themselves observe the fundamental procurement policies, the World Bank & other IFI's have laid down conditions that the borrowers shall have to follow the procurement policies framed by these institutions even if the borrowers are partially availing the funds released by CFI's. The World Bank has five basic concerns that govern its procurement policies:

- To ensure that the goods and services needed to carry out the project are procured with due attention to economy and efficiency;
- To ensure that the loan is used to buy only those goods and services needed to carry out the project;
- To give all qualified bidders an equal opportunity to compete for Bank financed contracts;

- To encourage development of local contractors and manufacturers in borrowing countries; and
- To ensure that the procurement process is transparent.

The Asian Development Bank procurement policy also take into account almost same aspects but points out that the ultimate responsibility for procurement of goods and works required for projects rests with the borrower but it should be ensured that loans should be used with due consideration of economy and efficiency. The African Development Bank's rule and procedure insists on Bank's interest, as a development institution in encouraging the development and participation of contractors and suppliers from regional member countries of the Bank; European Bank for Reconstruction & Development has framed the procurement policies and rules that are based on the fundamental principles of non-discrimination, fairness and transparency. They are designed to promote efficiency and effectiveness and to minimize credit risk in the implementation of the Bank's lending and investment operations. The preamble of United Nations common guidelines on procurement specifically mention that the objective of procurement activities within the UN system is timely acquisition of goods; works and services keeping in view: Fairness, Integrity and Transparency through Competition, Economy and Effectiveness Best Value of Money. Keidanren's (the Federation of Economic Organizations of Japan) Guidelines of procurement policies aim at procurement of the best possible goods and services in an economically rational manner. Qualified suppliers from worldwide are eligible to participate in procurement transactions on open, fair and transparent principles with easy to understand simple procedure.

## **PUBLIC PROCUREMENT – THE STATUARY SUPPORT**

### **Legislative Effect**

The public procurement is regulated by a set of rules by the government and its affiliated agencies. The government could regulate public procurement through legislation or through policy directives. New Nations and economic unions now intend to enshrine Public procurement in their constitution/set ups. South Africa accorded it special attention in its 1994 Constitution. Section 187 provides that:

- The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
- The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
- No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.
- All decisions of any tender board shall be recorded.
- Public procurement legislation's enforcement in many countries has also increased. Major multinational trade arrangements like the World Trade Organization's *Government Procurement Agreement*, and the EU *Procurement Directives*, set legal obligations for national procurement systems and practices. "Countries seeking EU membership must, therefore, establish and maintain procurement systems that meet standards of transparency, and of open, and fair competition. Such standards are designed to create an economically efficient procurement system, promote international trade, and attract national and foreign investment, thereby creating conditions that support economic development" (Organization for Economic Co-operation and Development, 1997). *Slovakia*, in 1994 became the first central and eastern European country to enact specific legislation on public procurement that complied with international obligations, the Ministry of Construction and Public Works is responsible for public procurement policy. In *Latvia*, the national procurement law came into effect on 1 January 1997.

### **Procurement as tool for Social Development**

"Social policy has played a central role in building Europe's economic strength, through the development of a unique social model. Economic progress and social cohesion, and a high level of protection and improvement of the quality of the environment are complementary pillars of sustainable development and are at the heart of the process of European integration. Raising living standards, promoting a high level of employment and social protection, improving living and working

conditions and promoting quality of life are goals of the European Union”(Commission of European Communities, 2001, p. 4).

Similarly a communication on integrating environmental considerations into public procurement procedures has also been presented by the commission in November 2001. It examines in detail the different stages in a public procurement procedure and explains how, at each stage, social considerations may be taken into account, while at the same time ensuring rational use of public money and equal access for all community enterprises to public procurement. For example, technical specifications with a social connotation can be used to characterize a product or service. When selecting suppliers to submit a bid, certain social considerations may also be taken into account. Thus, non-compliance by tenderers with certain social obligations may lead to their exclusion from public procurement procedures.

#### **INHERENT PROBLEMS IN PUBLIC PROCUREMENT**

Procurement is an essential activity for the Government of a nation and the international institutions established to provide humanitarian aid and development assistance. Because of transparency and set rules framed for procurement, international institutions have been able to introduce reforms in procurement. However in public procurement, supplies from domestic sources or in the cross border purchases, there are noticeable inherent problems. Some of the problems are:

##### **Corruption**

“Mention the subject of corruption in government and most people will immediately think of bribes paid or received for the award of contracts for goods or services, or--to use the technical term—procurement” ( Transparency International, undated ,ch2). Corruption undermines the whole fabric of economic and political life. Corruption is the abuse of public office for private gains. “Often there is some form of collusion between the purchasing and selling entities. Responsible officials on the contracting side request or are induced to accept gratuities from bidders or contractors to make favorable award decisions. Such influence in the decision-making and executive processes of a country has legal, administrative and economic costs” (Wittig, 1999, p. 4).

Asian Development Bank at its internet site quotes “Corruption robs the poor of a better life. It is a symptom of malfunction that hinders a country's economic growth and development”. Now let us see what can be done to combat corruption in procurement?

The most powerful tool is public exposure. The media can play a critical role in creating public awareness of the problem and generating support for corrective actions. The starting point will be the strengthening of the legal framework, beginning with an anti-corruption law that has real authority and effective sanctions.

One of the greatest anomalies in anti-corruption laws regarding public procurement is that most countries clearly prohibit bribery at home, but many are silent when their exporters are bribing abroad, or even reward it through tax write-offs. Of all the major powers, the United States has a Foreign Corrupt Practices Act since 1977 that specifically makes it a crime under its domestic laws to bribe foreign officials to gain or maintain business, even when these events take place abroad.

The next legal requirement is a sound and consistent framework establishing the basic principles and practices to be observed in public procurement. Another defense against corruption is a set of open, transparent procedures and practices for conducting the procurement process itself.

### **Protectionism**

Protection that domestic industry may take, is in the forms of subsidies, tariffs, or quotas. Increasingly, however, protectionism is taking the form of anti-dumping measures. WTO rules do allow some forms of protection: duties in response to subsidized goods, protection against import surges, and anti-dumping measures. However, these are often poorly defined and slow to process through dispute-settlement procedures. Proponents of protectionism suggest that the first duty of every government is to protect its own citizens; a duty of care is owed to those whose economic prosperity depends upon industrial production. However it has also been contended that prosperity for all is enhanced most by trade, liberalization and comparative advantage.

Cross-border trade especially in the IT-enabled services is rapidly growing due to the effects of globalization. Latest developments are creating a more efficient global division of labor and bringing significant welfare gains for all countries. “Despite the substantial global benefits

from such trade, the adjustment pressures created in importing countries could provoke a protectionist backlash” ( Mattoo & Wunsch, 2004, p. 1).

### **Discrimination**

“The rationales for discrimination in procurement vary but in most instances revolve around industrial policy goals, national security considerations, or other non-economic objectives. The latter include policies that reserve certain types (or a certain share) of contracts for businesses owned by minorities, for firms located in certain geographic regions, or for small and medium-sized enterprises” (Evenett & Hoekman, 2004 p. 4). These rationales if examined in proper perspective have certain logical basis in context of domestic economic compulsions of the concerned countries especially the under developed or least developed countries. However in case of developed countries it is the pressure groups of the multi- national corporations that play the pivotal role in decision making and influence the political echelons to enforce discrimination. The effects of discrimination may or may not be injurious to the economy of the country in over all context. It would depend upon the products to be procured, the domestic cost of production, the consumption pattern and involvement of quantum of foreign exchange the concerned country can afford.

“Discriminatory procurement does not necessarily constitute a barrier to trade. This means that it does not necessarily reduce trade flows.. The crucial element to determine whether discriminatory procurement constitutes a barrier to trade is the form of market structure. Theoretical research has shown that discriminatory procurement reduces trade flows in an industry when the market structure of the industry in question is characterized by imperfect competition (oligopoly or monopolistic competition) and is unlikely to result in a barrier to trade in those sectors characterized by perfect competition” (Trionfetti, 2000, p.2).

### **GOVERNMENT PROCUREMENT AGREEMENT OF WTO: THE ULTIMATE SOLUTION TO DISCARD DISCRIMINATION**

Public procurement has now become a significant political issue between the developing countries and the developed countries. USTR’s annual report on Discrimination in Foreign Government Procurement, 2001 states that a long-standing objective of U.S. trade policy has been to

open opportunities for U.S. suppliers to compete on a level playing field for foreign government contracts. It has been claimed by USTR that the first major breakthrough in this area was the conclusion of the Government Procurement Agreement (GPA) in 1979, followed by the ten-fold expansion of that Agreement during the Uruguay Round negotiations that led to the creation of the World Trade Organization (WTO). With the formation of WTO, the Government Procurement Agreement has been consented by some countries. The WTO estimates that, under the GPA, the United States and the 26 other GPA Parties provide their suppliers with non-discriminatory access to government tendering procedures worth more than \$300 billion annually (US Trade Representative, 2001, p. 1).

The Agreement on Government Procurement negotiated in the Uruguay Round is a plurilateral Agreement. In other words, unlike the other associated agreements, which are binding on all WTO Members, the agreement is binding only on the countries that have acceded to it. Most developing and transition countries are therefore not bound by the substantive and procedural obligations the Agreement imposes.

It has been advocated by developed countries that the main purpose of GPA is to open up as much of the business as possible to International Competition. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and ensure they do not protect domestic products or suppliers or discriminate against foreign products or suppliers.

The new agreement (G.P.A.) besides covering purchases of goods and material also extends coverage to services (including construction services), procurement at sub central level (states, provinces, departments prefectures) and procurement by public utilities. Proponents of multilateral GPA views it as part of a "good governance" agenda for the developing world - the more transparent procurement processes are, they argue, the less opportunity there will be for corruption.

#### **SOCIO ECONOMIC OBJECTIVES OF GPA.**

In order to facilitate the hoped participation of developing countries, the G.P.A. provides special and differential treatment for developing countries. GPA provisions states:

- Parties shall, in the implementation and administration of this agreement through the provisions set out in the relevant Article, duly take into account the development, financial and trade needs of developing countries, in particular the least-developed countries, in their need to safeguard their balance of payments position and ensure a level of reserves adequate for the implementation of programs of economic development;
- Promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;
- Support industrial units so long as they are wholly or substantially dependent on government procurement;
- GPA has not been much effective because regulated sectors like, transportation, water and energy have yet to be opened up and only about 26 countries are signatory to it. Thus GPA remains one of the few Plurilateral accords under the World Trade Organization (WTO). In short, government procurement remains an important item on the agenda for future trade liberalization.

While these countries hope for a multilateral GPA in the future, opposition to a multilateral agreement comes from several developing countries (particularly India, Pakistan and Egypt) and relief organizations, such as Oxfam. These parties feel the opening of government procurement not as a way to gain a "level playing field," but rather as a situation in which developing and least developed countries are likely to lose ground to expanding industrial countries. The developing countries and relief organizations fear that the growing industries of developing nations will be at a disadvantage if large and established foreign companies are allowed to bid for government contracts alongside their own domestic firms, leading to balance of payments problems.

“Coverage objectives were substantially achieved, although commitments contain many exceptions for services. The transparency of signatories' procurement practices was enhanced and enforcement provisions were strengthened, particularly by the introduction of a bid-protest challenge mechanism, which allows private parties (firms) to invoke the Agreement before national courts. (A potential problem:

domestic courts could produce divergent interpretations of the GPA). Unlike most of the other Tokyo Round codes - for example, the agreements on technical barriers to trade (standards), import licensing, customs valuation, subsidies, and antidumping - the GPA could not be "multilateralized." Its disciplines apply only to World Trade Organization (WTO) members that have signed it" ( Hoekman & Mavroidis, 1995, p. 2). Although international dispute settlement procedures are available to address discriminatory government procurement practices covered by the WTO Government Procurement Agreement (GPA) but in actual practice lot of difficulties are experienced for securing the cross border business. USTR'2001 report points out that United States has repeatedly expressed concern to Japan that Japanese procuring entities continue to engage in discriminatory procurement practices that impede American design/consulting and construction companies from participating in Japan's public works sector. These practices include: failure to address rampant bid-rigging; unreasonable restrictions on the formation of joint ventures, including the company joint venture rule; the use of discriminatory qualification and evaluation criteria; and the structuring of individual procurements so they fall below thresholds established in international agreements. About Canada, the report asserts "A number of Canadian provinces apply price preferences and other significant restrictions that discriminate against U.S. suppliers interested in bidding on provincial government procurement contracts. To date, the Administration has identified particular concerns with respect to procurement restrictions applied by the provinces of Ontario, Quebec and British Columbia" (US Trade Representative:2001p-4 If supreme political power like US has to face the above-mentioned resistance, then what could be the fate of small developing countries? Probably the concept of level playing field may not hold well. Thus there is evident need to deliberate on the various issues of cross border procurement particularly in context of globalization and for protection of under privileged section of the humanity. Thus we observe that the public procurement matters especially cross border procurement require lot of deliberations to build up the consensus.

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