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Heidi Mendoza
Writer

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For more information, please contact:

ANSA-EAP Operations Team

Ateneo School of Government, Pacifico Ortiz Hall, Fr. Arrupe Road, Ateneo de Manila University, Loyola Heights, Quezon City 1108, Republic of the Philippines.

Telephones: +6 32 426-6062 and +6 32 426-6002 ext 4627. Fax: +6 32 426-6062.

E-mail: info@ansa-eap.net. Website: www.ansa-eap.net.

I. REVISITING THE PROCUREMENT REFORM

A. *Pre-procurement Reform Situationer*

The old Philippine Public Procurement System is often described as outdated, and fragmented with inconsistent laws and regulations. The existence of more than 100 laws, rules, and regulations, made the system dysfunctional and prone to abuse and waste. In the executive branch, the absence of a single procurement oversight agency led to various interpretation of the law and lack of a control mechanism over its implementation. The situation was made severe by the absence of effective monitoring and feedback mechanism to determine agencies' compliance with the law. On the judicial side, very few convictions for corruption cases have been documented. This may be attributed to inadequate complaint and protest mechanism. The entire procurement process is found to be non-transparent creating opportunities for corruption and unethical practices which has become pervasive and systemic, resulting to lack of public trust and confidence in the public procurement process.

B. *Putting in place the framework (legislation, regulations, procedures)*

For a procurement code to be passed, four potential impediments had to be overcome. First, the Executive branch had to be unified in the effort. Second, civil society groups had to be mobilized to lead the advocacy needed to get the Legislature to act. Third, the reformers within the Executive branch and the civil society groups had to work together in unison. Fourth, influential legislators had to be recruited to champion the bill in their respective chambers.¹

B.1. *Legal and institutional framework*

In 2003, the Philippines passed a comprehensive act governing public procurement. (Government Procurement Reform Act RA 9184) The new procurement law simplified the procurement process considerably and introduced the use of an electronic procurement system as a mechanism for transparency and efficiency. An inter-agency policy body known as the Government Procurement Policy Board (GPPB) was established by virtue of Section 63 of the said law. It is supported by a technical support office that takes care of the implementation of public procurement reform initiatives in the country, among others.

B.2. *Procurement methods and procedures*

The Philippines' procurement act designates competitive bidding as the standard procurement method. Exceptions are permitted under conditions enumerated in the law and stipulated in more detail in implementing regulations. No particular institutional mechanisms exist that would routinely subject the list of exceptionally permitted methods to a review. Procuring agencies are required to publish tender openings twice in nationwide media to attract the greatest possible number of tenders, thereby helping to avoid collusion and failure of tenders. The Internet is also widely used for announcing tender opportunities, and the Government is expanding this instrument with the aim of enhancing transparency. Further mechanisms to ensure transparency comprise the development of standard bidding and contract documents to the extent practical. The use of these documents is compulsory.

¹ Campo, E. and Syquia J., *Managing the Politics of Reform: Overhauling the legal infrastructure of Public Procurement in the Philippines*, World Bank Working Paper No. 70

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

To ensure the transparency of the bid opening—a crucial moment in the tendering procedure that allows bidders to verify whether bids have been altered or destroyed—it has to take place in public at a predefined place and time. The law does not require bid opening right after the submission period, a requirement that is generally considered a safeguard against fraudulent alterations of bids during the time between the deadline for submission and the opening of bids.

As regards the evaluation of tenders, the procurement law prescribes the selection of the eligible bidder that has submitted the cheapest responsive offer for the goods and works.²

C. Implementing the New System

C.1. Institutionalization of procurement reform

The passage of the Procurement Law was followed by the issuance of the implementing rules in September 2003 which literally signal the start of reforms. This was followed by the issuance of the Philippine Bidding Documents (PBDs) as harmonized with World Bank, Asian Development Bank and Japan Bank for International Commerce in 2004 and its mandatory use by all government agencies in all its procurement activities in July 2005. In the area of capacity building, a National Training Program was rolled out through an effective training strategy which consist of forming a group of trainers trained on the law. These trainers were tasked to conduct the respective trainings of procurement practitioners within their respective assigned regions simultaneously. For national government agencies, the GPPB utilized the state universities and colleges to roll-out the trainings, while the composite team trainers from the Commission on Audit, Department of Budget and Management, Department of the Interior and Local Government and Philippine League of Local Budget Officers were tasked to train the local government units.

Part of the efforts to further improving the Philippine procurement system through capacity building is the institutionalization of the Value Engineering Program intended to rationalize, achieve cost savings and efficiency in design.

In its sincere efforts to monitor progress vis a vis internationally accepted standards, the country agreed to apply the Baseline Indicator system developed by the World Bank in 2004 to benchmark the state of the Philippine public procurement system. The country obtained a score of 67.89 using the DAC-OECD indicators.

To have a good monitoring system, the government also recognized the importance of building strong partnership with the civil society observers as they perform a significant role in ensuring check and balance and promoting transparency. An alliance of CSOs was formed in 2004, with PWI acting as secretariat.

A Training on Detecting Fraud and Corruption was conducted in May 2005. This was participated in by representatives from Commission on Audit, Presidential Anti-Graft Commission, Office of the Ombudsman, DPWH and the GPPB.

² ADB/OECD Anti-Corruption Initiative for Asia and the Pacific Curbing Corruption in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 countries Thematic Review

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

In order to fully disseminate procurement related information concerning the latest policies, issuances and activities of the Philippine government, the GPPB has established its presence in the world wide web through the launching of its website.

A web based system was put in place that shall serve as the single, centralized portal where government entities are required to advertise all procurement opportunities, bid results and other information on the procurement of goods and general support services, civil works and consulting services (Phil-GEPS). This system was established to make the procurement process more open, transparent, efficient and is envisioned to promote competition among suppliers. PhilGEPS also has an audit trail where agencies and auditors can go back to previous procurement transactions.

D. Post GPPRA Reforms

D.1. On line Monitoring and Evaluation System

An On line Monitoring and evaluation system was launched on November 2006 which functions as a self-help tool for government agencies that wish to identify its own strengths and weaknesses in the field of procurement.

D.2. Creation of a Procurement Transparency Board

To enhance transparency in public procurement, the President issued Executive Order No. 662-A on November 15, 2007 creating the Procurement Transparency Group (PTG) composed of the GPPB as the head, and the PAGC, National Economic and Development Authority (NEDA), DOJ, DBM, Department of the Interior and Local Government (DILG), and 5 civil society organizations (CSOs) designated by the CSO network as members. The group is tasked to evaluate, comment, record and monitor procurement activities of NGAs, GOCCs, GFIs, SUCs, and LGUs based on mode of procurement, amount of budget, volume, susceptibility to problems or anomalies and importance of the project to the developmental activities of the country. The group is also mandated to strategically deploy trained observers to the BACs and address the issues and concerns gathered from the monitoring of these observers.

D.3. Strengthening Capacity on Procurement

A grant amounting to US\$300,000.00 from the World Bank-IDF has been made available with the objective of professionalizing public procurement practitioners and functions in order to make Procurement Reform more sustainable and ensuring fair and transparent public procurement process. Two major components include the development of procurement and logistics training modules towards a certification program and the creation of a career stream.

D.4. Construction Performance Evaluation System

To help ensure the most cost-efficient project design and avoid the overpricing of infrastructure projects, NEDA approved the guidelines for the Construction Performance Evaluation System (CPES) for roads, bridges, housing, building, port and harbor, irrigation, and flood control projects. A similar draft guideline for power transmission and distribution projects was prepared by the TransCo (Transmission Corporation of the Philippines) for review/pilot testing and

validation. Likewise, a manual for value engineering (VE) has been published and 13 SUCs have been accredited to conduct roll-out trainings on VE.

D.5. EO No. 278

Amendments to the Build-Operate-Transfer (BOT) Law and its IRR were proposed to promote a wider participation of private sector companies in government projects. The hearings on these amendments were completed in October 2007. Draft guidelines providing the overall framework for joint venture projects were also formulated and submitted for review. To ensure the fair participation of local contractors and consultants in government projects, the IRR of Executive Order No. 278, s. 2004³ was drafted and approved by NEDA.

II. POLICY ANALYSIS

A. Drivers for Change

Procurement reform in the Philippines was born out of dual interests from the government and development partners because of the political imperative to make government more transparent and accountable⁴. It started in the 1990s, during the emergence of theories on Reinventing Government and the so-called New Public Management (NPM) which sought to incorporate the best of private sector management practices into the public service, while at the same time retaining the ethics of public service. This created a strong footing among reformers inside government, specifically inside the Department of Budget and Management, towards the creation of a cadre of reform-minded individuals in the bureaucracy.

The catalyst for the reform process was the publication in 1999 of a report by the World Bank that looked into the status of governance and corruption in the Philippines. This report acted as the specific trigger for the government to implement widespread procurement reforms. The report [considered the status of governance and corruption, and] contained among its recommendations the comprehensive reform of state procurement regulations and practices.⁵

B. Policy Reform Objectives

The reform of procurement in the Philippines sought to accomplish the following:

- to respond to the domestic pressure for good governance (specifically reduce the level of corruption in the administration, particularly around large public procurement);
- to unify the “splintered and chaotic”⁴ procurement regime that applied in government, making the process more manageable and oversight more effective;
- to modernize the processes of procurement in accordance with international best practice (the laws had not been amended for over 20 years); and
- to respond to international demand for improved procedures and practices in the management of finance and procurement, particularly from large lenders.

³ Entitled, “Prescribing Guidelines for Project Loan Negotiation and Packaging of Government Foreign-Assisted Infrastructure Projects.”

⁴ 2006 Asian Regional Forum On Aid Effectiveness: Implementation, Monitoring and Evaluation, MANILA, OCTOBER 2006. www.aguhas.co.uk

⁵ *Ibid.* p. 9

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

By improving procurement, it was expected that government would not only become more effective, but that it would also be perceived to be so. Building confidence in government was a key element of the Philippines development agenda.⁶

C. Policy environment

C.1 The timing and Nature of reform

C.1.a. Political context and Governance Challenges

The brewing demand for change and initial efforts towards procurement reform happened in the midst of a challenging political environment that somehow constrained the country's ability to undertake and sustain strong reforms. The ouster of former President Estrada on corruption charges somehow provided the leverage for the passage of the Procurement Reform Act, RA 9184 seizing the momentum of EDSA 2. It is also in the same year (2003) that Simeon Marcelo was appointed as the ombudsman, providing the strong message of government's sincere effort to fight corruption. The business community was quick to recognize the seeming sincerity of the government and immediately offered to put up an anticorruption fund that will be sourced from voluntary contribution of at least ten percent of business earnings. This initially funded the sporadic monitoring of procurement spearheaded by the Church, the business sector and civil society. At the helm of the advocacy and training is the Procurement Watch Incorporated which can be considered as the twin and precursor of Procurement Reform.

The succeeding years however have been plagued with destabilization creating the perception of political instability. By the beginning of 2002, the Arroyo presidency was bereft of both momentum and direction, except the President's overriding goal to be re-elected in 2004. An attempted coup occurred in 2003 followed by the and highly publicized resignations of several prominent cabinet secretaries in 2004, and repeated attempts to impeach the sitting president.

While the Procurement Reform Act was newly passed in January of 2003, by the end of the same year, a big scandal hugged the media when two sons of a general were caught in the US with significant amount of undeclared US dollars. This initiated the investigation of corruption in the military which centered on acceptance of bribes and kickbacks as well as the practice of conversion on major supply contracts within the agency. It can be said that the newly passed law had its baptism on fire for a year after or in 2004, months prior to the conduct of national election, funds intended for the purchase of fertilizer allegedly went into election campaign funds. This was followed by the Mega-Pacific deal covering overpriced election counting machines that were never put into use although the government continuously paid for the rental of the warehouse that kept them. By 2005, Tanodbayan Marcelo resigned on account of health reasons and this event served as the final blow to the newly formed and fragile partnership between the private sector and the government in fighting corruption. In the midst of all these scandals, procurement reform continue to proceed at a modest pace, focusing on strengthening of regulatory and procedural framework, codification of existing procurement rules and processes as well as capacity development of government procurement practitioners and the civil society. There existed a vacuum in between policy objectives and implementation. Long after a comprehensive law on procurement that covers all agencies of the government was passed and manuals have been issued, compliance remain low specially at the level of the local government units. There

⁶ Procurement reform in the Philippines, 2006 ASIAN REGIONAL FORUM ON AID EFFECTIVENESS: IMPLEMENTATION, MONITORING AND EVALUATION
MANILA, OCTOBER 2006,p.7

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

existed a lag between process achievement and the public conviction that the process is working as the country continues to be rocked by huge procurement corruption cases.

Efforts aimed at achieving the desired level of systemic change and ensuring that the agencies comply with the new framework can hardly pay off as the reform enter a new phase of implementing across agencies and generating incentive for compliance while the country continuously experience successive scandals.

D. Policy Stakeholders

There are different actors at different stages of the procurement process, each with different motives and behavior, all of which contribute to and shape the procurement outcomes. The outcome therefore should be viewed from various lenses of the actors.

D.1. The State Actors

The government is usually the biggest buyer and it does not only influence the quality of spending but also at critical times pump prime the economy. Roads need to be constructed, schools and other public buildings like hospitals and public markets must be erected in the name of development. Having the biggest exposure, the government has the best interest to reform existing procurement process. There are however various actors within the government itself, some of whom may have conflicting interest.

We have the heads of agency who are appointed by the President and the senior members of the agency who yields power and influence over procurement decisions either as the end user or the head of the Bids and Awards Committee. It should be noted that the new law managed to reduce the participation of the Head of procuring entity (HOPE) in public bidding but then in reality, the HOPE still exert influence over the head of the BAC. The structure of the bureaucracy is too heavy for someone inside it and under lines of power to simply disobey when instructions are coming from above.

There are middle managers that equally share in the process. The head of the requisitioning unit or the end user, the members of the BAC, the canvass officer, the inspector, not to forget those who process the claim, from the budget officer, to the accountant and ultimately, the head of Finance. Each of them has their own individual interest which may not totally be aligned with that of the organization nor supportive of the procurement reform. The procurement reform law has provided timelines and milestones that somehow reduces delay and therefore reduced every opportunity for facilitation fees.

Outside of the agency, there are vertical forces that should not be taken for granted, The legislators who exercise the power over the purse, the auditors who have the power to disallow specially now under the selective return to pre-audit.

The Legislators and their role in Planning and Allocation of resources

Procurement is but part and parcel of the bigger political arena which is the budget process. Legislators who should exercise oversight over the allocation and use of resources usually abstained from this task but instead use the budget hearing to leverage for contracts, extend favors to political supporters or simply partake with the spoils out of overpriced contracts. It is a common knowledge that congressional allocation is a “captured resource” where the interests of the contractors prevail. The legislators who at times are contractors themselves have the power

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

to choose which project to fund, who should get the contracts and when would construction start. On the otherhand, big time contractors, suppliers and economic players fund the political campaign of the legislators. It is therefore a vicious unending cycle.

Comes the deliberation of the procurement law, it is difficult to dissociate the beholden interests of the legislators with the real objective of the reform. Unfortunately, both internal reform champions in government and the active CSOs in the country could not influence the behaviors of majority of the legislators.

D.2 Non-State Actors

The market players

Outside the system, the market is dominated by big business players who usually eats up small contractors. To some small contractors/suppliers, dealing with the government is not for them for the simple reason that their small capital can hardly keep them afloat during the long months when they have to wait for their claims to be paid. Its either they used the much needed resources to pay financial charges that usually goes with bridge capital if not as grease money to speed up processing of claims. AT first, the procurement reform law is a welcome change as it open up the playing field to small players like them but initially, they were discouraged by the voluminous documentation required before they can participate not to mention the delays in payment which usually affect their limited capital.

To some who are scrupulous they have managed to survive by various creative ways of coping such as:

- They fill the gap whenever dummies are needed in order to create an impression of a competitive mood. For every simulated bidding, at least 3 contractors should participate.
- They can also provide some variance in otherwise very monotonous list of favored suppliers/contractors.
- As they learn the master of collusion, they have managed to devise a scheme where they even if they do not win the contract would still manage to earn. This started the "sahod system" where small time players will only buy the bid documents but not submit the letter of intent. It is an arrangement where the favored contractor/supplier will buy out their competitors. For others, it is as simple as getting aligned with masters of ghost projects.

As expected, the big players enjoy a bigger share, but their investment start as early as months before political campaign. Their however is a selective and targeted participation where the amount at stake is big and usually there are no public bidding involved.

The Civil Society Organizations

Evolving engagement in redefining governance

The 'civil society' we know today is an offshoot of the long and arduous anti-Marcos struggle of various social movements that then permeates outside the centers of powers.

Out of the tide of democracy that followed the change of government in 1986, emerged a new political landscape that compelled politicians to explore new structure of governance. In the process, this also open up spaces for participation and allowed CSOs to explore new forms of engagement.

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

There are nascent shifts in the role of CSOs from a simple barrio organizing to national advocacies such as promoting agrarian reform issues, to gender empowerment to participatory governance which initially manifests into observing public bidding. Observing public bidding however proved to be something that is not internal to them. They do not only have to learn the basic provisions of the law, familiarize with procurement documents and transactions but also to understand the unwritten rules that govern procurement players.

While the law has given them the task to exercise oversight, it has not ably provided them with resources. Here we can refer to the local government code (RA 7160) which does not only recognize citizens participation but also the obligation to provide financial support and assistance. The Code explicitly provided for provisions encourage LGU support, including financial aid, to NGOs-POs aside from venues for participation such as representation in local special bodies, legislative councils, etc.

While they expectantly await for the implementation of the procurement reform, they tend to forget about their capacity and network given the size technicalities of government procurement.

Unlike in barrio level organizing where they together with the community can immediately capture the benefits or the gains, it is a completely different thing in procurement monitoring.

The primary mood of 'mutual suspicion, hostility and mistrust' between CSO observers and the government also prove to be a barrier to effective monitoring.

The Public and their incentive to participate

The public although exposed to corruption in procurement transactions generally are not willing to provide voluntary services raising petty issues as " they do not have the time and resources to attend to observing public bidding. Observing public bidding is not directly perceived as a form of fighting corruption which is still far from the short sighted perception of an ordinary citizen on how it would improve his/ her living condition. A public perceptions survey on procurement released in January 2007, revealed that the overall awareness of the procurement law is low (13%) although 87% of those who are aware of the law believe that the law will help reduce corruption.

The Donors

The intention of the donors during the initial stage of the procurement reform is the development of fully harmonized procedures between government and external partners and the convergence between country systems and international standards.

With the assistance extended by the different development partners, various trainings were conducted. However, the trainings and orientation on the law continues to be diffused and uncoordinated. In addition to GPPB, the donor agencies are providing massive support in conducting trainings. Some CSOs were trained twice through different projects This situation highlights the need to coordinate efforts and explore common areas of collaboration, to identify common needs, to formulate strategies that can be supported by both the government agencies

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

and development partners in order to enhance the gains and advantages achieved out of procurement reforms and to institutionalize a single training or accreditation approach consistent with the planned professionalization of government procurement officers.

E. Policy Outcome

Essentially the reform focused on:

- 1) Addressing corruption risks in procurement**
- 2) Reducing Opportunities for Public Official to accept/solicit bribes in all stages of procurement**
- 3) Strengthening Internal and external control to ensure enforcement**

E.1. Addressing corruption risks in procurement

Addressing corruption risks in procurement is almost synonymous to responding to challenges to enhancing transparency and eliminating application of “discretion without accountability” in every stages of procurement process. In response to this, the reform included among other the following:

- The mandatory posting of procurement opportunities and the awards made
- The publication of the Invitation to Bid on newspaper of general circulation and public places including the agency website
- The invitation and participation of third party observes to the bidding process
- The use of the Phil-GEPS
- Creation of the Procurement Transparency Group

The above mentioned steps have increased transparency and widened competition but in reality, it failed to promote increased participation. Recent studies have shown that the rate of participating bidders in most government agency is quite low and far from ideal of at least five contractors for every transaction being bid out. The low number of participating contractors facilitates negotiations and arrangements that often leads to a single favored contractor cornering most of the contracts, or a group of contractors colluding to win in bids at the expense of the government.. This was confirmed in the latest scandal covering the World bank National Road Improvement Project implemented by the Department of Public Works and Highways.

While the country has succeeded in terms of improving the regulatory and legal framework for procurement reform, there is no certainty as to its success in addressing corruption risks in procurement. There are studies showing reducing procurement time and therefore reducing delays which creates opportunities for grease money, in terms of quality of goods procured, a lot still remains to be seen. Low compliance to the practice of competitive bidding is somehow indicative of hidden intentions to subvert the law and profit from negotiated procurement transactions. On the other hand, emergency purchases are hardly justified and on most occasion does not reflect the real prices.

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

Conduct of competitive bidding although lowly practiced in general still shows some occasional corrupt practices such as rigging or simulated public bidding in order to favor certain contractors. No concrete study has been conducted on savings generated out of implementing procurement law except for limited analysis of reduction in textbooks prices and medicines.

E.2. Reducing Opportunities for Public Official to accept/solicit bribes in all stages of procurement

This approach cut across the objectives of enhancing transparency in procurement as well as improving efficiency in existing procurement system. Under the procurement reform, internal procedures were developed into procurement manuals, timelines for specific procurement activities are mandated together with developing strong linkage between planning and budgeting resources.

The new procurement law simplified the procurement process considerably and introduced the use of an electronic procurement system as a mechanism for transparency. An inter-agency policy body known as the Government Procurement Policy Board (GPPB) was established by virtue of Section 63 of the said law. It is ably supported by a technical support office that takes care of the implementation of public procurement reform initiatives in the country, among others.

To help ensure the most cost-efficient project design and avoid the overpricing of infrastructure projects, NEDA approved the guidelines for the Construction Performance Evaluation System (CPES) for roads, bridges, housing, building, port and harbor, irrigation, and flood control projects. Since the law has been signed the implementation has gone a long way. Among the basic reforms are:

- Simplification of Pre-qualification by an objective eligibility check and stronger post-qualification that addresses costly delays, collusion, discretionary criteria and lack of competition
- Approved budget as ceiling, removal of floor that is usually the source of collusion and premature disclosure of privilege information. It can be recalled that prior to RA9184, the Approved Government Estimate is not known which literally open up opportunities for insiders to collude with contractors in order to determine the AGE and submit a proposal that is closest to the AGE. The publication of the ABC admittedly reduced the opportunities for insiders to command a price for disclosing the ABC.

In the process, the publication of the ABC also promotes transparency and enhances competition, thus reducing opportunities for bribery and collusion.

E.3. Strengthening Internal and external control to ensure enforcement

Having improved the legal and regulatory environment for procurement, the government aimed at strengthening internal and external controls in order to ensure consistent implementation and enforcement of the procurement regulations arising from the procurement reform.

Just like in any reform, a key challenge for implementation is compliance. A study done by CoA showed a low level of compliance among Local Government Units. There are even some pending bills at the congress excluding the LGUs from the coverage of RA 9184. At the level of the national agencies, there are simple provisions that can hardly merit compliance such as the

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

requirements on the preparation of the Annual Procurement Plan, posting of invitation and awards, among others. Procurement monitoring and collection of data to evaluate performance are not yet fully in place as the PhilGEPS is not yet fully implemented and compliance to the requirements is not yet of satisfactory level.

Embedded controls within the law

Philippine law governing procurement is compliant with legal standards and contains inherent control provisions such as, but not limited to the following:

Procurement Controls in the law	Control Objectives
Preparation of the APP	To promote efficient use of time and resources
Advertisement, Publication and Posting of Invitation	To ensure wide competition and transparency
Creation of the Bids and Awards Committee, the TWG and the BAC secretariat	Objectivity in procurement decisions and awards Documentation of the selection, bidding and award process
Invitation of Procurement Observers	To ensure transparency in selection, award and contracting processes and to report on agency's compliance with required procedures
Posting of Awards at the GPPB website	To ensure transparency and promote competitiveness

The Procurement Reform Act also contains penal, civil, and administrative sanctions available for non-compliance with the requirements of law, however the deterrent provisions of the law is also something to look into as shown in the previous discussion.

Strengthening Internal Control

The overall procurement reform agenda included the strengthening of Internal control among agencies of the government. This however happened almost four years after the passing of the law. World Bank granted a \$300,000 assistance to PAGC for the development of the Philippine Generic Internal Audit Manual and the necessary trainings as only a few government agencies have working internal audit units.

Although there are written standards for the internal controls, there is no periodic reporting to management to ensure compliance with the standards. Low level of compliance of agencies with internal control procedures is also observed. Compliance with existing internal control rules is clearly low as evidenced in the fact that the vast majority of national government agencies receive either adverse or qualified opinions in COA's annual audits

Internal control and internal audit are two areas the government is beginning to strengthen. The degree of familiarity with these rules among government employees involved in financial management seems to be low. Internal audit units are functional only in a handful of agencies), and thus internal audit reports are not being produced for most government agencies. In those

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

few cases where functioning internal audit exists, management responses are reportedly delayed, although actions are apparently taken eventually to address audit findings⁷.

It is the responsibility of internal audit units to review and monitor the existing internal controls in an agency which could have included the review of existing procurement system.

In lieu of perceived weaknesses in internal control, CoA has returned to selective pre-audit which included selected procurement transactions such as huge construction contracts etc.

Strengthening External controls

The Country Procurement Assessment Report included the observation that many of the CoA auditors are not updated on the procurement law. There are also several and at times conflicting interpretation of the procurement law among the auditors themselves, among auditors and GPPB or simply, auditors and investigators at the office of the ombudsman.

The CPAR action plan recommended for the creation of an oversight covenant that would facilitate discussion among oversight agencies such as CoA and Ombudsman on common interpretation of critical provisions of the law as well as define further punitive provisions and corresponding sanctions. Up to this date however, this action has not been done.

Recently however, World Bank has succeeded in pushing for the development of a procurement audit guide and the corresponding training of auditors in the use of the manual in order to ensure consistent implementation.

Assessment

While the GPRA appeared to have fully met the baselines for a good procurement legal and regulatory framework, a number of risks in the implementation and enforcement of the law remain.

Procurement monitoring and collection of data to evaluate performance are not yet fully in place as the PhilGEPS is not yet fully implemented and compliance is not yet of satisfactory level.

Enforcement of the law and penalizing violators are being performed by several anti-corruption bodies that are not fully coordinated to ensure successful enforcement. To illustrate, the law requires the preparation of the Annual Procurement Plan and that items not included in the APP should be disallowed in audit. Compliance to this requirement is nil as no monitoring of procurement compliance is being done.

In another point, the law also requires the participation of third party observers in the conduct of public bidding, including a representative from the Commission on Audit. There were several agencies however that complained about the failure of CoA representative to observe the conduct of bidding. There is also no monitoring being done as to the invitation and actual participation of observers in the conduct of public bidding. While observers are required to submit the corresponding diagnostic report regarding the results of their observation of public bidding, only a few CSOs are consistently complying with this requirement. Diagnostic reports are not shared among observers and even across agencies in order to benefit from the common violations and the corresponding red flag that must be identified during the observation of the public bidding. The sustainability of the CSO involvement as observers in the bidding process is an issue. Overall, the public awareness on the law is very low at 13 %.

⁷ PEFA Report

III. IDENTIFICATION OF POLICY ISSUES

A. CROSSCUTTING CHALLENGES TO PROUREMENT REFORM IMPLEMENTATION

As the government and donor partners faces the challenge of managing the implementation of the new framework, rolling out across government agencies, continuing to build sufficient skills among participants in the process and ensuring compliance with the framework that has been put in place, there are several challenges cutting across various stages of procurement process and somehow affecting the implementation of the Procurement Reform.

A.1. Perception of Low Enforcement & deterrence provisions of RA 9184

It is undeniable that that the regulatory environment covering procurement has improved a lot since the passing of the Omnibus Procurement Law. The DAC-OECD indicators have shown that the Philippine law governing procurement is compliant with the legal standards set forth on protest mechanism, settlement of disputes, penal clause, civil liability and administrative sanctions given the following specific provisions of RA 9184:

- Article 17 on protest mechanism
- Article 18 on the settlement of disputes
- Article 21 on penal clause
- Article 22 on civil liability
- Article 23 on administrative sanctions

Anticorruption laws that safeguard public sector procurement exists such as but not limited to the following:

Anticorruption Law	Provisions safeguarding public procurement
RA 3019 – anti-graft & corrupt practices act	Persuading, inducing or influencing public officers Soliciting gifts & commissions Causing undue injury to government Negligence or deliberate delays to obtain favors Grossly disadvantageous contracts Pecuniary interest in prohibited business transactions Using public office for personal interests
RA 6713 – Code of Conduct for Public Officials	Conflict of interest Disclosing/misuse of confidential information Soliciting & receiving gifts
Revised Penal Code	Falsification Perjury Bribery Fraud & illegal transaction Malversation Estafa

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

RA 7160	Prohibited business & pecuniary interest of local government officials Expenditures, disbursements, accounting & accountabilities
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The ability of the judicial system to prosecute offenders under the new legislation has yet to be tested even after several years after the law has been passed. For many, the prospect of a procurement-related corruption case reaching court still seems distant, specially with the growing perception on the credibility and sincerity of the sitting ombudsman.

A.2. Continuing Challenges in Building up and Prosecuting Procurement Related Corruption Cases

Enforcement climate is fraught with challenges that hinder the investigation & prosecution of corruption in procurement. While the Office of the Ombudsman issues orders of preventive suspensions and final order of those who have been found involved in violations of large-scale Corruption involving procurement transactions there are legal processes that weaken them.

Pursuing either criminal or administrative cases is thwarted by the interlocutory appeals or temporary restraining orders that even questions the authority of the Office of the Ombudsman. Moreover, there are jurisprudence that limit the powers to run after those who are corrupt. Presumption of regularity of transaction specially on publicly bided goods/services entirely places the burden of proof on the investigators & prosecutors. uditors and investigators,

In prosecuting criminal cases, the office is weighed down by delay in courts. When cases lag in court, it is the prosecution and its client – the state and the public – that loses, including the momentum and public interest.

A.3. Paucity of information required in initiating procurement-related corruption investigations

Aside from the above, investigation of procurement cases are also challenged with the difficulty experienced by government investigators in obtaining documentary evidence given the fact that procurement transaction documents are in custody of accused officials and investigators have poor access to information not to mention the delays incurred in complying with subpoena duces tecum.

Varied interpretations of some provisions of the procurement law sometimes led to confusions and conflicting decisions of oversight agencies. This is further buttressed by the lack of knowledge of majority of the auditors and even prosecutors in procurement fraud thus resulting to poor or insufficient documentation of procurement irregularities that often end in dismissal of cases filed.

A.4. Strengthening the implementation and enforcement of the law by several anti-corruption bodies

Enforcement of the law and penalizing violators are being performed by several anti-corruption bodies that are not fully coordinated to ensure successful enforcement.

Among oversight agencies who share the responsibility of implementing and enforcing the provisions of the law, there is the need to improve monitoring mechanisms in order to determine the extent of compliance and to prescribe the punitive actions for violations of the law as well as to identify common procurement irregularities and the particular schemes through which such acts are consummated and concealed. Both the auditors and the prosecutors have the need to be trained particularly on procurement principles, operations and regulations as well as the red flags that characterized early occurrence of procurement fraud.

IV. CHALLENGES TO EFFECTIVE PROCUREMENT MONITORING

A. Limitations in the law as regard exercise of oversight by the CSO

While the law has institutionalized the participation of third party observers in all stages of procurement process, their presence is not specified during the conduct of pre-procurement conference, where the critical setting of the ABC took place. The ABC proved to be critical as it sets the ceiling of the bids and automatically disqualify bids higher than the ABC. The ABC however can be set at a price that is higher than the actual and prevailing market price thus even if bids are lower than the ABC, it cannot be presumed that there is no overpricing.

The law only requires invitation of third party observers and not the actual presence and participation of observers in the conduct of public bidding.

Problems in Exercising Civil Society Oversight

One notable implementation challenge concerns one of the most innovative areas of the new legislation. It is proving hard in practice to institutionalize the oversight of procurement processes by civil society. PWI and others are concerned about the lack of individuals and agencies willing to take on this role, resulting in tender boards sitting without appropriate members of the public monitoring decisions (in spite of this being a constitutional right set out in the legislation). Such lack of implementation in practice undermines the gains to allow such an innovative process to take place.⁸ Third party observing in practice is not functioning fully as intended due to the disproportionate lack in the number of volunteers as against the sheer volume of procurement transactions in many government agencies.

It can be said that while the reform has been successful in institutionalizing the participation of third party observers, it has not fully guaranteed the effective discharge of procurement oversight by the CSOs. Experiences of those who have painstakingly done the process of observing public bidding have shown the pitfalls of their reports being unacted upon by government offices or worst, suffering the sad fate of being not invited again in the next public bidding. In the end, since these observers largely thrive on volunteerism, the inability to find a cause often led to a declining commitment. There are also gaps in terms of feedback mechanism and maximizing the use of the observers' diagnostic report as discussed below. There are also questions of capacity, availability and willingness of trained observers.

Low and unsystematic deployment of observers in the conduct of public bidding

⁸ Ibid., p.13.

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

While there are various CSOs trained on procurement law, the number of those who actually undergone the training is way above the number of those who actually commit to observing public bidding. The accountability feature of the law exercised through the participation of the CSOs is weakened by problems in deployment and in sustaining CSO participation.

While observers are required to submit the corresponding diagnostic report regarding the results of their observation of public bidding, only a few CSOs are consistently complying with this requirement. Diagnostic reports are not shared among observers and even across agencies in order to benefit from the common violations and the corresponding red flag that must be identified during the observation of the public bidding.

In terms of agencies engaged by the CSOs, only a few sectors are covered, literally leaving other sensitive sectors conducting big ticket public bidding with no observers at all.

Vulnerability of organized groups to be co-opted

The **sustainability of the CSO involvement as observers in the bidding process is also an issue**. There are reports of observers being harassed or openly being bribed in order to influence the diagnostic report that will be written. In some far flung local government units, it is the availability of registered organized groups that limit the control feature of the law leading to cases where the supposed independent observers belong to political organization connected to the reigning administration. The independence being enjoyed by the CSOs may be limited by the lack of funds necessary to sustain its operation.

Concentration of observers in Public Bidding and non in planning and allocation of resources as well as actual implementation which are equally vulnerable phases of procurement

Procurement to the majority is just the act of buying and attention hardly focused on allocation of resources and need assessment as well as implementation which are equally vulnerable. Demand Side intervention included external monitoring but largely focused on observing public bidding and less on monitoring procurement decisions, (specially decision not to use public bidding, emergency procurement) allocation of resources and need assessment which are equally vulnerable. The difficulty in tracking bid rigging, collusion given the fact that such acts are done in secrecy and bribes are hardly documented diffuses the impact of third party observers in the bidding process.

V. Overall Assessment

The approach to procurement reform tend to narrowly focused on technical and administrative requirements without undertaking a comprehensive assessment of existing governance structure at the time the reforms were introduced. Given the existing Public Financial Management system of the country where procurement is just a sub-set, implementation is shared among different agencies (DBM for budget, Treasury for cash management, CoA for accounting and Audit) that seldom coordinate. The existing fragmented Public Financial Management leaves no system that connect it with procurement system to ensure enforcement of procurement reform law. Procurement is not mainstreamed into the Public Sector Governance System, this being the case, there are various reforms within the entire PFM and within procurement system, all proceeding at various phases and uncoordinated. The situation

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

somehow challenged the absorptive capacity of a limited cadre of internal reform within the government. As such, at the outset, the reform agenda appeared to be overambitious resulting to implementation gaps.

While a comprehensive law has been passed, the necessary supporting infrastructure for reform have been neglected

Admittedly, the much-improved procurement rules following the 2003 Procurement Reform Act has somehow streamlined procurement procedures and limit the scope for corruption with a variety of transparency requirements embedded in the law itself. But, the complex and frequently opaque procedures involved in other processes that relates to procurement such as allocation of resources and release of actual cash combined with generally weak financial management capabilities in line agencies continue to pose challenges into the efficiency of procurement process when it comes to timeliness and reasonableness of the price at which goods and services needed by the government are obtained.

The procurement reform law institutionalized the participation of civil society but without looking at the existence of organized communities and the necessary infrastructure support such as the presence of “access to information law” that would have resulted to real and meaningful participation.

Developing readiness of the market to respond to procurement solicitation

The procurement reform intends to level the economic playing field but it failed to consider the readiness of the market players to compete. There are multiple constraints inhibiting private sector access to the procurement market, such as difficulties in getting licenses and permits not to mention the voluminous documentation needed before one can participate in public procurement which often discourages small contractors.

While the reform also included training of stakeholders, the bulk of the training went to training of government officers and civil society but less on suppliers and contractors. The training for them was considered as the responsibility of the procuring agencies but without the funds, how can the said agencies pursue the required training for suppliers and contractors. Lack of capacity building programs for private sectors, including small business to help the new entries into procurement marketplace characterized the early years of procurement reform implementation.

Absence of an effective and well funded communication plan

Public support and political will are both important ingredients in sustaining reforms. Unfortunately, there is a growing awareness on the absence of both. The absence of a well funded communication plan resulted to low awareness on the law (13% based on SWS survey)

Procurement monitoring requires minimum levels of capacity from each actor. a government that has resources and authority, the presence of sufficiently large numbers of citizens who want to participate in time consuming processes as well as clearly defined rules to increase the likelihood of producing positive results. Participatory institutions are likely to function less when they are adopted in context of weak state , low levels of social development, and limited civil society activity

PROCUREMENT POLICY REVIEW IN THE PHILIPPINES

There is truth to the saying that no problems are ended the moment a law is passed, in fact it has just started. Just as the law was passed so are creative ways been invented in order to circumvent the existing provisions of the law. There are however inherent weaknesses on existing policies.

Policy biases and Orientation

Some weaknesses however can be traced to the provisions of the law itself which only requires invitation to CSO and not actual participation in the bidding process. There is also the provision that limits the participation of the observers only at the stages starting from the conduct of bid conferences and not during the conduct of pre-bid conference where the setting of the Approved Budget for the Contract is done. Since the ABC is the ceiling, if the amount is already overstated, any bid no matter how excessive can still be considered. Therefore even after the implementation of RA 9184, overpricing in government contracts still abound.

To grant flexibility in exceptional circumstances such as calamity, alternative methods of procurement are provided by law like negotiated procurement in order to prevent loss of life and property but there is no provision on the need for review of such decision to resort to alternative mode of procurement nor oversight of procurement decision in general. The situation leads to abuses such as resorting to emergency procurement, precluding conduct of bidding even on non-emergency cases such as procurement of catering services for trainings, purchase of streamers and tarpaulins, ect.

The procurement of certain infrastructure projects, goods and services can be made exempt from the operation of RA No. 9184 on the basis of Section 4 of said law which mandates the observation of treaties or international or executive agreements affecting procurement in relation to Section 1 of RA No. 8555 which on the other hand empowers the President of the Republic to waive the application of any law in deference to the contracting of a loan or credit with a lending institution.

Reformers in the government and even the Procurement Internal Champions have virtually no leverage to change the political incentives with which legislators behave nor to limit the discretionary powers of the President. Insiders in the government often talked about the provision for mobilization funds in the original construction law (PD1594) as an accommodation of contractors' interest, majority of whom enjoys connection with legislators. In the same manner, there are also some thoughts that the Procurement Reform Act that we have right now is a watered down version.

For one, it has failed to consider the peculiarities in the procurement practices and operations of local government units thus there are pending laws at Congress seeking exemption of LGUs from the coverage of RA 9184.

Existence of policies that sets filing fees at 1% of the contract cost discourages filing of protest and prevent effective complaint and feedback handling mechanisms.

Decisions are not mandated to be published nor posted in the website. And there is no exercise of oversight in the review of procurement decisions specifically on the use of alternative mode of procurement. CPAR has shown the large use of alternative mode of procurement instead of competitive bidding. On the other hand, audit reports have shown occurrence of simulated bidding of not rigging bidding procedures used in competitive biddings which are largely unchecked by built in control features of the law.

VI. Conclusion

The quality of the outcomes of procurement monitoring is dependent on Capacity of State to create spaces for intervention by providing the necessary enabling environment such as institutional, political and legal framework. To this extent, the procurement reform has been effective. It also requires the government to provide basic levels of social development to allow citizen to participate effectively, aside from providing them with basic skills to understand the intricacies of the procurement process. There is a certain level of capacity that the citizens need before they can effectively participate. Citizens enter into the participatory institution in pursuit of individual and/or collective goods. Ensuring the alignment between individual and collective objective of stakeholders in the procurement reform is something that the reform failed to consider. Individual Interest and Strategic Choices of the organization will always come into play and influence the outcome of procurement monitoring as such, the process of reform should have seriously looked into developing immediate gains or how specifically can procurement monitoring contribute to their individual and organizational causes. The reform process should have early on taken account of how changes in citizens interaction with the government in a bureaucratic process as procurement seamlessly blend with formal institutions of the state and unpredictable conditions of the market, given their diverging interests.

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